This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

Digitized by Google

A. CHAUNCEY NEWLIN COLLECTION
OF
OCEANS LAW AND POLICY

LAW LIBRARY
OF THE
UNIVERSITY OF VIRGINIA

Digitized by Google

Digitized by Google

Digitized by Google

NAVAL DIGEST

CONTAINING

DIGESTS OF SELECTED DECISIONS OF THE SECRETARY OF THE NAVY AND OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE NAVY

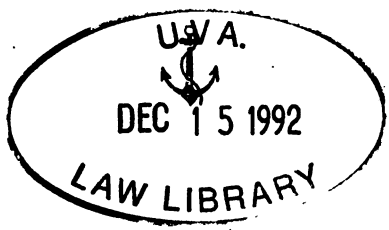
1916

REPRINTED 1920

PREPARED BY

CAPTAIN EDWIN N. McCLELLAN

United States Marine Corps



WASHINGTON
GOVERNMENT PRINTING OFFICE
1921

Digitized by Google

OCEANS
63.3
.M1263n
1921

Digitized by Google

9386-17,
C.

DEPARTMENT OF THE NAVY,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
Washington, November 29, 1916.

From: Judge Advocate General.
To: Secretary of the Navy.
Subject: "Naval Digest, 1916."
Inclosure: (A) Copy of Naval Digest, 1916.

1. I transmit herewith for your formal approval a copy of "Naval Digest, 1916," containing digests of selected decisions of the Secretary of the Navy and opinions of the Judge Advocate General of the Navy, prepared under my direction by Captain Edwin N. McClellan, United States Marine Corps, and authorized to be published by your authority.

RIDLEY MCLEAN.

Approved:

JOSEPHUS DANIELS,
Secretary of the Navy.

Digitized by Google

Judge Advocate General of the Navy.

Name.	From—	To—
Col. Wm. B. Remey, U. S. M. C.[1]	June 8,1880	June 4,1892
Capt. Samuel C. Lemly, U. S. N.[2]	June 4,1892	June 3,1904
Capt. Samuel W. B. Diehl, U. S. N.	June 4,1904	Nov. 12,1907
Capt. Edward H. Campbell, U. S. N.	Jan. 14,1908	Nov. 3,1909
Capt. Robert L. Russell, U. S. N.	Nov. 3,1909	Nov. 5,1913
Capt. Ridley McLean, U. S. N.	Nov. 5,1913	Dec. 2,1916
Capt. William C. Watts, U. S. N.	Jan. 6,1917	Apr. 15,1918
Rear Admiral George R. Clark, U. S. N.	July 9.1918	.....

[1] Served as Acting Judge Advocate General before the Office of the Judge Advocate General was established by the act of June 8, 1880 (21 Stat., 164).
[2] Retired June 17, 1902, but continued as Judge Advocate General.

Digitized by Google.

EXPLANATORY NOTE.

The Naval Digest is a reference book containing digests of decisions and opinions, and information in connection with them. Part of this information has been published from time to time in Court-Martial Orders, General Orders, Index-Digests, Annual Reports, etc., while a great deal of it is published herein for the first time.

The material is classified and arranged alphabetically under convenient reference headings, making it easy to consult and to locate readily any desired information to an extent that was never before possible. Small type has purposely been used in order that all the information contained in the digest might be published in a book of a convenient size. It is not a textbook and does not in any sense supersede the Navy Regulations, Naval Courts and Boards, or any other official publication.

Numerous citations of department file numbers, decisions of civil courts, decisions of the Comptroller of the Treasury, opinions of the Attorney General, etc., are published. While these may be of assistance to the service at large, they are published primarily for the future convenience of the department itself, which is thus afforded a reference to the authorities for use in cases involving similar points without having to go over ground which has been fully covered. In many cases subjects consist merely of references to file numbers and other citations. These are published for the information of the department.

No added weight is given to any information because it is published in this volume. As an illustration, the information published in Court-Martial Orders under the heading of "Bulletin" has the same weight after being published in this Digest as it had originally. Since matter herein published might be overruled or amended subsequent to the publication of the Digest, great care should be exercised to ascertain if such has occurred before assigning weight to such matter. With reference to the relative weight of *opinions* and *decisions* reference should be made to "JUDGE ADVOCATE GENERAL, 30," page 316 of this book.

The Navy Regulations, Naval Courts and Boards, and Court-Martial Orders issued subsequent to 1915 should always be consulted and followed in preference to the Naval Digest, for they contain the latest authoritative regulations, decisions, opinions, and information. This is particularly so with reference to matters of form for naval courts-martial procedure and the correct forms and phraseology for charges and specifications.

Particular attention is directed to the heading "WORDS AND PHRASES," under which heading will be found not only many definitions of Latin words and phrases, legal words, terms, and expressions, but other information, all alphabetically arranged.

The annual Index-Digest of Court-Martial Orders will hereafter be in the nature and form of a Supplement to the Naval Digest, 1916, and thus make a revision of it convenient and practicable when it is desired to issue a new edition.

Digitized by Google

Many abbreviations of citations have of necessity been used but only the following will be explained: "R–" means "Navy Regulations, 1913," unless some other year is specifically mentioned or clearly apparent; thus "R–817 (7)" means "Navy Regulations, 1913, R–817 (7)." "File" means the files of the Secretary of the Navy (which includes the Office of the Judge Advocate General), unless some other department, bureau, or office is mentioned; thus "File 26251–12159, Sec. Navy, Dec. 22, 1916," means a letter signed by the Secretary of the Navy, dated December 22, 1916, and in general refers to a decision, while "File 26251–12159, J. A. G., Dec. 22, 1916," means a letter signed by the Judge Advocate General, dated December 22, 1916, and in general refers to an opinion. In addition to the above, "J. A. G." means "Brief and Opinion Book of the Judge Advocate General," containing letter-press copies of briefs and opinions; thus "14 J. A. G. 23" would mean Volume 14 of the Brief and Opinion Books of the Judge Advocate General, page 23. "C. M. O." means "Court-Martial Order." At one time such orders were designated "General Court-Martial Orders," but as a matter of convenience they are all cited as "C. M. O." "G. C. M. Rec." means "General court-martial record." Upon being received in the department and after final action is taken thereon each general court-martial record receives a number and is filed in the Office of the Judge Advocate General. This number is in addition to the file number which is placed upon the charges and specifications and all correspondence relating to the trial; thus "G. C. M. Rec. 29422, p. 2" means "General Court-Martial Record No. 29422, page 2." "G. O." means General Order of the Navy Department. Decisions of the Supreme Court of the United States are published officially in United States Reports, although the earlier volumes are known and generally cited by the names of the official reporter, Dallas, Cranch, Wheaton, Peters, Howard, Black, Wallace, and Otto; thus, "2 Dall. 23," "2 Cr. 25" or "2 Cra. 25" or "2 Cranch 25," "1 Wheat. 2," "2 Pet. 32," "1 How. 45," "2 Black 342," "1 Wall. 46," and "1 Otto, 4." These may also be cited as are the official publications of later decisions, as, "232 U. S. 546," which would mean volume 232 of the decisions of the United States Supreme Court, page 546. Decisions of Inferior Federal Courts are found in Federal Cases (Circuit and District Courts) cited as "Fed. Cas." and extending from 1789 to 1880, and the Federal Reporter, cited as "Fed. Rep." or "Fed." and extending from 1880 to date. These reports do not include the decisions of the Court of Claims (a Federal court), which are published officially in the Court of Claims Reports cited as "Ct. Cls." or "C. C." or "C. Cls." "Op. Atty. Gen.," "Op. A. G.," and "A. G." means "Opinions of Attorneys General"; thus, "25 Op. Atty. Gen. 2" or "25 Op. A. G. 2" or "25 A. G. 2" means volume 25 of the Opinions of Attorneys General, page 2. "Comp. Dec." means "Decisions of the Comptroller of the Treasury"; thus, "19 Comp. Dec. 5" means volume 19 of the Decisions of the Comptroller of the Treasury, page 5. "R. S." means Revised Statutes of the United States. "Stat." means the United States Statutes at Large; thus, "35 Stat. 621" means volume 35 of the United States Statutes at Large, page 621.

Digitized by Google

NAVAL DIGEST.

ABBREVIATION.

1. **Middle names in specifications**—Christian names in specifications other than the first may be indicated by initial letters. C. M. O. 150, 1897, 3; 36, 1914, 6, 7; 4, 1916, 5. *See also* C. M. O. 1, 1914, 4; 5, 1914, 7; 40, 1914; 39, 1915. *See also* C. M. O. 23, 1911, 2, where first name was indicated by initial in court-martial order.
2. **Sentences**—Improper abbreviations—"U. S." for "United States." G. C. M. Rec. 21869, 21852, 21847, 21846, 21845, 22936, 23760. *See also* File 26504-76, Sec. Navy, April 5, 1910.

ABETTING. *See* AIDING AND ABETTING.

ABSENCE.

1. **Accused during trial.** *See* ACCUSED, 1–9.
2. **Arrest during.** *See* ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED, 3.
3. **Counsel during trial.** *See* COUNSEL, 1.
4. **Death, presumption of.**—Continued absence. *See* COMMON LAW, 7; LINE OF DUTY AND MISCONDUCT CONSTRUED, 18–21.
5. **Leave of absence.** *See* LEAVE OF ABSENCE.
6. **Member from meeting of court.** *See* MEMBERS OF COURTS-MARTIAL, 1–6.
7. **Unauthorized**—General court-martial charge. *See* ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED; ABSENCE FROM STATION AND DUTY WITHOUT LEAVE; DESERTION.
8. **Same**—Diseases contracted during. *See* ENLISTMENTS, 11; GENERAL ORDER NO. 100, JUNE 15, 1914; MARINE CORPS, 30.
9. **Same**—Voluntary drunkenness is no defense to unauthorized absence. *See* ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED, 9, 10; DRUNKENNESS, 1.
10. **Same**—Duration or period of the unauthorized absence should be alleged in specifications—The length of an unauthorized absence should be set forth in the specification of a naval court-martial, as such allegation goes to show whether or not the offense is of an aggravated nature. File 26287-3016, J. A. G., June 25, 1915; C. M. O. 22, 1915, 4. *See also* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 29; CHARGES AND SPECIFICATIONS, 92; DESERTION, 99.
11. **Same**—Department held that a specification of a naval court-martial, which merely alleged an unauthorized absence at a certain time, but not the period or duration of such absence, is sufficient in law and alleges an offense. (*See* C. M. O. 89, 1890; File 26287-1125; 1, J. A. G., Mar. 19, 1912; G. C. M. Rec. No. 30485, p. 754; Dynes *v.* Hoover, 20 How., 65.) File 26287-3016, J. A. G., June 25, 1915; C. M. O. 22, 1915, 4. *But see* ABSENCE, 10. *See also* CHARGES AND SPECIFICATIONS, 92.
    It has been the custom and practice to allege the period of absence. *See* G. C. M. Rec. 383 (1821).
12. **Same**—Duration or period of—A man who was injured while absent without leave, was considered as so absent until the time that he reported, or some one reported in his behalf, as to his whereabouts. File 3901-04, J. A. G., May 3, 1904.
13. **Same**—"Absence from station and duty without leave" and "Absence from station and duty after leave had expired" is properly chargeable as such under A. G. N. 8, paragraph 19. C. M. O. 5, 1914, 7; 49, 1915, 19.
14. **United States, absence from**—Inasmuch as the Territory of Hawaii is under the jurisdiction of the United States it was held that residence in Honolulu is not absence from the United States within the meaning of A. G. N., 61 and 62. File 6091, Nov. 5, 1906.
15. **Without pay**—Can not be granted officers. *See* LEAVE OF ABSENCE, 11, 12.

ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED.

1. **Aggravating circumstances**—Combined with—General courts-martial. *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 12.
2. **Same**—Combined with—Summary courts-martial. C. M. O. 16, 1916, 6–7. *See also* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 6.

Digitized by Google

3. **Arrest and acquittal by civil authorities**—A defense to—Where an accused is charged with "Absence from station and duty without leave" or "Desertion" and upon his trial by naval court-martial for the offense it is proved that his unauthorized absence was solely due to his arrest and detention by the civil authorities, which detention was followed by an acquittal in the civil court, the accused should be acquitted in the court-martial proceedings. If, however, the unauthorized absence was caused by the misconduct of the accused, as evidenced by his conviction in the civil courts, such facts do not constitute a legal defense to the unauthorized absence. C. M. O. 5, 1912, 3–14; 14, 1914, 4–6. *See also* File 26287–1008; 26287–1012; 3811–04; Op. J. A. G., Jan. 18, 1912; INTENT, 2.
4. **Same**—Where a commanding officer, arrested by the civil authorities, while absent without leave fails to make any report whatever of his whereabouts, either to his immediate superior or to the Secretary of the Navy, he must be held responsible for his resulting unauthorized absence, notwithstanding the fact that he may be acquitted by the civil courts when tried. C. M. O. 19, 1915, 9.
5. **Arrest and conviction by civil authorities**—Not a defense to. *See* ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED, 3.
6. **Charge**—Proper charge is "Absence from station and duty after leave had expired," and not "Absence overleave." C. M. O. 53, 1914, 5–6.
7. **Clearly proved by the evidence**—Accused should be found guilty. C. M. O. 49, 1915, 8.
8. **Conduct to the prejudice of good order and discipline**—Simple offense of "Absence from station and duty after leave had expired" not properly chargeable under. *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 12.
9. **Drunkenness, voluntary**—In a case where an accused, charged with "Desertion," was found "guilty in a less degree than charged, guilty of absence without leave, but without criminality" and acquitted, the department stated that it can not admit that a man absent from his station and duty for nearly seven months, whose only excuse was his own drunkenness at the time of leaving, was without blame and should be acquitted. The court erred in so finding, for no claim was made that the accused had been drugged, or forced into such drunken condition. Accordingly the proceedings, findings, and acquittal were disapproved, and the accused being an undesirable person for the naval service, discharged as undesirable, as an independent proceeding. C. M. O. 11, 1905, 2. *See also* DRUNKENNESS, 1.
10. **Same**—Voluntary drunkenness is never an excuse for an offense such as unauthorized absence, but in many cases is an aggravation. (*See* G. O. 110, p. 7.) C. M. O. 25, 1915, 2.
11. **Duration of**—Should be alleged in specification, etc. *See* ABSENSE, 10, 11; ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 39; CHARGES AND SPECIFICATIONS, 92.
12. **Enlisted men**—Comments in Court-Martial Orders regarding unauthorized absence of enlisted men. C. M. O. 23, 1912, 4; 25, 1914, 4; 49, 1915, 8.
13. **Intent**—Not necessary to allege or prove specific intent. C. M. O. 5, 1912, 9. *See also* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 20; INTENT, 2.
14. **Leave of absence**—Burden of ascertaining time of expiration of leave of absence or liberty is on individual. *See* LEAVE OF ABSENCE, 3.
15. **Officers**—Charged with. C. M. O. 31, 1887; 48, 1888; 56, 1889; 61½, 1890; 41, 1891; 20, 1894; 73, 1896; 136, 1901; 230, 1902; 203, 1902; 1, 1908; 38, 1909, 51, 1910; 29, 1912; 5, 1913; 13, 1914; 39, 1914; 47, 1914; 28, 1915; 40, 1883; 39, 1915; 4, 1913; 37, 1913; 39, 1915; 14, 1916; 39, 1916; 40, 1916; 42, 1916; 4, 1917; 8, 1917.
16. **Overstaying leave**—Enlisted men tried by general court-martial—Should have been charged as "Absence from station and duty after leave had expired." C. M. O. 13, 1881.
17. **Paymaster's clerk**—Charged with. C. M. O. 38, 1913.
18. **Prima facie case of**—Where an accused was arrested by the civil authorities on the same day that his liberty expired and at a place which was approximately 400 miles from his station and duty, a distance which would require at least seven hours to cover, he is prima facie guilty of absence from station and duty after leave had expired, at least, unless the accused can satisfactorily show, in rebuttal, that the situation was not due in any manner to his own misconduct. C. M. O. 14, 1914, 4. *See also* JUDICIAL NOTICE, 1.
19. **Warrant officers**—Charged with. C. M. O. 35, 1912; 3, 1913; 23, 1914; 11, 1915; 10, 1879; 52, 1880; 49, 1888; 60, 1888; 189, 1901; 236, 1902; 15, 1903; 89, 1907; G. C. M. Rec. 11218,
20. **Warrant officers (commissioned)**—Charged with. C. M. O. 18, 1911; 37, 1914; 23, 1915; 25, 1915; 28, 1915; G. C. M. Rec. 19776; C. M. O. 14, 1917.

Digitized by Google

ABSENCE FROM STATION AND DUTY WITHOUT LEAVE.

1. **"Absence without leave"**—While at the present time this offense is charged as "Absence from station and duty without leave," it was charged as "Absence without leave" in the following instances: C. M. O. 7, 1881; 12, 1882; 15, 1882; 43, 1882; 48, 1882; 56, 1882; 23, 1883; 36, 1883; 39, 1883; 25, 1885; 19, 1889; 63, 1889; 42, 1891.
2. **Same**—Where an accused, charged with desertion, is found guilty in a less degree than charged, he should be found guilty of "Absence from station and duty without leave" or "Absence from station and duty after leave had expired," and not "Absence without leave" or "Absence over leave." C. M. O. 53, 1914, 5–6. *See also* FINDINGS, 2.
3. **Acquittal of**—Approval of acquittal of unauthorized absence entitles accused to pay during such absence. *See* PAY, 1. *See also* CONFINEMENT, 7; DESERTION, 9.
4. **Same**—Acquittal of "Desertion" is also acquittal of "Absence from station and duty without leave." *See* DESERTION, 9.
5. **Aggravating circumstances**—Combined with—General courts-martial. *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 12.
6. **Same**—Combined with—Summary courts-martial—"Absence from station and duty without leave" combined with aggravating circumstances, being made up of two separate offenses, should be preferred in two specifications in a trial by summary court-martial. C. M. O. 16, 1916, 6–7.
7. **Arrest and acquittal by civil authorities**—As a defense to unauthorized absence. *See* ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED, 3, 4.
8. **Arrest and conviction by civil authorities**—Not a defense to unauthorized absence. *See* ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED, 3.
9. **"Attempting to absent himself from his station and duty without leave"**—Enlisted man charged with. C. M. O. 15, 1889.
10. **Charge**—Proper charge is "Absence from station and duty without leave," not "Absence without leave." C. M. O. 53, 1914, 5–6.
11. **Commanding officer**—Charged with. C. M. O. 34, 1889; 19, 1915.
12. **"Conduct to the prejudice of good order and discipline"**—It is proper to charge an accused with both "Absence from station and duty after leave had expired" or "Absence from station and duty without leave" and "Conduct to the prejudice of good order and discipline" where the unauthorized absence was with the manifest intention of evading some particular duty (as coaling ship or a landing party), or service on some particular ship (as by missing ship). C. M. O. 6, 1908, 4–5; 5, 1914, 7; 25, 1914, 5; 3, 1916, 7–8. *See also* C. M. O. 6, 1915, 2; 12, 1915, 2; 16, 1915, 2; 20, 1915, 1; 27, 1915, 2; 42, 1915, 2.
13. **"Desertion"**—Accused should not be charged with both "Desertion" and "Absence from station and duty after leave had expired" or "Absence from station and duty without leave" for the same unauthorized absence. C. M. O. 49, 1910, 15–16; 23, 1910, 6; 5, 1914, 7. *See also* DESERTION, 5.
14. **Same**—Enlisted men acquitted by naval court-martial of the charge of "Desertion" are thereby acquitted by implication of the lesser offense of "Absence from station and duty after leave had expired" or "Absence from station and duty without leave." C. M. O. 14, 1914, 4–5.
15. **Drunkenness, voluntary**—Not an excuse for unauthorized absence. *See* ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED, 9, 10; DRUNKENNESS, 1.
16. **Duration of**—Should be alleged in specifications, etc. *See* ABSENCE, 10; 11; ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 29.
17. **Extending over period of enlistment.** *See* ENLISTMENTS, 9–11.
18. **Finding of "Absence from station and duty without leave" on a charge of "Desertion" is an acquittal of "Desertion"**—Every desertion includes an unauthorized absence and upon a trial for desertion the accused is tried for this unauthorized absence involved in the offense of desertion charged. If convicted of the lesser offense, the accused is acquitted, in law, of the greater offense of desertion. C. M. O. 17, 1910, 8–10. *See also* DESERTION, 6; 13 Op. Atty. Gen., 460.
19. **Gist**—Is the unauthorized absence. *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 29.
20. **Intent**—Upon a charge like that of "Absence from station and duty without leave" it is not necessary to allege or prove any *specific intent;* but this does not apply to "Desertion," in which a *specific intent* permanently to abandon the naval service, or at least the pending contract of enlistment is impliedly alleged and must be proved. C. M. O. 10, 1911, 5–6; 5, 1912, 9. *See also* C. M. O. 10, 1911, 6; File 26251-3252; 26251-4200; INTENT, 1, 2.

Digitized by Google

21. **Marine Corps enlistment.** *See* MARINE ENLISTMENTS, 30; CORPS, 11.
22. **Officers**—Charged with. C. M. O. 3, 1882; 23, 1882; 35, 1883; 34, 1884; 5, 1885; 30, 1885; 58, 1889; 36, 1892; 42, 1894; 39, 1895; 104, 1896; 50, 1898; 132, 1897; 86, 1904; 1, 1905; 53, 1905; 108, 1905; 17, 1906; 51, 1907; 2, 1909; 22, 1909; 58, 1910; 13, 1910; 23, 1910, 7; 16, 1911; 28, 1911; 19, 1915; G. C. M. Rec. 6142; 6737; 7107; 7217; 6760; 6956; 11586. Midshipmen cases were as follows: C. M. O. 77, 1905; 67, 1906; 10, 1909.
23. **Same**—Found guilty of "Absence from station and duty without leave" may be reduced to rating of ordinary seaman. *See* REDUCTION IN RATING, 24-27.
24. **Pay**—Enlisted men acquitted by naval court-martial of desertion, and thereby acquitted by implication of the lesser offense of unauthorized absence, are entitled to pay during the period of their alleged desertion, if such acquittal be approved. C. M. O. 14, 1914, 4; 49, 1915, 8. *See also* PAY, 1, 2.
25. **Paymaster's clerk**—Charged with. C. M. O. 3, 1903; 31, 1905; G. C. M. Rec. 12768.
26. **Period**—Of the unauthorized absence should be alleged in the specifications, etc. *See* ABSENCE, 10-11; CHARGES AND SPECIFICATIONS, 92; ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 29.
27. **Reduction in Rating**—Officers may be reduced to rating of ordinary seaman if found guilty of "Absence from station and duty without leave." *See* REDUCTION IN RATING, 24-27.
28. **Specifications**—Period or duration of unauthorized absence should be alleged in specifications, etc. *See* ABSENCE, 10-11; CHARGES AND SPECIFICATIONS, 92; ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 29.
29. **Time of beginning**—Gist of the offense is the unauthorized absence, and an incorrect allegation in the specification of time of beginning of such unauthorized absence is not a substantial defect, and such defect is waived by a plea of "guilty." In this offense it is the act itself and not the time that is the necessary element. File 26287-1125, J. A. G., March 19, 1912. *See also* ABSENCE, 10, 11; CHARGES AND SPECIFICATIONS, 92.
30. **Trial for**—When extending over period of enlistment. *See* ENLISTMENTS, 9-11.
31. **Warrant officer**—Charged with. C. M. O. 114, 1894; 142, 1897; 164, 1901; 80, 1904; 30, 1905; 86, 1905; 102, 1905; 62, 1905; 93, 1906; 96, 1906; 65, 1907; 117, 1907; 32, 1910; 17, 1912; 31, 1912; 11, 1916; G. C. M. Rec. 20746; 20286; 8277; 10015.
32. **Warrant officer, acting**—Charged with. C. M. O. 102, 1905; 120, 1907.
33. **Warrant officer (commissioned)**—Charged with. C. M. O. 78, 1907; 32, 1912.
34. **"Without leave from proper authority"**—Found not proved. Finding disapproved. File 26251-12739, Sec. Navy, Jan., 1917.

ABSENCE WITHOUT LEAVE AND OUT OF UNIFORM ASHORE.

1. **Charge criticised by department.**—A fleet convening authority preferred this charge against an accused. The department stated that it was extremely irregular in that it contained more than one offense "of a perfectly distinct nature" (R-712(2)), and is not phrased in the form prescribed. It is obvious that the court erred when "it found the charges and specifications in due form and technically correct." C. M. O. 35, 1915, 6-7. *See also* CHARGES AND SPECIFICATIONS, 53.

ABSENTING HIMSELF FROM HIS COMMAND WITHOUT LEAVE.

1. **Officer**—Charged with. C. M. O. 34, 1889.

ABSENTING HIMSELF FROM HIS POST OF DUTY IN TIME OF DANGER.

1. **Officers**—Charged with. C. M. O. 21, 1883; 22, 1883.

ABUSIVE AND PROFANE LANGUAGE.

1. **Specification of**—The objectionable language used by the accused must be set forth in the specification alleging its use. C. M. O. 7, 1911, 13.
2. **Under Massachusetts statutes**—On this subject. *See* File 26251-2993:12.

ABUSIVE LANGUAGE TOWARD OTHER PERSONS IN THE NAVY.

1. **Duplicity**—Where the accused used abusive language toward three other enlisted men, the department stated that the rules of pleading as to duplicity required that three separate specifications should have been used, instead of only one. The convening authority (fleet), after commenting upon several irregularities, approved the proceedings, findings, and sentence. C. M. O. 150, 1897, 2-3. *See also* C. M. O. 160, 1897, 2.
2. **Wrong phraseology**—In the above case the department held that it would have been better pleading had each of the three allegations embraced in the one specification been made the basis of a separate specification, and that the charge, to conform to the department's practice in such matters, should have been "Using abusive language toward another person in the Navy." C. M. O. 150, 1897, 3.

Digitized by Google

ACADEMIC BOARD OF THE NAVAL ACADEMY.

1. **Ensigns**—Appointment of. *See* APPOINTMENTS, 17.
2. **Function and duties of**—The Academic Board was first given powers with respect to the final graduating examination of midshipmen by the act of August 5, 1882 (22 Stat., 285). The change then made in the law must have been due to a change in the regulations of the Naval Academy, which have now (1910) for many years provided that the final graduating examination shall be conducted by the Academic Board instead of a special examining board, as was originally the case. File 5252–36, J. A. G., May 5, 1910, p. 6.
3. **Origin, powers, etc.** *See* File 5146, J. A. G., June 23, 1906; 5146:1; 5146:2.
4. **Recommendation of is not final**—The commendation of the Academic Board that a midshipman found deficient upon examination for promotion to ensign be dropped from the service is not final; but such recommendation may be disapproved by the department and the midshipman continued in the service until further reports on fitness in his case may be received and considered by the department. File 5252–36, J. A. G., May 5, 1910. *See also* Comp. Dec., Aug. 23, 1913, 20 COMP. DEC. 141; File 26254–1277:1, re power of Academic Board in case of midshipmen found physically deficient.

ACADEMY, NAVAL. *See* NAVAL ACADEMY.

ACCEPTANCE OF RESIGNATIONS. *See* RESIGNATIONS.

ACCESSORIES. *See also* EXEMPTIONS IN SENTENCES, 1.

1. **Sentence**—Used in. *See* Weems *v.* U. S. (217 U. S., 349); Grafton *v.* U. S. (206 U. S., 333); Navy Regulations, 1913, R–816 (4). *See also* SENTENCES, 3, 49.

ACCIDENT POLICY.

1. **Medical certificate on accident policy**—Naval surgeons are without authority to sign unofficial medical certificates on accident policies of officers. File 26806–15. *See also* File 5195–61:1; C. M. O. 29, 1915, 7; MEDICAL RECORDS, 3–5.

ACCOMPLICE.

1. **Officer issuing an order**—Which is illegal as applied to the existing facts, and does so either knowingly or in culpable disregard of what conditions exist, is an *accomplice* in the illegal action taken by his subordinate pursuant to such order. C. M. O. 37, 1915.
2. **Sodomy.** *See* SODOMY, 6.

ACCOUNT, NAVAL SUPPLY. *See* File 24482–31, J. A. G., Feb. 17, 1911; 24482–34, J. A. G., May 1, 1911.

ACCUMULATION OF OFFENSES.

1. **Offenses**—Shall not be allowed to accumulate in order that sufficient matter may thus be collectively obtained for a trial, without due notice to the offender. C. M. O. 38, 1894, 2. *See also* CHARGES AND SPECIFICATIONS, 3.
2. **Plea in bar of trial**—On ground that offenses were allowed to accumulate. The plea was not allowed by the court. C. M. O. 38, 1894, 2, 3.

ACCUSED.

1. **Absence of**—Naval courts-martial are empowered to require the presence of the accused during the entire proceedings and should always exercise this power to avoid any possible irregularity. While an irregularity of this character does not necessarily invalidate the proceedings, the department looks upon it with great disfavor. C. M. O. 51, 1914, 2. *See also* G. C. M. Rec. No. 21223; 24633; 29422; File 26251–9996:2; Simon *v.* Craft, 182 U. S., 427, 435; Frank *v.* Mangum, 237 U. S., 309; Weirman *v.* U. S., 36 Ct. Cls., 236; REVISION, 1.
2. **Same**—The action of a naval general court-martial in permitting the accused, upon a request made expressly by himself and not merely by counsel, to be absent from the immediate presence of the court during the testimony of expert witnesses for the defense concerning the physical and mental condition of the accused, did not invalidate the proceedings, such action being due to humanitarian considerations based upon representations of counsel for accused as to latter's health, and that it would be "cruel" to require his personal attendance during specified portions of the trial. C. M. O. 51, 1914, 1–2. *See also* ACCUSED, 1; BRIG. SOMERS Case (1843), p. 189.

Digitized by Google

3. **Same**—The judge advocate should not be present in the court room during closed court. However, the presence of the judge advocate when a naval court-martial is closed for deliberation, and when the accused, his counsel, and spectators have consequently withdrawn, while a grave irregularity and a disregard of Navy Regulations, 1913, R-787 (3), the provisions of which are directory only and not mandatory, would not necessarily render the proceedings invalid. C. M. O. 51, 1914, 1, 2; 6, 1915, 6; 41, 1915, 10; 49, 1915, 10, 12, 14. *See also* C. M. O. 88, 1895, 12; 1, 1897, 1–2; G. C. M. Rec. No. 24633; File 26251–5558; 26251–9996:2; 212 Fed. Rep., 569; JUDGE ADVOCATE, 104, 105. *But see* C. M. O. 61, 1894, 3; 127, 1900, 1; 216, 1901, 2.
4. **Same**—"According to the record the accused was not present when the various witnesses were called before the court to correct their testimony. Some of the corrections made showed material changes in the evidence given, and the action of the court in conducting this part of the proceedings without the attendance of the accused was illegal." In view of this fact and of other irregularities the department disapproved the proceedings. C. M. O. 44, 1909. *See also* G. C. M. Rec. No. 21223. *But see* ACCUSED, 1, 2, holding that such irregularity as this does not necessarily invalidate.
5. **Same**—If a statement as set forth in a general court-martial record that the accused withdrew after completing his testimony, "was a true report of the proceedings followed the subsequent proceedings were illegal in that they were held during the absence of the accused." C. M. O 47, 1910, 7–8; 23, 1910, 5. *But see* ACCUSED, 1, 2.
6. **Same**—The record was returned to the court for revision to correct the record as to the notations regarding the arraignment of the accused who had been tried in joinder. "The accused were not present at the revision as they should have been, since the arraignment occurred in open court.". The department because of this irregularity and other reasons "accordingly disapproved the proceedings and findings" and "set the sentence aside." C. M. O. 78, 1905, 1. *But see* ACCUSED, 1, 2.
7. **Same**—Where the record by the omission of an entry on the record fails to show the accused present during a step in the proceedings but the record taken as a whole showed him present continuously during the trial, the department held that the irregularity was merely a "clerical error." C. M. O. 47, 1910, 7–8; 12, 1911, 3.
8. **Same**—Clerical errors in general court-martial records may be amended by the court in revision without the presence of the accused. *See* RECORD OF PROCEEDINGS, 26, 27.
9. **Same**—Where the court received evidence with reference to a plea in bar of trial, during the absence of the accused, the department, while approving the conclusions reached stated "the mode of introducing that proof was wholly irregular, and is disapproved." G. O. 152, March 29, 1870. *See also* COURT, 22.
10. **Admissions in open court**—Of certain allegations in the specifications. *See* ADMISSIONS, 1.
11. **Affidavit**—Inadmissible in connection with accused's statement. *See* AFFIDAVITS, 7.
12. **Amenability of, to trial**—Statute of limitations having run. *See* STATUTE OF LIMITATIONS.
13. **Arraignment of accused.** *See* ARRAIGNMENT.
14. **Arrest, released from**—Record should show that accuesd (officer) in proper cases was released from arrest and restored to duty. *See* ARREST, 8, 9, 27.
15. **Caution, to**—As to incriminating himself when a witness. *See* SELF-INCRIMINATION, 8.
16. **Same**—When resuming his status after testifying. *See* WITNESSES, 10.
17. **Character**—Official record of accused is best evidence of his character. C. M. O. 1, 1914, 5, 7. *See also* EVIDENCE, 12.
18. **Same**—When evidence as to character of accused may be placed in evidence. *See* EVIDENCE, 12–22.
19. **Same**—Witnesses as to character of accused will not be subpœnaed from other stations at Government expense. C. M. O. 1, 1914, 5, 7. *See also* EVIDENCE, 12; WITNESSES.
20. **Charges and specifications**—Copy of furnished accused. *See* CHARGES AND SPECIFICATIONS, 4, 5, 18.
21. **Confession by**—When admissible. *See* CONFESSION.
22. **Constitutional rights of.** *See* CONSTITUTIONAL RIGHTS OF ACCUSED.
23. **Continuance**—Should be granted accused by court, if request for is reasonable and it is practicable to do so. *See* CONTINUANCES.
24. **Convening authority**—Action of will be furnished by department upon application of accused. C. M. O. 21, 1909, 2. *See also* ACCUSED, 36; RECORD OF PROCEEDINGS, 32.
25. **Copy of charges and specifications**—Received 10 days before trial. *See* CHARGES AND SPECIFICATIONS, 18 .

Digitized by Google

26. **Counsel.** *See* COUNSEL.
27. **Crimination.** *See* SELF-INCRIMINATION.
28. **Cross-examination**—The accused has a right to cross-examine witnesses and the record must show that the accused was given the opportunity to cross-examine the witnesses against him. *See* CONSTITUTIONAL RIGHTS OF ACCUSED, 16.
29. **Defense of**—Precluded by plea of "guilty." *See* EVIDENCE, 50–53.
30. **Definition of**—Use of term "accused" in trials in joinder. *See* JOINDER, TRIAL IN, 14.
31. **Deposition**—Prior notice should be given accused of intention to use. *See* DEPOSITION, 1.
32. **Designation and name of accused**—Should appear in sentence. *See* SENTENCES, 33.
33. **Discharged as undesirable**—After acquittal. C. M. O. 11, 1905, 2.
34. **Same**—After case was disapproved. C. M. O. 39, 1905, 2; 78, 1905, 1.
35. **Errors without injury.** *See* ERROR WITHOUT INJURY.
36. **Findings, sentence, and action of convening authority**—Will not be furnished the accused until after the publication of the sentence, or, in trials ordered by the department, they will be furnished by the department upon application of the accused. *See* RECORD OF PROCEEDINGS, 32.
37. **"Guilty," plea of**—Waives defects in specifications. *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 29.
38. **Same**—After plea of "Guilty," accused may introduce only evidence in extenuation, of a palliative nature, and of good character. *See* EVIDENCE, 50–53.
39. **Same**—Judge advocate not even to suggest. *See* JUDGE ADVOCATE, 34.
40. **Same**—Precludes regular defense. *See* EVIDENCE, 50–53.
41. **Half-witted.** *See* INSANITY, 20.
42. **Identity of**—Essential in proving fraudulent enlistment. *See* FRAUDULENT ENLISTMENT, 51.
43. **Incrimination.** *See* SELF-INCRIMINATION.
44. **Insane.** *See* INSANITY.
45. **Irresponsible.** *See* INSANITY, 20, 27.
46. **Joinder**—Trial in. *See* JOINDER, TRIAL IN.
47. **Judge Advocate**—Relation to accused before and during trial. *See* JUDGE ADVOCATE, 25, 28–44, 86.
48. **Mute**—When arraigned. *See* ARRAIGNMENT, 18–24.
49. **Name and designation of accused**—Should appear in sentence. *See* SENTENCES, 33.
50. **Name of accused**—Middle name may be abbreviated in specifications. *See* ABBREVIATION, 1.
51. **Offense**—More serious if committed by officer on duty at Naval Academy. C. M. O. 14, 1915.
52. **Same**—More serious when committed by an accused of long service and who has been entrusted by his superiors with a position of responsibility, as an offense committed by such a man has a far more detrimental effect upon the naval service because of the example which he thereby sets his subordinates and others likely to be influenced by his misconduct. C. M. O. 1, 1914, 8.
53. **Pay, forfeiture of**—Should, in general, be remitted only as an act of clemency to accused. *See* ALLOTMENTS, 6; PAY, 23.
54. **Pay account of**—A statement of the pay account status of an accused is not contemplated in the procedure for general courts-martial, and is made a part of summary court-martial procedure merely as an aid to such a court-martial in preventing an excessive or illegal sentence. C. M. O. 28, 1910, 4. *See also* File 3980–1051.
55. **Physical condition of**—Court should not consider in adjudging sentence. *See* CLEMENCY, 41, 42.
56. **Plea of guilty**—Waives defects in specifications. *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 29.
57. **Sentence**—Will be furnished by department upon application of accused. *See* ACCUSED, 36; RECORD OF PROCEEDINGS, 32.
58. **Statement in presence of accused**—Admissible in evidence. C. M. O. 214, 1902. *See also* DESERTION, 125; STATEMENTS MADE IN PRESENCE OF ACCUSED.
59. **Statement of accused.** *See* STATEMENT OF ACCUSED.
60. **Testimony of**—The testimony of the accused unsupported by other corroborative evidence should not be accorded entire credit. *See* WITNESSES, 4, 7.
61. **Trial**—Accused is solely responsible for informing his natural or legal guardians or relatives of the fact that he is to be tried by general court-martial. C. M. O. 27, 1915, 10. *See also* CHARGES AND SPECIFICATIONS, 18.
62. **Warning**—It is not necessary that the accused should be warned that any statement he might make would be used against him as evidence. *See* CONFESSIONS, 26, 27.

Digitized by Google

63. **Same**—It is improper and contrary to the Navy Regulations to warn or caution the accused, after he has been a witness, not to converse upon matters pertaining to the trial. *See* WITNESSES, 10.
64. **Same**—Accused should be warned as to the effects of his plea of "guilty"—Where this was not done the department disapproved. C. M. O. 47, 1892; 84, 1894, 3. *See also* C. M. O. 5, 1911, 4; WARNING, 2. *Note.*—This irregularity is not, in general, necessarily fatal.
65. **Withdrawal of.** *See* ACCUSED, 5.
66. **Witness**—Accused as witness. *See* WITNESSES, 1–11.
67. **Youth**—Of accused as grounds for clemency. *See* CLEMENCY, 67–71.

ACCUSER.

1. **Court of inquiry**—Accuser can not demand a copy of the record. *See* COURTS OF INQUIRY, 1, 12.

ACQUITTAL.

1. **Absence, authorized**—Approval of acquittal of unauthorized absence entitles accused to pay during such absence. *See* PAY, 1. *See also* CONFINEMENT, 7; DESERTION, 9.
2. **Same**—Acquittal of desertion is also acquittal of absence from station and duty without leave. C. M. O. 14, 1914, 4–5. *See also* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 14; DESERTION, 9; PAY, 1.
3. **Same**—Acquittal of a charge of unauthorized absence is also an acquittal of desertion.
   Finding of "absence from station and duty without leave" on a charge of "desertion" is an acquittal of "desertion." C. M. O. 17, 1910, 8–10. *See also* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 18; DESERTION, 6.
4. **Arrest and acquittal by civil authorities**—As a defense. *See* ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED, 3, 4.
5. **Authorized forms of acquittal**—There are only four authorized forms of acquittal in naval court-martial procedure: (*a*) Simple acquittal, (*b*) "fully acquit," (*c*) "honorably acquit," (*d*) "most fully and honorably acquit." The foregoing supersedes the forms of acquittal given in Forms of Procedure, 1910, p. 40, and the use of any other form is prohibited. C. M. O. 29, 1916, 2–3.
6. **Court-martial orders**—Published where officers acquitted of all charges (File 26504–189, Sec. Navy, Mar. 18, 1910, overruled). C. M. O. 26, 1906; 4, 1908; 5, 1908; 35, 1908, 32, 1915; 36, 1915; 38, 1915; 41, 1915; 21, 1916; 40, 1916. *See also* ACQUITTAL, 24; COURT-MARTIAL ORDERS, 1.
7. **Disapproval of findings and acquittal**—In cases of officers. C. M. O. 44, 1883, 5; 3, 1884, 3; 48, 1907; 14, 1914, 5; 29, 1914, 10; 32, 1915; 38, 1915, 5; 41, 1915; 24, 1916, 5.
8. **Same**—In cases of commissioned warrant officers. C. M. O. 28, 1915, 3; 36, 1915.
9. **Same**—Because the judge advocate tried case out of court. C. M. O. 42, 1915, 8.
10. **Same**—Department disapproved the findings and acquittal as an approval might mislead courts-martial. C. M. O. 14, 1914, 5–6; 29, 1914, 10. *See also* C. M. O. 41, 1885.
11. **Dismissal**—Acquittal of accused (paymaster's clerk) approved but accused dismissed from naval service. C. M. O. 160, 1901. *But see* C. M. O. 15, 1902.
12. **Embezzlement**—Effect of acquittal on the financial responsibility of accused. C. M. O. 39, 1913, 11. *See also* EMBEZZLEMENT, 25.
13. **"Entirely"**—Court did "entirely acquit" accused. C. M. O. 115, 1894.
14. **Finding of "Not guilty"**—Should be followed by a statement of acquittal. *See* FINDINGS, 63.
15. **"Fully acquit."** C. M. O. 44, 1883, 3; 59, 1903; 28, 1907; 5, 1908; 32, 1909; 41, 1909; 29, 1916; G. C. M. Rec. No. 31423.
   The use of this form of acquittal indicates that a court not only fails to find a charge proved beyond a reasonable doubt, but that it finds no facts whatever, as brought out by the evidence introduced in the case, which reflect adversely on the conduct of the accused in connection with matters pertaining to the charge and specification. In other words, a court should not "fully acquit" in cases where the record shows any uncontroverted facts whatever reflecting upon the accused. C. M. O. 29, 1916, 2.
16. **"Fully and honorably."** *See* CRITICISM OF COURTS-MARTIAL, 22; File 26251-12159.
17. **Handwriting**—An acquittal should be recorded in the handwriting of the judge advocate. C. M. O. 29, 1914, 5.
18. **"Honorably acquit."** G. O. 118, Mar. 27, 1869; C. M. O. 28, 1882.
   This form is to be employed only in cases where the offense charged is, besides being an offense against military authority, of such a character that a conviction thereof would tend to dishonor the accused, such as, for example, a charge of "Con-

Digitized by Google

duct unbecoming an officer and a gentleman." This acquittal, as in the case of a full acquittal, should never be used if the record shows any adverse, uncontroverted evidence reflecting upon the accused. C. M. O. 29, 1916, 2.

19. **"Most fully and honorably."** C. M. O. 214, 1901; 38, 1905, 2; 48, 1907; 5, 1913, 2, 7, 12, 13; 27, 1913, 6; 41, 1915; File 26251-12159, Sec. Navy, Oct. 7, 1916, p. 6: DEBTS, 24.

20. **Same**—The court not only acquitted the accused but did "most fully and honorably acquit" him, this being the very highest degree of the six different forms of acquittal known to naval procedure. By such action the court in effect puts the highest stamp of approval upon the actions of the accused. (C. M. O. 5, 1913; 27, 1913, 9 File 26251-7776.) An acquittal of this character would mean not only that the accused was blameless but that his conduct was creditable, and that he was not only not negligent, but that he zealously guarded the interests of the Government at all times. C. M. O. 41, 1915, 11.

This form should be used only in extreme cases, in which not only have the requirements of "full" and "honorable" acquittals been fulfilled, but in which the court wishes to place the highest stamp of approval upon the actions of the accused in connection with the matters covered by the specifications. The use of this form of acquittal might, for example, be justified in the case of an officer charged with unbecoming conduct in battle if the court wished to make it a matter of record that, far from considering the conduct of such officer censurable, it both approved and commended his conduct. (For examples of an improper use of this form of acquittal, *see* C. M. O. 5, 1913, 3; 27, 1913, 9; 41, 1915, 11.) C. M. O. 29, 1916, 2.

It will be noted that there is no legal distinction between a simple acquittal and one to which one of the additional expressions or embellishments has been added, and it is to be emphasized that only in exceptional cases is the use of any form of acquittal other than the simple acquittal justified. Unless this rule be strictly adhered to and other forms of acquittal reserved for special cases, the distinction drawn between the various forms will be lost, and not only would a simple acquittal be robbed of its full absolving significance, but also the proper purposes for which the other forms of acquittal are reserved would be defeated. C. M. O. 29, 1916, 3.

21. **"Not guilty"**—If the finding is "not guilty" upon any charge, the explicit statement should immediately follow that the court acquits the accused of such charge. *See* FINDINGS, 63.

22. **Officers acquitted**—Of some but not all of the charges against them. C. M. O. 26, 1909; 27, 1909; 32, 1909; 41, 1909; 44, 1909; 52, 1910; 5, 1913; 7, 1914, 3; 10, 1914; 50 1914; 33, 1915; 1, 1916.

23. **Same**—Of all charges. C. M. O. 26, 1906; 5, 1908; 35, 1908; 26, 1909: 44, 1909; 32, 1915; 38, 1915; 41, 1915; 21, 1916; 40, 1916; 43, 1916.

24. **Same**—Court-martial orders shall be published where officers are acquitted of all the charges (File 26504-189. Sec. Navy, Mar. 18, 1910, overruled). *See* ACQUITTAL, 6; COURT-MARTIAL ORDERS, 1.

25. **"Proved but without criminality"**—Is virtually a form of *acquittal* and is not to be encouraged. C. M. O. 10, 1911, 5; 10, 1913, 3–5.

26. **Setting aside**—There is no power to set aside the verdict of acquittal, and the accused is entitled by law to the full benefit of it. C. M. O. 101, 1903, 10.

27. **Simple acquittal**—This form, which will be referred to as a *simple acquittal*, should be used in all cases except in the three special cases (ACQUITTAL, 5). The use of this form sufficiently records the fact that the court has not sustained the charge and has the same legal effect as an acquittal expressed with some embellishment. C. M. O. 29, 1916, 2.

28. **Warrant officers (commissioned) acquitted**—Acquitted of some but not all of the charges against them. C. M. O. 23, 1915; 28, 1915. *See also* C. M. O. 28, 1916.

29. **Same**—Of all charges. C. M. O. 36, 1915.

30. **Without prosecution**—Where the accused pleaded "Not guilty" and the recorder stated that there were no witnesses available to prove the offense, and recommended that the court accept the plea of the accused, the department held that a finding which *acquitted* the accused was improper and irregular and that the trial should have been postponed until witnesses were available. C. M. O. 42, 1909, 15–16.

31. **Witnesses**—A court-martial order was published in the case of an officer who was acquitted and contained this notation: "The publication of this general court-martial order carries with it no reflection upon any witness who testified before the court." C. M. O. 214, 1901.

Digitized by Google

ACTING APPOINTMENTS.

1. **Honors due an officer**—Navy Regulations, 1905, R-46, respecting honors due an officer while serving under an acting appointment was held to apply to an Acting Commandant and Governor of an insular possession of the United States. File 4551. *See also* GUAM, 1.

ACTING ASSISTANT DENTAL SURGEONS. *See also* DENTAL SURGEONS, 2.

1. **Appointment of**—An acting assistant dental surgeon for temporary service, who had originally requested permission to be examined for an appointment as acting assistant dental surgeon for temporary service and who upon examination had failed physically (general obesity), which disability had been waived because "the appointment is for temporary service," requested that the temporary appointment be made permanent. In view of the entire dissimilarity in the status of an "acting assistant dental surgeon for temporary service" as compared with one of permanent tenure, it was *held* that the present "temporary appointment" of this officer could not be made "permanent" from the date of entry in the service, but that he may be legally authorized to undergo examination for an original appointment in the same manner as if he did not hold his present appointment for temporary service. File 13707-46, J. A. G., Mar. 19, 1915; C. M. O. 12, 1915, 8. *See also* Act of Aug. 29, 1916.

ACTING ASSISTANT SURGEONS.

1. **Appointment of**—The law authorizing the appointment of acting assistant surgeons reads in part as follows:

   "The President is hereby authorized to appoint for temporary service 25 acting assistant surgeons, who shall have the relative rank and compensation of assistant surgeons." (30 Stat. 380.) File 28407-13, J. A. G., Mar. 24, 1915; C. M. O. 12, 1915, 10. *See also* MEDICAL RESERVE CORPS OF THE NAVY, 1.
2. **Same**—A candidate who fails by a small margin in his examination for appointment as acting assistant surgeon may be given an appointment as such without further examination, should the department so desire, there being nothing in the Navy Regulations concerning such appointment or examination, and any provisions in circulars issued by the department may be waived by the department at any time. File 15229-6, J. A. G., May 15, 1911.
3. **Death gratuity**—The term "officer or enlisted man" in act of May 13, 1908 (35 Stat. 128) includes all persons in the service and applies to acting assistant surgeons. File 26543-10, Sec. Navy, Sept. 11, 1908.
4. **Marine examining boards**—Acting assistant surgeons are not "medical officers of the Navy" within the provisions of section 1621, R. S., but are officers in the temporary service of the Navy. (*See* Taylor *v.* U. S., 38 Ct. Cls. 155.) Therefore such officers are not eligible for duty as members of a marine examining board. File 947-M.
5. **Medical Reserve Corps**—Appointment of Medical Reserve Corps officers as acting assistant surgeons. *See* MEDICAL RESERVE CORPS OF THE NAVY, 1.
6. **Retirement.** *See* RETIREMENTS OF OFFICERS, 2.
7. **Status of, in 1865**—From the language of the act of July 24, 1861 (12 Stat. 273), acting assistant surgeons served under temporary acting appointments made by the Secretary of the Navy for a limited time, either "until the return of the vessels in which they are respectively employed, or until the suppression of the present insurrection." They received the same pay as assistant surgeons; they were entitled to wear the uniform of the grade to which appointed; and to annex the title of their acting rank to their official signatures. While these officers, therefore, were not commissioned, they nevertheless occupied the status of officers of the volunteer Navy; they were not enlisted men. File 26510-579, J. A. G., Oct. 25, 1911.

ACTING BOATSWAINS.

1. **General court-martial**—Tried by. C. M. O. 102, 1905; 105, 1905.
2. **Sentence of dismissal**—Confirmed by President. C. M. O. 102, 1905.

ACTING GOVERNOR.

1. **Guam.** *See* ACTING APPOINTMENTS, 1; COMMANDANTS OF NAVY YARDS AND NAVAL STATIONS, 1, 2; GUAM, 1.

ACTING GUNNER.

1. **General court-martial**—Tried by. C. M. O. 120, 1907; 3, 1911, 1.

ACTING JUDGE ADVOCATE. *See* JUDGE ADVOCATE GENERAL, 1.

Digitized by Google

ACTING JUDGE ADVOCATE GENERAL. *See* JUDGE ADVOCATE GENERAL, 2, 3, 18

ACTING MACHINISTS.

1. **Status of**—Pending the issuance of a warrant the status of an acting machinist unquestionably continues to be that of an enlisted man, although at the same time acting as a warrant officer, and he is therefore entitled to draw interest on his deposits or to make additional deposits in accordance with the act of February 9, 1884 (25 Stat. 657). File 26254-2020, Sec. Navy, June 6, 1916. *See also* DEPOSITS, 1, 4.

ACTING MASTER'S MATE.

1. **Dismissal of.** File 26367-2, J. A. G., July 8, 1909.

ACTING PAY CLERKS.

1. **Appointment of**—Under provisions of act of March 3, 1915 (38 Stat. 942). C. M. O. 12, 1915, 13; 29, 1915, 8; 31, 1915, 5. *See also* PAY CLERKS and CHIEF PAY CLERKS, 1-3, 7.

ACTING SECRETARY OF THE NAVY. *See* PRECEDENCE, 29; SECRETARY OF THE NAVY, 3.

ACTING WARRANT OFFICERS.

1. **Appointment of.** *See* PAY CLERKS and CHIEF PAY CLERKS, 1-3, 7.
2. **Deposits.** *See* ACTING MACHINISTS, 1; DEPOSITS, 1, 4.
3. **General courts-martial.** *See* ACTING BOATSWAINS; ACTING GUNNERS.
4. **Reenlistment**—Inasmuch as R. S. 1409 clearly contemplates the concurrence of the status, duties, and obligations of an enlisted man, and that of a warrant officer, and in view of the practice of the Bureau of Navigation in the matter, no objection is perceived to the reenlistment of an acting warrant officer whose term of four years has expired. (This with view to preserving for the man his continuous service should he fail to be warranted.) File 7267-03, J. A. G.
5. **Status of.** *See* ACTING MACHINISTS, 1.

ACTION.

1. **Convening authority.** *See* CONVENING AUTHORITY.
2. **President.** *See* PRESIDENT OF THE UNITED STATES.
3. **Record of proceedings**—Action on—Right of accused to. *See* CHARGES AND SPECIFICATIONS, 4, 5, 18; RECORD OF PROCEEDINGS, 32.
4. **Reviewing authority.** *See* REVIEWING AUTHORITY.
5. **Revising authority.** *See* PRESIDENT OF THE UNITED STATES; REVIEWING AUTHORITY; REVISING AUTHORITY; SECRETARY OF THE NAVY; SENIOR OFFICER PRESENT.
6. **Secretary of the Navy.** *See* SECRETARY OF THE NAVY.
7. **Senior officer present.** *See* SENIOR OFFICER PRESENT.
8. **Withheld**—Desertion case—What constitutes conviction. *See* PAY.

ACTIONS.

1. **Intentions**—The law judges a man's intentions by his actions. C. M. O. 29, 1914, 9.

ACTS.

1. **Desertion**—Acts of accused during unauthorized absence may create a presumption of specific intent to desert. *See* DESERTION, 10, 62.
2. **Intentions**—The law judges a man's intentions by his acts. C. M. O. 29, 1914, 9. *See also* DESERTIONS, 72.
3. **Natural consequences**—It should be remembered that in all well-organized society every man of sound mind is and must be assumed to intend the natural and necessary consequences of his own deliberate acts. Without this imperative legal principle the order of civil society could not be preserved, and the sanction of military discipline and the efficiency of all military organizations would depend upon the personal theories and opinions, however crude, of the individuals who compose them. G. O. 182, Apr. 2, 1873. *See also* C. M. O. 19, 1912, 7.

ADDITIONAL CHARGES AND SPECIFICATIONS.

1. **Army**—Difference between Army and Navy—In applying to naval courts-martial by analogy decisions in cases tried by courts-martial of the Army care must always be taken to note differences in the laws governing court-martial procedure in these branches of the service. With reference to naval courts-martial, it will be noted from A. G. N. 43 that the law plainly contemplates the trial of additional charges at the same time, where such additional charges, as in this case, are preferred under conditions specified in the statute.

Digitized by Google

The objections stated in Dudley's Military Law, etc. (par. 127, p. 66), and Winthrop's Military Law and Precedents (Vol. I, Sec. VII, p. 225) do not apply to cases tried before naval courts-martial, as the oath used by naval courts-martial differs from that used by the Army courts-martial. The law (art. 43, A. G. N.) expressly provides that the accused shall be allowed a reasonable time to make his defense against additional charges.

The oath administered to members of general courts-martial in the Navy is broader in its terms than that used in the Army, the latter relating merely to "the *matter* now before you," while in the Navy the oath relates to "*the case* now depending," which includes all charges and specifications which may legally be preferred against the accused, whether at the time he is placed under arrest or subsequently at any time before his *case* is disposed of by the court. C. M. O. 10, 1913, 7-8. *See also* File 26251-8539:1, J. A. G., Jan. 21, 1914; 26262-1194, p. 6.

2. **Oath**—Where additional charges and specifications are preferred after arraignment no legal objection could exist to swearing members again as to the additional charges and specifications, and as a matter of precaution it might be advisable that such procedure be followed. File 26251-6822:9.

3. **Preferred after arraignment**—An accused was brought to trial by general court-martial (file 26251-6822:9) by order of the Secretary of the Navy. While the trial was in progress information reached the department concerning additional misconduct by the accused. An additional charge predicated upon the offense was preferred against the accused and forwarded to the judge advocate of the court, the department's order expressly stating that the intelligence of such additional charge did not reach the department until after the accused was put under arrest. Upon presentment thereof by the judge advocate, the court decided that it was without jurisdiction in the premises and the judge advocate was directed to return the additional charge to the convening authority. The letter returning the additional charge cited as the court's authority for its action, Dudley's Military Law, etc. (par. 127, p. 66), and Winthrop's Military Law and Precedents (Vol. I, Sec. VII, p. 225).

The department held that the objections stated by the court do not apply to the present case tried before a naval court-martial. The law (art. 43, A. G. N.) expressly provides that the accused shall be allowed a reasonable time to make his defense against additional charges.

The oath administered to members of general courts-martial in the Navy is broader in its terms than that used in the Army, the latter relating merely to "the *matter* now before you," while in the Navy the oath relates to "*the case* now depending," which includes all charges and specifications which may legally be preferred against the accused, whether at the time he is placed under arrest or subsequently at any time before his *case* is disposed of by the court.

The additional charge preferred against this accused was expressly stated to be an "*additional* charge" (or a part of "*the case now depending*") and not a separate charge to be tried in an independent proceeding.

This officer was dismissed on the original charges and specifications without considering the additional ones. The department thereupon addressed a communication to the president of the court with the direction that the remarks be referred to the members and judge advocate of the court for their information. C. M. O. 10, 1913, 7-8. *See also* C. M. O 7, 1913.

4. **Same**—Original charges and specifications were preferred on December 1, 1913, accused was arraigned on January 5, 1914, and additional charges and specifications, intelligence of which did not reach the convening authority until January 6, 1914, were preferred on January 7, 1914. C. M. O. 27, 1914.

5. **Same**—An accused warrant officer was tried by general court-martial April 16, 1912, on charges preferred April 4, 1912, found guilty of "Absence from station and duty without leave" and "Drunkenness on duty," and a sentence adjudged. The department on April 11, 1912, preferred two additional charges with one specification under each charge. The court tried the accused on the two additional charges and specifications in a separate trial, and sentenced the accused to dismissal. C. M. O. 17, 1912; G. C. M. Rec. No. 25187.

6. **Same**—Enlisted men—Additional charges sent to court before trial on original charges and specifications. G. C. M. Rec. No. 31329; 31400; 31402.

7. **Same**—Officer tried upon the charges of "Scandalous conduct tending to the destruction of good morals and naval discipline" and "Embezzlement," and upon an "additional charge," preferred after the commencement of his trial, of "Neglect of duty." G. O. 162, Mar. 25, 1871.

Digitized by Google

8. **Preferred before arraignment**—One additional charge with two specifications thereunder were preferred against the accused before arraignment. He was arraigned upon the original and the additional charges and specifications at the same time. (G. C. M. Rec. 6174.) C. M. O. 56, 1880, 3–5.
9. **Same**—In the case of an accused ensign additional charges and specifications were preferred against the accused prior to arraignment and received by him 10 minutes before he was brought to trial on the original charges and specifications. The accused stated that he was ready for trial on the additional charges and specifications. Defense desired to have the original charges and specifications disposed of before being arraigned on the additional ones. The accused was arraigned on the original charges and specifications, the record showing this entry: "*The judge advocate:* If the court please, as I understand it, the court permits the accused to defer pleading to the additional charges and specifications until some subsequent time? *The court:* They may have time for that." The trial then proceeded on the original charges and specifications. The accused later pleaded to the additional charges and specifications. Findings on all charges and specifications were arrived at by court at proper time. (G. C. M. Rec. 7771.) C. M. O. 23, 1895.
10. **Same**—In the case of an accused chaplain charges and specifications were preferred by the department and transmitted to the general court-martial before which the accused was to be tried, by letter dated July 24, 1907. Thereafter (July 29, 1907) nine additional charges and specifications were preferred against the accused and transmitted to the same court by separate letter. At the trial, August 5, 1907, the accused was arraigned at the same time upon both the original and additional charges and specifications, which were tried together. This procedure was in accordance with the precedents of the department and authorities on military law. G. C. M. Rec. No. 16323. *See also* File 26251–4794, J. A. G., June 6, 1911; C. M. O. 74, 1907.

ADDITIONAL NUMBERS.

1. **Promotion of**—The practice of making officers additional numbers in their grade is followed by Congress only where for good and sufficient reasons it is desired that such officers shall not delay the promotion of others who are their juniors. In other words, the provision that an officer shall be an additional number in his grade is not intended for his benefit, but is intended to facilitate the promotion of others below him on the list; and unless Congress uses language clearly indicating its intention that the officer so made an additional number is to be promoted at an earlier date than he would otherwise have been entitled to promotion, that is to say, on the same date as the officer next above him on the list, the department has held that he should be promoted only from the date on which his position would have entitled him to promotion had he not been made an additional number. The additional-number officer is not promoted either with the officer next below him or with the officer next above him, but is promoted precisely as he would be if he were not an additional number, only his promotion does not operate to delay the promotion of junior officers. It can make no difference to the additional-number officer how many junior officers may be promoted at the same time; his promotion is in no way delayed thereby. File 11130–26, Sec. Navy, Jan. 8, 1915; C. M. O. 6, 1915, 10. *See also* File 11130–23, Sec. Navy, Feb. 25, 1914; 11130–24, Feb. 25, 1914; 11130–25, Mar. 4, 1914; 11130–5, J. A. G., Nov. 24, 1909; 26254–655; Bu. Nav.; File 1511–40, Sec. Navy, Jan. 1, 14, 1911; BUREAU CHIEFS, 8.
2. **Sentence of General court-martial**—Additional numbers should be included in counting the numbers which an officer has been sentenced to be reduced by general court-martial. File 4865–5, June 26, 1906.

ADDITIONAL PAY. *See* PAY, 7, 8.

ADDITIONAL PUNISHMENT.

1. **Secretary of the Navy**—Has the authority to remit but not to commute the sentence, and therefore not to increase the punishment. While the reviewing authority may remit any part of the sentence imposed he can not add to the sentence by imposing an additional forfeiture. C. M. O. 17, 1910, 8; File 25675–9, 10, 11, Sec. Navy, Oct. 28, 1915. *See also* COMMUTING SENTENCES; SECRETARY OF THE NAVY, 54, 56.

ADDRESS.

1. **Desertion**—Change of address of accused during unauthorized absence without notice to naval authorities may create an inference of specific intent to desert. *See* DESERTION, 111.

Digitized by Google

2. **Furlough**—Duty of enlisted men on furlough to notify commanding officer of change of address. C. M. O. 33, 1914, 7.
3. **Witness fees**—On May 4, 1909, the following instructions were issued:
"It is directed that, in the preparation of claims for witness fees for the attendance of civilian witnesses before naval courts-martial, the post-office addresses of such claimants be entered upon the certificate prepared by the judge advocate of the court; and a copy of the subpœna need not be attached to the certificate." C. M. O. 21, 1909, 3.

ADEQUATE SENTENCES.

1. **Clemency extended**—By court in adjudging an inadequate sentence, department can not. *See* CLEMENCY, 54.
2. **Commensurate**—A sentence should be adjudged in each case which is commensurate with the nature of the offense charged. C. M. O. 28, 1912, 3.
3. **Congress**—"Congress, as shown by its legislation on the subject, has evidently not been willing to intrust the power of exercising clemency to courts-martial, but has preferred to repose such power in the Secretary of the Navy, who is charged with the administration of the entire Navy. Accordingly, when a naval court-martial undertakes to adjudge a lenient sentence in a case where it has found the accused guilty of a serious charge such court is attempting to usurp a function which Congress has expressly withheld from it and has delegated to higher authority." C. M. O. 28, 1913, 6.
4. **Courts-martial**—It is made by law the duty of courts-martial, in all cases of conviction, to adjudge a punishment adequate to the nature and degree of the offense committed.
If mitigating circumstances have appeared during the trial, which could not be taken into consideration in determining the degree of guilt found by the verdict, the court may avail itself of such circumstances as adequate grounds for recommending the prisoner to clemency. (R-811.)
5. **Same**—The law does not vest in courts-martial the pardoning power, nor the right to adjudge nominal punishments equivalent to a pardon. The power to remit or mitigate is expressly vested in the President of the United States or the officer authorized to convene the court. The exercise of this power by a court-martial is therefore illegal. (R-808.) C. M. O. 42, 1892. *See also* C. M. O. 22, 1884, 2; 30, 1885, 3; 35, 1892, 11; 51, 1893, 2; 9, 1897, 9; 89, 1897; 107, 1897; 132, 1897, 2; 12, 1900; 67, 1902.
6. **Same**—The law enjoins upon courts-martial "in all cases of conviction to adjudge a punishment adequate to the character and nature of the offense committed." It leaves it discretionary with a court-martial "to recommend the person convicted to clemency; this clemency, however, is to be exercised not by the court, but by the revising power or the President of the United States, who are expressly clothed with the power to mitigate or remit punishment.
"In all these provisions the law is clear, precise, and free from ambiguity."
It may be that the court, or members of it, deemed the law under which the accused was arraigned one of a harsh character; but even admitting that it be so, it is still law, and they were bound by a solemn obligation to administer it as it stands, and not to modify it so that it might accord with their own notions of justice. They had no more authority to do so than to repeal the law. G. O. 68, Dec. 6, 1865.
7. **Same**—"Courts-martial are required by law (Art. 51, A. G. N.) to impose an *adequate* sentence, the members of the court as individuals being permitted to recommend the accused to the clemency, if, in their opinion, extenuating circumstances exist and warrant such recommendation." C. M. O. 4, 1913, 53. *See also* C. M. O. 67, 1902; 28, 1913, 5; 37, 1914.
8. **Same**—"The sentence of the court in this instance is considered by the department to be so light as barely to comply with that provision of the law requiring courts-martial to adjudge punishments *adequate* to the offense committed." C. M. O. 20, 1909, 1.
9. **Same**—"The law makes it the duty of courts-martial in all cases of conviction to adjudge punishment adequate to the nature of the offense." C. M. O. 49, 1910, 12.
10. **Same**—In one case the department stated in part as follows: The sentence of the court "can hardly be regarded as a compliance with the statutory requirement that courts-martial in all cases of conviction adjudge an adequate sentence, and the department is forced to conclude that the court in adjudging such a lenient sentence has encroached upon the prerogatives of the Secretary of the Navy by exercising clemency, as this power is vested by law not in courts" but in the convening authority. C. M. O. 1, 1914, 8.

Digitized by Google

11. **Same**—"The convening authority is entirely unable to understand the mental attitude of an officer who, as a member of a court-martial that has convicted another officer of deliberate falsehood, could vote to award such a ludicrously inadequate punishment, thus forcing his brother officers and himself to continue to associate with an officer who has been proven guilty of deliberately and knowingly making a false statement in writing in an official report to the commander in chief." C. M. O. 10, 1908, 5-6.
12. **Same**—The convening authority (fleet) stated that he approved the sentence "against my conviction that it is entirely inadequate to the nature of the offenses, for the reason" that the accused would otherwise go unpunished. C. M. O. 30, 1885, 3. *See also* C. M. O. 22, 1884, 2.
13. **Same**—Where a general court-martial adjudged an inadequate sentence, the convening authority (fleet) remarked that "the court has shown by its sentence that at least a majority of its members are disposed to trifle with the authority which the people of the United States, through their Representatives in Congress, have confided to their naval officers." The department added: "While the commissioned officers of the court hold in such light estimation the discipline of the Navy, and have such mild ideas as to the gravity of offenses committed against its laws, the subordinates in all degrees can not be expected to consider them more seriously." C. M. O. 57, 1895, 2-3; 58, 1895, 2-3. *See also* C. M. O. 36, 1905, 3; 10, 1912, 8; 14, 1913, 5; 22, 1913, 5; CRITICISM OF COURTS-MARTIAL, 11, 35.
14. **Same**—Where the sentence was considered inadequate the department stated: "The department considered the sentence awarded by the court in this case entirely too light and inadequate for the gravity of the offense committed and directed the convening authority to so inform the president and members." C. M. O. 6, 1912, 2.
15. **Same**—A sentence was disapproved by the Secretary of the Navy as inadequate, the Secretary saying: "Yet the public is to be informed that a court of officers of the Navy consider this capital offense, attended by no circumstances of mitigation, sufficiently punished by suspension from duty for six months without pay, and with pay for the same period, the latter being equivalent to leave of absence for six months. The department declines to outrage public opinion and its own sense of justice, or to mislead the younger officers of the Navy, by approving a sentence so glaringly inadequate. G. O. 58, June 29, 1865. *See also* File 7719-03.
16. **Same**—The members of any naval court-martial who fail to adjudge a substantial punishment for the offense of "Neglect of duty" are lacking in the appreciation of the full requirements imposed by command. File 26262-2214, Sec. Navy, Mar. 10, 1915.
17. **Same**—The convening authority (fleet) stated: After a careful review of the foregoing case, the commander in chief can not but express his surprise that a court composed of responsible officers should adjudge such a wholly inadequate sentence after finding the accused [officer] guilty of "neglect of duty," which neglect probably resulted in serious damage to the ship. C. M. O. 9, 1913, 3.
18. **Same**—"The sentence, as stated, does not appear to be adequate to the nature of the offense, which is a plain and flagrant violation of a very salutary provision of law with which every officer is assumed to be familiar." C. M. O. 7, 1901, 2.
19. **Same**—The convening authority (fleet) returned the record for revision of the sentence, as in his opinion it was inadequate. In revision the court revoked its sentence and substituted therefor another. The convening authority again returned, calling attention to the fact that the second sentence was less than the first. In revision the court revoked its second sentence and adjudged a third sentence. The convening authority noted that in awarding its final sentence the court changed the form but not the substance of its original sentence, and that, attention having twice been called to the inadequacy of the sentence, the court entirely failed to realize its responsibilities to the naval service, and subsequent to these remarks approved the proceedings and findings and, in order that the accused might not entirely escape punishment, the sentence. The department concurred in the remarks of the convening authority relative to the inadequacy of sentence. The record of the accused (a chief boatswain), which was before the court, shows that he has been twice tried and convicted for similar offenses involving drunkenness. The department, therefore, feels that to permit the accused to continue in the service as a commissioned officer is adverse to the interests of justice and discipline, and that the action of the court has resulted in a miscarriage of justice. C. M. O. 21, 1916.

Digitized by Google

20. **Same**—The department approved the recommendation contained in the following indorsement placed upon a general court-martial record by the Chief of the Bureau of Navigation: "The bureau can not understand how a court composed of officers of experience and judgment could fail to appreciate the seriousness of this offense, and it is recommended that the president and members of the court be informed that their action has resulted in a miscarriage of justice." C. M. O. 12, 1916, 2.
21. **Court-martial orders**—Have commented upon sentences being inadequate. C. M. O. 29, 1909, 2; 46, 1910, 1; 47, 1910, 7; 49, 1910, 12, 16; 51, 1910, 2; 12, 1910, 2; 11, 1911, 7; 7, 1912, 3; 8, 1912, 3; 11, 1912, 2; 14, 1912, 2; 16, 1912, 3; 28, 1912, 3; 37, 1912, 2; 1, 1913, 4, 7; 4, 1913, 53; 10, 1913, 5; 16, 1913, 3; 20, 1913, 4; 23, 1913, 15; 26, 1913, 1; 28, 1913, 5; 32, 1913, 2; 36, 1913, 1; 39, 1913, 14; 5, 1914, 7; 45, 1914; 46, 1914; 8, 1915, 2; 14, 1915; 17, 1915; 23, 1915; 25, 1915; 28, 1915; 43, 1915; 44, 1915; 49, 1915, 12; 4, 1916, 3; 6, 1916, 2; 10, 1916, 1–2; 12, 1916; 19, 1916; 21, 1916; 23, 1916, 2; 35, 1916; 40, 1916.
22. **Disapproval**—The accused (officer) was found guilty of "Neglect of duty" and sentenced to be publicly reprimanded by the commander in chief, United States Atlantic Fleet. The record was returned to the court because the sentence was inadequate. The court adhered to its former sentence and the convening authority disapproved the sentence as inadequate. C. M. O. 46, 1914. *See also* C. M. O. 83, 1904, 4; 4, 1916, 3.
23. **Same**—The department returned a record, ordering the court to reconvene for the purpose of reconsidering the sentence, which was, in the opinion of the department, "grossly inadequate for the very serious offense of which" the accused was found guilty. The court in revision adhered to its sentence. The court was once more directed to reconvene for the same purpose and again adhere to its sentence, "and in order that the service at large might not be misinformed as to what the department considers as proper punishment for this offense, the sentence adjudged * * * was disapproved as wholly inadequate." C. M. O. 10, 1913, 6. *See also* ADEQUATE SENTENCES, 15.
24. **"Glaringly inadequate."** *See* ADEQUATE SENTENCES, 15.
25. **"Grossly inadequate."** *See* ADEQUATE SENTENCES, 23.
26. **Law**—The law (R. S. 1624; A. G. N. 51) makes it the duty of naval courts-martial to adjudge adequate sentences. *See* ADEQUATE SENTENCES, 8.
27. **"Manifestly and absurdly inadequate."** C. M. O. 7, 1912, 3.
28. **"Ludicrously inadequate."** *See* ADEQUATE SENTENCES, 11.
29. **Not necessarily maximum**—"Courts-martial are to bear in mind that they do not meet in all cases to adjudge the maximum sentence for the offense, as laid down in the table of limitations of punishment, but to determine the attending circumstances and degree of wrongdoing of the accused and adjudge a sentence accordingly." C. M. O. 6, 1909, 3.
30. **Officers**—When an officer is a member of a naval court-martial he is assumed to know that the law makes it mandatory for him to adjudge an adequate sentence. C. M. O. 107, 1901, 2.
31. **Usurpation**—Of convening and reviewing authorities' power. *See* ADEQUATE SENTENCES, 10.

ADJOURNMENT OF COURTS-MARTIAL.

1. **General courts-martial**—When the proceedings of any general court-martial have commenced, they shall not be suspended or delayed on account of the absence of any of the members, provided five or more are assembled; but the court is enjoined to sit from day to day, Sundays excepted, until sentence is given, unless temporarily adjourned by the authority which convened it. (A. G. N. 45; Forms of Procedure, 1910, p. 17.) In view of the above, though such action would not necessarily invalidate the proceedings, a general court-martial during a trial should not adjourn over a holiday or any other day which is not a Sunday, without such permission being expressly granted, or unless the court is expressly granted such authority in the precept. (*See* C. M. O. 49, 1910, 11; G. C. M. Rec. No. 21330; File 26251–2842.) C. M. O. 51, 1914, 4.
2. **Same**—Where a general court-martial adjourned from Tuesday until Friday without permission from the convening authority, the department stated prior to approving the case that the specific provision of A. G. N. 45 violated in this instance, being directory only and not mandatory and the error committed one which causes no injury to the accused, the irregularity offers no sufficient grounds upon which to set aside and defeat the proceedings. C. M. O. 27, 1898, 1–2.

Digitized by Google

3. **Same**—The court adjourned over from Friday, December 31, 1909, until Monday, January 3, 1910, without previously having been authorized so to do by the convening authority. As it appears that the provisions of A. G. N. 45 were promulgated primarily to prevent an accused being held in confinement an unwarrantable time while awaiting final action, and as in the case at issue no injury appears to have been done him, in fact the contrary appears to have been the case, the adjournment permitting him to secure counsel which he had not previously obtained, this irregular action on the part of the court is an irregularity which did not invalidate the proceedings. C. M. O. 49, 1910, 11. *See also* File 26504-37.

ADJUTANT AND INSPECTOR, UNITED STATES MARINE CORPS.

1. **Assistant adjutant and inspector**—Authority to administer oaths. *See* OATHS, 48.
2. **Indorsement**—On letter of adjutant and inspector as evidence. C. M. O. 47, 1910, 5. *See also* INDORSEMENTS, 1; LETTERS, 4, 5.
3. **Letter**—Of adjutant and inspector as evidence. C. M. O. 47, 1910, 5. *See also* LETTERS, 5.
4. **Oaths**—Administering of oaths by. *See* OATHS, 48.

ADJUTANT GENERAL OF THE ARMY.

1. **Indorsement**—On letter of adjutant and inspector, U. S. M. C., is not competent evidence to prove previous convictions. *See* LETTERS, 4.

ADMINISTRATION.

1. **Commissions of same date**—Numbering of. *See* COMMISSIONS, 26.
2. **Commissions**—Change in date of. *See* COMMISSIONS, 9-19.
3. **Comptroller of the Treasury**—Department's policy has been to disapprove submission of specific questions involving administrative matters under its own jurisdiction to Comptroller of the Treasury. *See* COMPTROLLER OF THE TREASURY, 3.
4. **Promotion, suspension from**—Administrative officer determines the manner the loss of numbers shall be executed. C. M. O. 42, 1915, 12. *See also* PROMOTION, 200.
5. **Res judicata**—For a list of cases wherein it was held to be a settled rule of administrative practice that official acts of a previous administration are to be considered as final by its successor so far as the executive is concerned. *See* File 11130-6, J. A. G., Dec. 28, 1909; COMMISSIONS, 14-16; RES JUDICATA.
6. **Same**—The only exception to the rule is where the application for review is based upon new facts, a new state of law, or some extraordinary circumstances. File 11130, J. A. G., Dec. 28, 1909, p. 5. *See also* RES JUDICATA, 6.
7. **Resignations, acceptance of**—The Secretary of the Navy is the proper administrative person to accept the resignation of an officer for the President. C. M. O. 42, 1915, 13. *See also* RESIGNATIONS, 28.
8. **Secretary of Navy**—Charged with the administration of the entire Navy. *See* ADEQUATE SENTENCES, 3; SECRETARY OF THE NAVY, 6.

ADMINISTRATOR. *See also* LEGAL REPRESENTATIVES.

1. **Death gratuity.** *See* DEATH GRATUITY, 13.
2. **Officer's effects**—Disposition of. *See* DISPOSITION OF EFFECTS, 5, 6.
3. **Paymaster**—Jurisdiction of Court of Claims over claim of paymaster's administrator. C. M. O. 39, 1913, 12.
4. **Private.** *See* DISPOSITION OF EFFECTS, 2.
5. **Public.** *See* DISPOSITION OF EFFECTS, 2.
6. **Sheriff**—Payment of reward for deserter to administrator. *See* REWARDS, 2.

ADMIRALS.

1. **Admirals of fleets**—Pay of. *See* REAR ADMIRALS, 2, 3.
2. **Admiral of the Navy**—Retirement of—Only upon application. *See* RETIREMENT OF OFFICERS, 4.
3. **Rear admirals**—Pay of rear admirals, lower nine. C. M. O. 12, 1915, 12-13. *See also* REAR ADMIRALS, 2, 3.
4. **Same**—Retired rear admiral—Tried by general court-martial. C. M. O. 41, 1915.
5. **Title of**—Ancient title of admiral appertains to the military and command branches of the naval service. *See* TITLES, 1.

ADMISSIONS.

1. **Accused**—Admitted in open court certain allegations in the specifications. C. M. O. 30, 1912, 5; 34, 1913, 7; 37, 1915, 2. *See also* G. C. M. Rec. No. 28652, pp. 3, 7; 31925; 32078; 31904; C. M. O. 9, 1897, 9, 11; 39, 1913, 4; File 26251-12462; C. M. O. 5, 1917.
   Evidence is not required to prove allegations in specifications which accused or his counsel admit in open court. File 26251-12159, Sec. Navy, Dec. 9, 1916, p. 10.

Digitized by Google

2. **Admissions against interest.** *See* ADMISSIONS AGAINST INTEREST.
3. **Judge advocate, by**—The judge advocate may be authorized by the convening authority to admit in open court that a person would give certain testimony if he were summoned and testified before the court. (File 26251-4119:6, Sec. Navy, Jan. 9, 1911; 26251-10649:3, Sec. Navy, June 2, 1915; G. C. M. Rec. No. 30669.) The judge advocate should not be authorized to admit that the facts in question are true, but only that the person, if present as a witness, would testify that they were true. File 26251-4119:6, Sec. Navy, Jan. 12, 1911; C. M. O. 49, 1915, 9. *See* Ct. Inq. Rec., 4952, p. 799, with reference to similar admissions by judge advocate of a court of inquiry.
4. **Same**—Of contents of efficiency reports of officers. *See* REPORTS ON FITNESS, 5.

ADMISSIONS AGAINST INTEREST. *See* ADMISSIONS; DYING DECLARATIONS, 1 (p. 201, line 55).

1. **Board of investigation**—The statement made by an accused before a board of investigation, when such statement takes the complexion of an admission against interest or a confession, is admissible as evidence before naval courts-martial. G. C. M. Rec. No. 11279. *See also* CONFESSIONS, 8.

ADMONITION. *See* CRITICISM OF COURTS-MARTIAL, 22; JUDGE ADVOCATE, 6; MARINE EXAMINING BOARDS, 2; WORDS AND PHRASES.

ADOPTION.

1. **Citizenship by.** *See* CITIZENSHIP, 34.

ADVANCE DECISIONS BY THE DEPARTMENT.

1. **Policy**—Of the department outlined. *See* HYPOTHETICAL QUESTIONS, 1.

ADVANCES OR LOANS BY PAYMASTERS.

1. **Prohibited**—Section 1389 R. S. provides that "it shall not be lawful for any paymaster, passed assistant paymaster, or assistant paymaster, to advance or loan, under any pretense whatever, to any officer in the naval service, any sum of money, public or private, or any credit, or any article of commodity whatever." C. M. O. 4, 1913, 9. *See also* C. M. O. 107, 1901; 17, 1915, 2.
2. **Trivial advances.** C. M. O. 107, 1901, 2.

ADVANCES OF PAY TO OFFICERS.

1. **Officers**—Ordered to sea, etc. *See* FRAUD, 5; PAY, 9.

ADVISING.

1. **Crime.** *See* AIDING AND ABETTING, 1.
2. **Desertion.** *See* DESERTION, 48, 79, 80.
3. **Judge advocate**—Should not advise the accused to plead "guilty." C. M. O. 6, 1909, 3. *See also* JUDGE ADVOCATE, 34, 86.
4. **Same**—Advice to court. *See* JUDGE ADVOCATE, 49–59.

ADVISORY STATUTES.

1. **Directing mode of proceeding**—In general, statutes directing the mode of proceeding by public officers are deemed advisory, and strict compliance with their detailed provisions is not indispensable to the validity of the proceedings themselves unless a contrary intention can be clearly gathered from the statutes construed in the light of other rules of interpretation. C. M. O. 27, 1898, 1.

AFFIDAVITS.

1. **Admission**—Of an *ex parte* affidavit favorable to accused does not invalidate proceedings, and is no ground for clemency by the department; but otherwise if the affidavit is against the accused. File 1009–94. *See also* File 26251-11479, Sec. Navy, Feb. 16, 1916, where department disapproved a finding on a general court-martial specification because an affidavit unfavorable to accused was introduced in evidence over objection of accused. *See also* C. M. O. 48, 1915, 2; CLEMENCY, 3.
2. **Certificate**—That affiants are known to be reputable and creditable may be made by the person before whom the oath is administered. This rule applies only to ordinary cases with respect to which there is nothing to suggest the propriety of further inquiry. Additional evidence may be called for as public interests require. File 546–97, J. A. G., Mar. 3, 1897.
3. **Date and place of birth of an applicant for enlistment**—A recruiting officer of the Navy may administer an oath to a person not in the naval service who desires to make an affidavit as to the date and place of birth of an applicant for enlistment in the United States Navy. C. M. O. 5, 1916, 7. *See also* OATHS 39.

Digitized by Google

4. **Deposition**—An affidavit is "a statement or declaration reduced to writing and sworn or affirmed to before some officer who has authority to administer an oath or affirmation. It differs from a deposition in this, that in the latter the opposite party has an opportunity to cross-examine the witness, whereas an affidavit is always taken *ex parte*." (1 Bouvier, 111.) C. M. O. 48, 1915, 2. *See also* DEPOSITIONS, 2.
5. **Evidence**—An affidavit is inadmissible in evidence. Affidavits, or statements of persons not subjected to cross-examination, are entirely incompetent as evidence before courts-martial. Affidavits, however, have sometimes been admitted by courts-martial in the absence of objection by a party. But, notwithstanding the consent of parties, a court-martial could rarely, if ever, with safety receive evidence of this character, which must, in general, be too incomplete to serve as a reliable basis either for its own judgment or the action of the reviewing authority.

In a case where an affidavit signed by a witness for the defense who had failed to appear, was introduced and accepted by the court as evidence, the department stated:

"The Forty-first article of the Articles for the Government of the Navy requires that: 'An oath or affirmation * * * shall be administered to all witnesses before any court-martial, by the president thereof.' There is no authority of law for the acceptance by naval courts-martial of an *ex parte* affidavit as evidence, and the court erred, therefore, in admitting such affidavit. The introduction of an affidavit of this character by the prosecution would have been fatal to the validity of the proceedings, but inasmuch as the matters contained in said affidavit were favorable to the accused, its introduction by the defense can not have that effect." (C. M. O. 50, 1893, 6.)

In another case the department held that "the court erred in admitting as evidence of" the accused's "previous good character a written statement purporting to be the affidavit of" an officer "who had been summoned to appear before the court as a witness and was unable, on account of sickness, to so appear," and quoted with approval the above holding in court-martial order No. 50, 1893, 6. (C. M. O. 99, 1893, 1.)

In court-martial order No. 41, 1894, p. 2, the department quoted approvingly the above excerpt from court-martial order No. 50, 1893, p. 6, and further stated: "It appears that an affidavit—the sworn statement of a physician regarding the effect of intoxicating liquor—was offered for the inspection of the court, read aloud by the judge advocate, and appended to the record, and that, in the argument for the defense, this document was referred to as being in evidence. The court erred in accepting such affidavit as evidence." C. M. O. 48, 1915, 2-3.
6. **Parents of enlisted man**—To show son under age when enlisting. C. M. O. 6, 1915, 14.
7. **Statement of accused**—In court-martial order No. 21, 1910, p. 12, the department held that an affidavit should not be included as part of the statement of the accused. In that case "the judge advocate read for the accused an affidavit as part of the statement of the accused" which was appended to the record. "By such a procedure the statement of the accused is made a vehicle of evidence in that it is made to embrace a document which, even though sworn to, is nothing more than an *ex parte* statement, and not even a deposition, and as such is incompetent as evidence, and furthermore inadmissible as a part of the statement of the accused." (*See also* C. M. O. 22, 1896, pp. 1-2; 132, 1897, p. 2.) C. M. O. 48, 1915, 3. *See also* STATEMENT OF ACCUSED, 38.

AFFIRMATION.

1. **Witnesses**—May affirm instead of taking the oath. *See* DEPOSITIONS, 5; OATHS, 20.

AFFRAY.

1. **Witnesses of**—Excited witnesses of a riot or furious affray are not likely to comprehend and remember accurately the movements of the various persons actively engaged. C. M. O. 7, 1911, 8. *See also* EVIDENCE, 128.

AGE.

1. **Age of appointment**—"More than 26 years of age" construed. *See* ASSISTANT PAYMASTERS, 3.
2. **Appointment assistant paymasters.** *See* ASSISTANT PAYMASTERS, 3.
3. **Clemency**—Because of youth. *See* CLEMENCY, 67-71; YOUTH.
4. **Date of birth**—Upon the furnishing of *proper evidence* the department will authorize the Bureau of Navigation to change upon the records the date of birth of an officer. File 8912-02.
5. **Fraudulent enlistment**—By misrepresenting age. *See* FRAUDULENT ENLISTMENT, 57-60.
6. **Midshipmen**—Age limit for candidates to Naval Academy. *See* MIDSHIPMEN, 3-6.

Digitized by Google

7. **Misrepresented**—Fraudulent enlistment by misrepresenting age. *See* FRAUDULENT ENLISTMENT, 57–60.
8. **Retirement for age.** *See* RETIREMENT OF OFFICERS, 4–9.

AGGRAVATING CIRCUMSTANCES.

1. **Absence unauthorised**—Combined with. *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 12.
2. **Assault**—Of a civilian by a naval officer after "considerable provocation." C. M. O. 53, 1910, 2; 54, 1910, 2.
3. **Cigarettes**—Smoking of cigarettes by officer of the deck is an aggravation for other offenses with which he might be charged. C. M. O. 25, 1909, 2. *See also* OFFICER OF THE DECK, 3.
4. **Drunkenness**—Voluntary drunkenness is never an excuse for an offense such as unauthorized absence, but in many cases is an aggravation. *See* ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED, 9, 10; DRUNKENNESS, 1.
5. **Offenses**—Misconduct of an officer on duty at the Naval Academy is aggravated by the fact that he is on duty at the Naval Academy. C. M. O. 14, 1915.

"AID OR EXECUTIVE."

1. **Executive officer**—At one time called the "Aid" of the commanding officer. *See* EXECUTIVE OFFICER, 1.

AIDS.

1. **Additional pay.** *See* PAY, 7, 8.

AIDS TO NAVIGATION. *See* NAVIGATION.

AIDING AND ABETTING.

1. **Assault and battery**—"All persons who are present at the commission of an assault and battery, aiding, encouraging, or inciting the principal participants by words, gestures, looks, or signs, or who, in any way, countenance or approve the assault, are in law deemed to be principals, and a blow by one is a blow by each and all." (2 A and E Ency. 975; U. S. *v.* Ricketts, 1 Cranch, 164.) C. M. O. 55, 1910, 6. *See also* File 26251–4729: 34.
2. **Same**—An accused was charged with "Assaulting and striking his superior officer while in the execution of the duties of his office," the specification alleging that he did assault and strike said superior officer. The court found this specification proved, except the words "and strike," thus finding the accused guilty of the assault, but not guilty of the striking. The evidence conclusively showed that the accused was present and took part in a general assault by several persons on the person assaulted. As the accused was in the general mix-up which resulted in the beating of the person assaulted it was held by the department that, from the evidence, the accused being guilty of assault, was also guilty of "striking" under the rule that one who is present and aids and abets, assists, or encourages is guilty as a principal. C. M. O. 55, 1910, 5–6.
3. **Desertion.** *See* DESERTION, 12.
4. **Embezzlement**—Accused "did then and there aid and abet." C. M. O. 29, 1911, 3, 5; 30, 1911, 1.
5. **Theft**—Should be charged as a principal—"Where two or more persons act together in a larceny, each of them doing one part of the whole act, they are joint principals in the crime." (25 Cyc. 56.) Thus, "where one party brings the property stolen to a certain place, where his confederate takes it and makes off with it, since he whole constitutes one transaction in which both take a part, both are guilty of larceny as principals." (25 Cyc. 56.) C. M. O. 8, 1913, 3–4. *See also* File 6251–4729: 34.
6. **Same**—If the facts indicate that a person aided and abetted a theft or larceny he should be tried under the charge of "Theft," not "Aiding and abetting larceny (or theft) in violation of clause sixteen of article 8 of Articles for the Government of the Navy." C. M. O. 8, 1913, 3–4. *See also* File 26251–4729: 34.
7. **Sodomy.** File 26251–4729: 34. *See also* SODOMY.

AIDING IN VIOLATION OF LIQUOR LAWS.

1. **Guam, of.** *See* JURISDICTION, 33.

AIR SERVICE. *See* File 26687–9; AVIATION; NAVAL MILITIA, 1.

AIRCRAFT. *See* File 26687–9.

Digitized by Google

ALABAMA CLAIMS.
1. **Laws relating to**—18 Stat., 245; 19 Stat., 1, 3; 22 Stat., 98; 23 Stat., 34; 24 Stat., 77. *See* Files 1122–97 and Notes.

ALASKA.
1. **Executive order**—Reserving certain islands for naval purposes. Signed December 8, 1903, and filed in Bureau of Yards and Docks. *See* File 10329–03.
2. **Juneau**—Correspondence and history of naval reservation in Juneau, Alaska. *See* Files of J. A. G. for 1883 and 1897. *See also* File 6219–04.

ALCOHOL. *See* C. M. O. 42, 1909, 12, 14; 24, 1914, 21; 42, 1915, 3. *See also* DRUNKENNESS.

ALCOHOLISM. *See* DRUNKENNESS.
1. **Judge advocate**—Of a general court-martial tried by general court-martial—For being incapacitated for the proper performance of his duty in consequence of the excessive use of intoxicating liquor, and was thereby in such condition as to necessitate his being placed on the sick list for "alcoholism." C. M. O. 104, 1896, 1.
2. **Officer**—Under treatment for "alcoholism." C. M. O. 22, 1884, 3.
3. **Petty officer**—A petty officer who renders himself unfit for duty through alcoholism is not to be trusted. *See* PETTY OFFICERS, 1.
4. **"Pronounced chronic alcoholism."** File 5925–03.
5. **Treatment for**—An enlisted man requested remission of sentence in order that he might take course of treatment for alcoholism. File 26287–3467, July, 1916.

ALIAS.
1. **Desertion**—Used in specification under charge of "desertion." C. M. O. 8, 1888.
2. **Findings**—Alias of accused should be included. C. M. O. 9, 1916, 5; G. C. M. Rec. 31812.
3. **Fraudulent enlistment**—Used in cases of. *See* C. M. O. 25, 1914, 6; 29, 1914, 4, 7.
4. **Sentence**—Alias of accused should be included. C. M. O. 9, 1916, 5; G. C. M. Rec. 31812.

ALIENS. *See also* CITIZENSHIP, 34.
1. **Citizenship of**—Requirements for. *See* CITIZENSHIP, 34.
2. **Discouraging retention of, in naval service**—An alien was sentenced to confinement, extra police duties, loss of pay and allowances, and dishonorable discharge. The department approved the sentence, but pursuant to the department's general policy of discouraging the retention of aliens in the naval service, so much of the sentence as provided for confinement, with corresponding extra police duties and loss of pay and allowances, was remitted, and the accused was discharged from the service in accordance with the remaining terms of the sentence. C. M. O. 181, 1902, 2.
3. **Enlistments of, not permitted**—Aliens are not permitted to be enlisted. *See* Department Circular of Sept. 1, 1908; CITIZENSHIP, 12.
4. **Enlistment papers**—Entries on enlistment papers. *See* SERVICE RECORDS.
5. **Foreigners on warships**—Representatives of a foreign Government can not be admitted to serve on board American warships for a term of two years, without special authority of Congress. File 6273, J. A. G., Dec. 17, 1906.
6. **Fraudulent enlistment**—Effect of. G. C. M. Rec. No. 24710. *See also* FRAUDULENT ENLISTMENT, 2.
7. **Guam**—Jurisdiction to naturalize aliens as citizens of the United States is not possessed by any court in Guam. File 26252–90, J. A. G., Feb. 27, 1914.
8. **Midshipmen.** *See* MIDSHIPMEN, 8.
9. **Naturalization of.** *See* CITIZENSHIP.
10. **Navy yards**—Employment of aliens in navy yards—Recommended that rule be suspended in the case of an alien who was adopted by American parents, and in whose case the question of citizenship was raised. (*See* Navy yard Order No. 26, Revised Dec. 28, 1905; File 3194–3, Mar. 31, 1905.) File 3194–1, Oct. 17, 1906.
11. **Requirements**—For naturalization of. *See* CITIZENSHIP, 34.
12. **Serving on vessels of the U. S. Navy**—No law governing, but growing tendency to decline such requests. Settled that no foreign officers are allowed to attend the course at the Naval War College. File 9868–246, J. A. G., March 29, 1912. *See also* CITIZENSHIP, 12.

ALLOTMENTS.
1. **Erroneously canceled**—May be continued. File 8528–431, J. A. G., Nov. 10, 1915.
2. **Forgery**—Of indorsement on an allotment check. File 27381–25, J. A. G., June 3, 1916.

Digitized by Google

3. **Government Hospital for the Insane**—A chief carpenter confined in the Government Hospital for the Insane is not authorized by law or regulations to register an allotment, even though mentally competent, for the reason that he is ashore within the United States. (Navy Regulations, 1909, R-1094.) The wife of such an officer desiring to secure a portion of his pay should have a guardian or committee appointed to take charge of his affairs. File 8528-327:1. *See also* File 8528-111; Navy Regulations, 1913, R-4472.
4. **Same**—Where an enlisted man of the naval service is a patient at the Government Hospital for the Insane and it has been certified by the naval medical officer at, and the superintendent of, the said hospital that he is mentally competent to receive and dispose of his pay, he is legally competent to make an allotment or assignment of wages in accordance with Navy Regulations, 1913, R-4471 and R-4472. (*See also* C. M. O. 22, 1915, p. 8.) File 10060-67, J. A. G., Aug. 18, 1915; C. M. O. 29, 1915, 5. *See also* File 8528-340; 1802-04; 8528-399, Oct. 29, 1913; ASSIGNMENT OF WAGES.
5. **Infants**—In view of the probable inconvenience to the accounting officers and the difficulties an infant would be subjected to in cashing checks should an allotment be made to him, an allotment should not be made to an infant but should be made to the guardian of the infant for the benefit of the infant. File 8528-425, Sec. Navy, July 7, 1915; C. M. O. 27, 1915, 6.
6. **Loss of pay remitted**—On condition that the accused allot all pay, except necessary prison expenses, transportation, and gratuity to be paid on discharge, etc. C. M. O. 28, 1909, 1; 37, 1909, 1; 10, 1913, 6.
7. **Same**—Allotments by persons convicted of fraudulent enlistment and desertion—Loss of pay may be remitted by the Secretary of the Navy, to allow allotment to families, etc. File 26254-279. *See also* File 26262-811:3; CLEMENCY, 39, 53; PAY, 23.
8. **Minor.** *See* ALLOTMENTS, 5.
9. **Naval Instructions, 1913, I-4893.** *See* NAVAL INSTRUCTIONS, 1913, I-4893.

ALLOWANCES.

1. **Confinement of marine reduced**—Convening authority when reducing period of confinement of a marine should make a corresponding reduction in the forfeiture of pay and allowances adjudged. A failure to do so is irregular, for if the sentence was carried out as thus mitigated, the accused would lose all pay and allowances during confinement, except $3 a month for prison expenses, and all pay and allowances *throughout the balance of his enlistment.* C. M. O. 49, 1910, 11. *See also* CONFINEMENT, 34.
2. **Detentioners**—Status of, as to clothing allowances, etc. *See* DETENTIONERS.
3. **Dishonorable discharge adjudged marines**—If the sentence of a marine includes confinement with corresponding hard labor, forfeiture of pay, and dishonorable discharge, loss of allowances should also be adjudged in accordance with Navy Regulations, 1913, 816 (5); R-817 (1). C. M. O. 7, 1911, 4; 2, 1912, 4.
4. **Same**—Remitted—If convening authority remits dishonorable discharge in marine's sentence, he should also remit forfeiture of allowances. Where convening authority neglected to do so the department remitted the forfeiture of allowances. C. M. O. 7, 1911, 4.
5. **Fraudulent enlistment**—Receipt of either pay *or* allowances by a person not in the naval service when fraudulently enlisting completes the offense of fraudulent enlistment and proof of receipt of either under such enlistment will support a finding of guilty of that offense. *See* FRAUDULENT ENLISTMENT, 4, 50.
6. **Government Hospital for the Insane**—Allowances for patients and prisoners at. *See* GOVERNMENT HOSPITAL FOR THE INSANE, 2.
7. **Limitation to period of forfeiture.** *See* PAY, 29.
8. **Marines**—Only, should be sentenced to forfeiture of allowances in general court-martial sentences. C. M. O. 37, 1909, 3; 42, 1909, 6, 11; 55, 1910, 7, 8; 6, 1913, 3.
9. **Same**—Should not be sentenced to forfeiture of allowances unless dishonorable discharge is also adjudged. *See* ALLOWANCES, 10.
10. **Same**—Not sentenced to dishonorable discharge should be sentenced to forfeiture of pay only (not allowances) during confinement. C. M. O. 42, 1909, 3; 14, 1910, 7; 15, 1910, 6; 17, 1910, 5; 14, 1913, 3.
11. **Midshipmen.** *See* MIDSHIPMEN, 62.
12. **Mounted marine officers**—Marine officer whose duty requires him to be mounted is entitled to forage, etc. File 26254-306:2. *See also* PAY, 67.
13. **Pay**—"Allowances" and "Pay" distinguished—Additional pay of enlisted men defined. *See* File 26254-113.
14. **Waived**—Allowances may be waived by enlisted men. File 13673-1442, J. A. G., Nov. 22, 1911, p. 12. *See also* ESTOPPEL, 8.

Digitized by Google

ALOUD.
1. **Reading documents**—The record of proceedings should not state that "the judge advocate read *aloud*" documents, for Forms of Procedure, 1910, p. 18, provides that when the record states that a paper, document, or testmony was read, it is understood that it was read aloud. C. M. O. 12, 1911, 3.

ALTERATIONS. *See also* AMENDMENTS; CORRECTIONS.
1. **Finding**—Shall be free from all alterations. *See* FINDINGS, 7.
2. **Navy Regulations**—Necessity of President's express approval. *See* REGULATIONS, NAVY, 16-19.
3. **Sentence**—Sentence shall be free from all alterations. *See* SENTENCES, 10.

AMBIGUITY.
1. **Sentences**—Should not be ambiguous. *See* DISHONORABLE DISCHARGE, 3; SENTENCES, 11.

AMENDMENTS. *See also* ALTERATIONS; CORRECTIONS.
1. **Charges and specifications.** *See* CHARGES AND SPECIFICATIONS, 33, 34.
2. **Constitution of the United States.** *See* CONSTITUTION OF THE UNITED STATES, 1-2.
3. **Record of proceedings**—No changes are to be made in the original record of proceedings in revision. *See* CORRECTIONS, 4; RECORD OF PROCEEDINGS, 26, 97; REVISION, 30.
4. **Same**—Where record of proceedings correctly reports the proceedings which actually occurred, it can not properly be "corrected" so as to record a different state of facts. *See* CORRECTIONS, 5.

"AMERICAN BLUEJACKET." *See* C. M. O. 7, 1911, 9.

AMERICAN INDIAN. *See* INDIANS.

AMPUTATION.
1. **Arm**—Chief gunner continued on active list for shore duty only. File 26253-473, Sec. Navy, May 22, 1916. *See also* File 26260-950, Sec. Navy, July 29, 1910; 9346-08, Sec. Navy, Feb. 14, 1908.

ANESTHETICS.
1. **Death of naval patient**—While under cocaine. C. M. O. 10, 1915, 8.

ANNUITY.
1. **Oath**—Powers of commanding officers. *See* OATHS, 38.

ANTEDATING.
1. **Commissions.** *See* COMMISSIONS, 3, 4.
2. **Enlistments.** *See* ENLISTMENTS, 2.
3. **Sentence**—Whereas it is within the province of the convening authority to mitigate sentences of general courts-martial convened by him, and he may in such cases, by *express terms*, reduce the period of confinement adjudged, his action in making confinement date from a previous day would be irregular and contrary to the provisions of Navy Regulations. C. M. O. 49, 1910, 15. *See also* C. M. O. 27, 1887, 16; 27, 1911, 6; 21, 1912, 4; 21, 1914, 4; CONFINEMENT, 1, 9.

ANTIMILITARY SOCIETIES.
1. **Laws relating to**—There is no Federal law which would necessarily be violated in time of peace by an organization which teaches "young men to refuse to do military service" and "that no one should volunteer to serve." File 15183-65, Sec. Navy, Apr. 10, 1916.

APOLOGY.
1. **Does not cure an offense**—"It is not sufficient for any person who, through carelessness and thoughtlessness of consequences, injures another, perhaps for life, to say to the injured person, 'I am sorry, I did not intend to hurt you,' and then drive off and make no further effort to care for the victim or heal the wounds." C. M. O. 18, 1910, 2. *See also* C. M. O. 31, 1881, 3; OFFICERS, 101.

APPEALS.
1. **Comptroller of the Treasury.** *See* COMPTROLLER OF THE TREASURY.
2. **Congress, to**—Death gratuity—Where deceased left no widow or children, and mother has not been "previously designated," her only redress "lies in an appeal to Congress." File 26543-137, Sec. Navy, Nov. 20, 1915; C. M. O. 42, 1915, 9-10.
3. **Same**—Where officer believes his date of commission is erroneous. *See* COMMISSIONS, 14.

Digitized by Google

4. **Counsel of accused to department**—Counsel (marine officer) for accused (officer) appealed to Secretary of the Navy, to have findings and sentence set aside on grounds that "his trial was not a public trial as required by law," the judge advocate having been present during closed court—Department declined to set aside. C. M. O. 6, 1915, 6. *See also* File 8464–03; 670–97. *See also* APPEALS, 10.

Civilian counsel for the accused (enlisted man) appealed to the department but his appeal was not granted. C. M. O. 2), 1915, 6.

Counsel for accused appealed on grounds that accused "did not have a fair trial" in that the court sustained objections to certain questions. File 26262–2644:1.

5. **Death gratuity**—"Appeal to Congress." *See* APPEALS, 2.

Appeal to Secretary of the Navy by beneficiary from decision of Paymaster General. *See* DEATH GRATUITY, 4, 23.

6. **Deck court**—Testimony taken in deck-court proceedings forwarded to department only in case of appeal. *See* DECK COURTS, 1, 2.

7. **Same**—Accused may appeal from a deck-court sentence in accordance with the provisions of section 6 of the act of February 16, 1909 (35 Stat., 621) (Navy Regulations, 1913, R–516). *See* DECK COURTS, 1, 2, 58; File 27217–1752, Sec. Navy, Sept. 23, 1915, for an actual appeal denied.

8. **Habeas corpus**—Should the civil court order the discharge of the party, the officer making the return, or counsel, should note an appeal pending instructions from the Navy Department. *See* HABEAS CORPUS, 18.

An officer acting as counsel for an accused should not institute habeas corpus proceedings or a suit for damages against members. *See* COUNSEL, 29, 36; HABEAS CORPUS, 17.

9. **Illegal orders**—Appeals from. *See* ORDERS, 4, 5, 38, 39, 64, 67.

10. **Officer**—Appeals to President under Navy Regulations, 1900, R–1657 (4) [Navy Regulations, 1913, I–5323], can not be made by an officer in behalf of another person, as in a case of an appeal by an officer who acted as counsel in a general court-martial trial in behalf of accused. File 8464–03; 670–97. *See also* APPEALS, 4.

11. **Same**—As a general rule, no appeal lies to the President from the head of a department, whose acts are presumed to be acts of the President himself (9 Op. Atty. Gen. 462). However, in the naval service appeals may be taken to the President from the orders and decisions of the Secretary of the Navy. (Naval Instructions, 1913, I–5323). An official appeal from an order or decision of the Secretary of the Navy, by an officer, shall be addressed to the President as the common superior, and be forwarded through the department, except in case of refusal or failure to forward, when it may be addressed directly. Similarly, an appeal from an order or decision of an immediate superior shall be addressed to the next highest common superior who has power to act in the matter, and shall be forwarded through the immediate superior, or, should the latter refuse or fail to forward it within a reasonable time, it may be forwarded direct with an explanation of such course. (I–5323.)

12. **Same**—Accused (officer) sentenced to lose 15 numbers, which was approved by convening authority. The accused appealed from the sentence. The case was thereupon examined by the Judge Advocate General and by the Secretary of the Navy, and finally submitted, with a full statement of the points covered by the appeal, to the President, who directed that the sentence be mitigated and that the accused be reprimanded for neglect of duty. C. M. O. 48, 1904, 1.

13. **Same**—Accused (officer) sentenced to lose 10 numbers, which was approved by convening authority, made a formal appeal to the department, which declined to disturb the conclusions reached by the court. C. M. O. 73, 1896, 2.

A marine officer appealed to President regarding his position on the list, stating that under section 19 of the personnel act and R. S. 1219 he should precede four others. File 8171–03.

Appealed to department and requested consideration of department's letter of censure in connection with report of board of investigation. File 26283–327:24, J. A. G., June 15, 1916. *See also* RES JUDICATA, 14.

Member of a general court-martial protested and appealed against criticism of convening authority (fleet). *See* CRITICISM OF COURTS-MARTIAL, 35.

Member of a summary court-martial appealed from criticism of convening authority being entered on report on fitness. *See* CRITICISM OF COURTS-MARTIAL, 36.

Officer appealed for a reconsideration of his general court-martial sentence, but Secretary of the Navy denied appeal. File 26251–8101:2, Sec. Navy, Apr. 30, 1915. *See also* File 4435 and 4445–04, J. A. G., May 19, 1904.

Officer appealed from opinion of Judge Advocate General to Secretary of the Navy. File 14018–4, J. A. G., Aug. 16, 1909, p. 7.

Digitized by Google

14. **Orders**—Appeals from illegal orders. *See* ORDERS, 4, 5.
15. **President**—Appeals to. *See* APPEALS, 10, 11.
16. **Property accounts**—To Secretary of the Navy.
17. **Report on fitness**—Officer appealed to have punishment removed from report on fitness.
    See CRITICISM OF COURTS-MARTIAL, 36.
18. **Second lieutenant, U. S. M. C.**—Having failed professionally in examination for promotion appealed on ground that he was ill at time of examination. Disapproved. File 26260–3514:6, Sec. Navy, August, 1910. *See also* PROMOTION, 97, 130, 148.
19. **Secretary of the Navy**—Has the power, and therefore his duty, to examine into the grounds upon which an accused bases his appeal. C. M. O. 73, 1896, 2.
20. **Subig Bay Naval Reservation**—Secretary of Navy denied an appeal by a civilian from action of commandant in deporting him. File 11406–429, Sec. Navy, July 6, 1915. *See also* JURISDICTION, 96.

APPLICANTS FOR ENLISTMENT.

1. **Assumed names**—Should not be enlisted under. *See* NAME, CHANGE OF, 5.
2. **Marine Corps**—Prosecution of those who fraudulently receive transportation, etc. *See* File 7657–180 and 180:1, June 4, 1913. *See also* MARINE CORPS, 27, 29.

APPOINTING POWER.

1. **Power of**—The power of appointing officers of the Navy, vested by the Constitution in the President and the Senate, can not be restricted by a custom, however long continued; and unless the laws plainly and unmistakably contain such limitation, it can not be held to exist. File 5252–36, J. A. G., May 5, 1910, p. 2.
2. **Same**—Under the Constitution Congress has power to create offices, but by Article II, section 2, the power of appointment to such offices is expressly vested elsewhere. Congress may and frequently has exercised the power of changing the rank or emoluments of persons holding office under the United States, but it can not appoint such person to a "new and different office, because the Constitution vests the appointing power in the President, with the advice of the Senate, or in certain cases in the President alone, the heads of executive Departments, or the courts of law." (Wood *v.* U. S., 15 Ct. Cls. 86; *see also* Wood *v.* U. S., 107 U. S., 414; Moser *v.* U. S., 42 Ct. Cls., 86; 25 Op. Atty. Gen., 185; 20 Op. Atty. Gen. 358; 19 Op. Atty. Gen., 589; 6 Comp. Dec., 828; veto message of President Arthur of July 2, 1884, VIII Mess. and Papers Prest., 221.) *Held*, That the provision in act of August 22, 1912 (37 Stat. 391), "that the dentist now employed at the Navy Academy shall not be displaced by the operation of this act and he shall have the same official status, pay, and allowances as may be provided for the senior dental surgeon at the Military Academy," did not create a new office at the Naval Academy, and no appointment or commission is necessary or can properly be issued to "the dentist now employed at the Naval Academy." File 13707–25, J. A. G., Oct. 24, 1912. *See also* APPOINTMENTS, 8.
3. **Resignations**—The appointing power may decline to accept resignations. *See* RESIGNATIONS, 2, 16–19.
4. **Statutes in derogation**—Of the appointing power. *See* OFFICERS, 96; STATUTORY CONSTRUCTION AND INTERPRETATION, 28.

APPOINTMENTS. *See also* ACTING APPOINTMENTS; COMMISSIONS.

1. **Acting Assistant Dental Surgeons.** *See* ACTING ASSISTANT DENTAL SURGEON.
2. **Acting Assistant Surgeons.** *See* ACTING ASSISTANT SURGEONS, 1, 2.
3. **Acting Pay Clerks.** *See* PAY CLERKS AND CHIEF PAY CLERKS, 1, 2, 3.
4. **Age limit.** *See* AGE, 1; ASSISTANT PAYMASTERS, 3; MIDSHIPMEN, 3–6.
5. **Assistant paymasters.** *See* ASSISTANT PAYMASTERS, 1–3.
6. **Commandant of Marine Corps**—Can not be temporary. *See* MARINE CORPS, 47, 48.
7. **Same**—Retired officer can not receive an appointment as. *See* MARINE CORPS, 47, 48.
8. **Congress**—Can not of itself make an appointment to an office, such act being one of the functions of the Executive, the courts of law, or heads of departments. File 22724–16:1, J. A. G., Apr. 24, 1911, p. 10. *See also* APPOINTING POWER, 2.
9. **Date of**—The appointment of an officer is not consummated until his commission is signed and sealed by the President, who has a right to withhold his signature after confirmation by the Senate. File 4996, June 1, 1906. *See also* COMMISSIONS, 41.
   It would seem to be the opinion of the court in Marbury *v.* Madison (1 Cranch, 137) that *the office* is completely filled in every case of vacancy as soon as the appointment is complete, independently o f the acceptance of the appointee. (2 Story, 5th ed., sec. 1554.) File 22724–16:1, J. A. G., Apr. 24, 1911, p. 9.

Digitized by Google

10. **Same**—Promotion is a vested right, and an officer is entitled to rank from date of vacancy. File 14818-4. *But see* PROMOTION, 142, 213.
11. **Same**—Where the appointment of a midshipman as ensign is held over, after final graduation of his class, and he is later appointed, his commission should bear the date of confirmation of his class by the Senate. *See* File 4996, June 1, 1906.
12. **Same**—An officer having been appointed as soon as he becomes eligible will not be subsequently given an earlier date, although his eligibility may relate back to such date. File 9466-03.
13. **Same**—Officers advanced in the corps of civil engineers, to fill vacancies caused by the retirement of Civil Engineer Robert E. Peary, United States Navy, should be given the date of that officer's actual retirement, and not the date from which it was provided by special act of Congress that his retirement should date. File 26255-83:4, J. A. G., Aug. 4, 1911.
14. **Date of acceptance**—Where an officer of the Marine Corps was appointed a second lieutenant on July 18, 1905, the date he became 21 years of age, and on that date wrote an acceptance from Fort Missoula, Mont., and thereafter the Bureau of Navigation, on July 24, 1905, forwarded a notification of such appointment and a blank form of acceptance and oath of office, which were executed by the officer July 31, 1905. *Held*, That if he was informed in effect that he would be appointed when he reached the age of 21, or if he had actual notice that he had been appointed, or if his appointment had been "in some way brought to his knowledge," his letter of July 18, 1905, constituted a valid acceptance from said date. File 11130-16, J. A. G., May 28, 1912.
15. **Dental Surgeons, Acting Assistant.** *See* ACTING ASSISTANT DENTAL SURGEONS.
16. **Desertion of an officer**—Effect of. *See* DESERTION, 90, 91.
17. **Ensigns**—Academic Board has no power—An examination of the statutes providing for the appointment of ensigns in the Navy, from 1862 to May 5, 1910, does not disclose any mention of the Academic Board as possessing exclusive powers with respect to such appointments. *See* ACADEMIC BOARD OF THE NAVAL ACADEMY, 4.
18. **Same**—From boatswains, gunners, warrant machinists, etc.—The act of March 3, 1901 (31 Stat., 1129) provides for filling vacancies in the grade of ensign by presidential appointments from boatswains, gunners, or warrant machinists, not exceeding six per calendar year. The act of March 3, 1903 (32 Stat., 1197) raised the number to 12 yearly. *See* J. A. G. Memo., Sept. 30, 1916; Act, Apr. 27, 1904 (33 Stat. 346) *cited* in File 28026-1209: 4, J. A. G., Oct. 25, 1916; PROMOTION, 192, 216.
19. **Examining Boards**—Appointments to. *See* MARINE EXAMINING BOARDS, 4-8; NAVAL EXAMINING BOARDS, 2, 4, 5.
20. **Marine Corps**—May be made from civil life. File 3727-2, Sec. Navy, Feb. 17, 1906.
21. **Same**—Appointment of Major General Commandant. *See* MARINE CORPS, 47-50.
22. **Same**—Enlisted men of the Navy and Marine Corps, as well as noncommissioned officers, may be appointed as second lieutenants. File 13261-426, J. A. G., May 29, 1913.
23. **Same**—Enlisted men to Naval Academy. *See* MIDSHIPMEN, 52.
24. **Medical Reserve Corps.** *See* MEDICAL RESERVE CORPS OF THE NAVY, 1.
25. **Midshipmen.** *See* MIDSHIPMEN; NAVAL ACADEMY.
26. **Naval Academy**—Legal residence and age requirement. *See* MIDSHIPMEN, 3-6.
27. **Naval officers**—From civil life, Army, or Marine Corps. *See* CONSTRUCTIVE SERVICE.
28. **Pay clerks and chief pay clerks.** *See* PAY CLERKS AND CHIEF PAY CLERKS.
29. **Paymasters, assistant.** *See* ASSISTANT PAYMASTERS.
30. **Paymaster's clerks.** *See* U. S. Navy Reg. Cir., Sec. Navy, Jan. 10, 1880; PAYMASTER'S CLERKS, 10.
31. **Physical disability**—Waiver of, and rights to retirement. *See* RETIREMENT OF OFFICERS, 40.
32. **Post traders.** *See* POST TRADERS.
33. **Power of.** *See* APPOINTING POWER, 1, 2.
34. **Professor of mathematics**—Filling vacancy in corps of. *See* PROFESSORS OF MATHEMATICS.
35. **Prohibited in certain cases**—A naval surgeon can not be appointed to the position of health officer of Culebra, P. R. File 9736-18, J. A. G., June 25, 1910, p. 16. *See also* File 1831-18, Sec. Navy, Apr. 18, 1907.

    A marine officer can not accept the appointment as member of governor's staff in Porto Rico. (File 5381-1, Sec. Navy, Aug. 30, 1907.) File 9736-18, J. A. G., June 25, 1910, p. 16.
36. **Qualifications for appointment**—The qualifications of a candidate are presumed to have been ascertained and found satisfactory previous to his appointment to office,

Digitized by Google

and in the absence of fraud his qualifications can not, under certain conditions, thereafter be inquired into, although it should be claimed that he did not possess the statutory qualifications for appointment. (28 Op. Atty. Gen. 180.) File 5460-82, J. A. G., June 3, 1916. *See also* CONSTITUTIONAL LAW, 4.

37. **Recess appointments.** *See* COMMISSIONS, 1, 23, 29.
38. **Requirements for**—Commission void if unfulfilled. *See* COMMISSIONS, 20.
39. **Retired officer**—As delegate to Hague Conference. *See* RETIRED OFFICERS, 38.
40. **Revocation of.** *See* COMMISSIONS, 20, 22; POST TRADERS.
41. **Temporary**—Acting assistant dental surgeon. *See* ACTING ASSISTANT DENTAL SURGEONS.
42. **Same**—Major General, Commandant of Marine Corps. *See* MARINE CORPS, 48.
43. **Vacated**—By filling grade to authorized number. *See* DESERTION, 91; PROMOTION, 109.
44. **Warrant machinists.** *See* WARRANT OFFICERS.

APPRENTICES.

1. **Hospital apprentices**—Clothing outfits for. *See* CLOTHING OUTFITS.
2. **Minors**—Who enlist with consent of guardian, have same right as other enlisted men to make agreement to reenlist or to waive transportation. File 4652-04, J. A. G., May 31, 1904.
3. **Naval apprentices**—Clothing outfits for. *See* CLOTHING OUTFITS, 1.

APPROVAL ONLY THAT ACCUSED MIGHT NOT ENTIRELY ESCAPE PUNISHMENT. *See also* CRITICISM OF COURTS-MARTIAL, 35 (p. 143).

1. **Approval of proceedings, findings, and sentence**—That accused might not escape punishment—"The department approves the sentence in this case only in order that the accused might not escape punishment for the serious offense of which he was convicted, upon his own plea." C. M. O. 1, 1914, 8.
2. **Same**—The convening authority (fleet) stated, in part, that the sentence in revision was still inadequate, but approved the proceedings, findings, and sentence in revision, in order that the accused might not entirely escape punishment. C. M. O. 38, 1914, 2; 45, 1914, 1.
3. **Same**—"The proceedings, findings, and sentence in this case are approved only for the reason that they are the result of prolonged deliberation by a respectable and legally organized court," and because the accused would otherwise go wholly without punishment. G. O. 148, Dec. 31, 1869.
4. **Same.** *See* C. M. O. 22, 1884, 2; 35, 1884; 30, 1885, 3; 61½, 1890, 4; 102, 1893, 2; 2, 1896, 2; 139, 1897, 2; 215, 1901, 2; 108, 1903; 2, 1907; 10, 1908, 5; 23, 1908; 24, 1908; 28, 1908; 1, 1914, 8; 38, 1914, 2; 45, 1914; 14, 1915, 2; 17, 1915, 3; 43, 1915; 6, 1916; 12, 1916; 19, 1916, 3.
5. **Approval**—Of the finding "not guilty" upon a charge of "Culpable inefficiency in the performance of duty" only on the presumption that the court must, though unwarrantably, have regarded the charge of "culpable inefficiency" as implying an element of fraudulent intent. C. M. O. 129, 1896, 8.

ARCTIC RELIEF SQUADRON.

1. **Return of**—"The Navy Department announces to the service the safe arrival at Portsmouth, N. H., on the 1st of August, of the *Thetis*, *Bear*, and *Alert*, composing the Arctic Relief Squadron, after having successfully accomplished the object of their mission, in the rescue of Lieutenant Greely of the Army, and the other survivors of his party." G. O. 321, Aug. 5, 1884.

ARGUMENTS.

1. **General court-martial trial**—The Forms of Procedure 1910, page 39, provides: "The judge advocate is entitled to the closing argument" and the sequence of procedure contained on the same page indicates that the defense makes the opening argument and the judge advocate follows, either making an argument or stating that he submits the case to the court without remark. (*See also* G. C. M. Rec. No. 21478*a*, p. 3.) In case the accused has only one counsel and the judge advocate has no counsel associated with him, the court, in its discretion, may properly grant a request of either the prosecution or defense to argue more than once. If the judge advocate has an associate and the accused is represented by more than one counsel, the court may exercise its discretion as to granting requests from either side for an argument by each individual or that an individual may argue more than once. By placing these matters within the discretion of the court the department does not desire to encourage unnecessary arguments. The court should grant such requests for additional arguments only

Digitized by Google

in cases where it is clearly necessary. The court, in its discretion, shall arrange the sequence in which the parties present their arguments, except that in all cases the defense shall make the first argument and the prosecution afforded an opportunity to make the last. (*See* C. M. O. 55, 1910, 10; G. C. M. Rec. No. 28652.) C. M. O. 51, 1914, 3.

While great latitude is allowed counsel for defense in their arguments, still the court should require that such arguments be based upon matter which is relevant to the issue of the trial. The court should not permit counsel to resort to a general malediction of a third party. File 26251-11479; b and c, Sec. Navy, Feb. 16, 1916.

Judge advocate read extracts from law books in his argument. G. C. M. Rec. 23037, p. 89.

Court allowed counsel for accused to make a second argument, and the judge advocate exercised his right, by making the final argument. G. C. M. Rec. 30012; File 26251-11960. *See in this connection* G. C. M. Rec. 23037, p. 89.

2. **Same**—Judge advocate should not make his closing argument a plea for the accused when accused is represented by counsel of his own selection. C. M. O. 1, 1914, 6.
3. **Irregular**—Court commits an error if it permits counsel for the defense to read in the beginning as a part of his argument a statement of facts by the accused. The so-called statement in this case was throughout an assertion of independent facts and therefore should not have been listened to by the court. C. M. O. 76, 1896, 9. *See also* STATEMENT OF ACCUSED, 14.
4. **Oral arguments**—Upon the admissibility of evidence and upon interlocutory proceedings, may be allowed, but shall not be recorded; briefs of such arguments, if prepared at his own expense and subsequently submitted to the court by the party who made the same, shall be appended to the record. C. M. O. 27, 1913, 12; 31, 1914, 2; 49, 1915, 9. *See also* G. C. M. Rec. 30485; 13370; BRIEFS, 1.
5. **Record of proceedings**—Copy appended. C. M. O. 26, 1905, 3.

ARMISTICE. *See* WAR, 1-4.

ARMY.

1. **"Army code."** C. M. O. 31, 1915, 9. *See also* ARTICLES OF WAR.
2. **Arrest of deserters from Army**—By civil authorities. *See* DESERTERS, 2.
3. **Articles of War.** *See* ARTICLES OF WAR.
4. **Chaplains.** *See* CHAPLAINS, 1.
5. **Charges and specifications, additional.** *See* ADDITIONAL CHARGES AND SPECIFICATIONS, 1, 3.
6. **"Conduct unbecoming an officer and a gentleman"**—Sentence of dismissal is mandatory in Army. *See* CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN, 6; COURT, 169.
7. **Court-martial, Army**—Enlisted men of the Navy and Marine Corps while being transported on board an Army transport are subject to the rules and regulations of said transport, but those regulations contain nothing which would give an Army summary court jurisdiction over such enlisted men for purposes of their trial thereby. To be so amenable to trial by such a court, the enlisted men must be attached to the Army by Executive order. File 26287-534, J. A. G., June 15, 1910.

   No Army court-martial shall be held on board any naval vessel in commission, nor shall officers in charge of troops embarked order any public punishment or confinement in irons to be inflicted on board without the previous approval of the commanding officer of the ship. (R-3845.)
8. **Deserters from Army**—May be arrested by civil authorities. *See* ARREST, 1; DESERTERS, 2.
9. **Desertion**—On a charge of desertion the specification in addition to alleging "that the accused remained in desertion until identified while serving in the Army" must also allege the date upon which he was identified. C. M. O. 33, 1912, 2; 6, 1913, 4.
10. **Dishonorable discharge from the Army**—Men who fraudulently enlist in Navy or Marine Corps concealing a dishonorable discharge from the Army should be sentenced to dishonorable discharge for, irrespective of the offense for which the man may be tried and convicted, it can not be to the best interests of the naval service to retain in it men who have been dishonorably discharged from the Army. C. M. O. 17, 1910, 7; 26, 1910, 5. *See also* FRAUDULENT ENLISTMENT, 9, 39.
11. **Fraudulent enlistment**—As proof of desertion. C. M. O. 23, 1910, 8. *See also* DESERTION, 51; FRAUDULENT ENLISTMENT, 37, 38, 51.

Digitized by Google

12. **General court-martial**—Trial of marine by Army court-martial—Sentence mitigated by President after return of accused to naval jurisdiction. *See* MARINES SERVING WITH ARMY, 6.
13. **General court-martial record as evidence**—A record of a trial by general court-martial of an accused while serving an enlistment in the Army is inadmissible in evidence before a naval court-martial to show that the accused was mentally irresponsible, and a request by the defense for postponement until copy of such record of trial is secured was properly overruled. C. M. O. 17, 1910, 9.
14. **General Orders of Army**—A general order of headquarters of California, United States Army, is such a document as may properly be admitted in evidence for certain purposes. C. M. O. 49, 1910, 10.
15. **General Order No. 110, Navy Department**—A soldier who enlists in Marine Corps for first time upon the termination of an enlistment in Army is not a reenlisted man within purview of G. O. 110. *See* GENERAL ORDER NO. 110, JULY 27, 1914, 19.
16. **Guard duty.** *See* MANSLAUGHTER, 9.
17. **Manual of Interior Guard Duty, 1914**—Court may take judicial notice of. *See* JUDICIAL NOTICE, 6.
18. **Marines serving with Army.** *See* MARINES SERVING WITH ARMY.
19. **Medical Reserve Corps of.** *See* MEDICAL RESERVE CORPS OF THE NAVY, 1.
20. **Mitigation of sentence after final approval**—The convening authority of an Army court-martial has no authority under the 112th Article of War to mitigate after final approval. C. M. O. 1, 1912, 4. *See also* ARTICLES OF WAR, 3.
21. **Previous convictions**—Of marine while serving *temporarily* with Army, under executive order, admissible in a subsequent trial by naval court-martial, if otherwise admissible. *See* PREVIOUS CONVICTIONS, 3.
22. **Same**—Previous convictions while serving an *enlistment* in the Army is inadmissible in a subsequent trial by naval court-martial. *See* PREVIOUS CONVICTIONS, 2.
23. **Promotion**—Officer shall be examined for promotion prior to the existence of the vacancy. *See* PROMOTION, 131, 132.
24. **Same**—Where examined after existence of vacancy. *See* PROMOTION, 131, 132.
25. **Regulations, Army.** *See* REGULATIONS, NAVY, 5, 13.
26. **Sentence**—Imposed by Army court-martial mitigated by President after return of accused to naval jurisdiction. *See* MARINES SERVING WITH ARMY, 6.
27. **Summary court**—No jurisdiction over marines on Army transport. *See* ARMY, 7.
28. **Transports**—Marines embarked upon—No jurisdiction by Army summary court. *See* ARMY, 7.
29. **Trials**—Time of day Army courts-martial convene for trials. C. M. O. 27, 1913, 10. *See also* COURT, 171.

ARMY AND NAVY CLUB OF MANILA, P. I.

1. **Officer expelled from.** C. M. O. 5, 1909, 1; File 26260-1392, J. A. G., June 29, 1911, p. 18.

ARMY AND NAVY CLUB OF WASHINGTON. *See* C. M. O. 15, 1916, 3.

ARRAIGNMENT.

1. **Additional charges and specifications**—May be preferred by convening authority, even after arraignment. *See* ADDITIONAL CHARGES AND SPECIFICATIONS.
2. **Errors in**—Where the record failed to show that the accused had been arraigned on *all* specifications, but merely on one, and the court made a similar error in its findings, the department held that as it was impossible to ascertain to which specification the accused's plea of guilty was directed and that the accused was certainly not informed as to which specification he was pleading, such errors were fatal and necessitated a disapproval of the findings by the department. C. M. O. 49, 1910, 14.
3. **Same**—It is improper to arraign the accused as follows: "How say you to the specification of the *first* charge * * *" when there is but one charge against the accused. It is also improper, in such case, to record that the court finds the accused guilty of the *first* charge. C. M. O. 21, 1910, 11. *See also* ARRAIGNMENT, 6, 16, 28, 29.
4. **Same**—Where the record showed that the accused, upon arraignment, pleaded guilty to the specification of the second charge, but contained no entry as to what his plea was to the charge, the finding as to that charge was disapproved. C. M. O. 51, 1905.
5. **Same**—An accused charged with desertion, pleaded guilty of absence without leave, and not guilty to so much of the specification as alleged desertion. The court neither accepted nor rejected his plea, but called his attention to Navy Regulations, 1905, R-897 [N. R., 1913, R-3632(4)]. The accused was then arraigned a second time and

Digitized by Google

pleaded guilty to both charge and specification. *Held*, That this procedure of the court was irregular, and in view of Navy Regulations, 1905, R-900 [N. R., 1913, R-3633], improper. The proceedings, findings, and sentence were disapproved. C. M. O. 4, 1906.

6. **Same**—It is an error for the first question to refer to "charges and specifications" if there is but one charge and specification. C. M. O. 78, 1905. *See also* ARRAIGNMENT, 3, 16, 28, 29.
7. **Same**—Accused pleaded in bar of trial the statute of limitations, but court decided that said plea was not valid. Thereupon, without arraigning the accused, who was given no opportunity to plead to the general issue, the judge advocate began the prosecution. The accused was found guilty and sentenced. The department held "that if, as appears from the record, the accused was not arraigned upon the charge and specification preferred against him, such omission constitutes a fatal defect in the proceedings of the court, and that, even if the error in this regard is one of record only, and not of fact, the evidence adduced is wholly insufficient to establish the offense charged." The sentence was accordingly disapproved. C. M. O. 28, 1902.
8. **Same**—The record showed that the accused was arraigned on the *first specification* of the second charge and on the *third specification* of the second charge, but failed to show that the accused had been arraigned and pleaded to the *second specification* of said second charge. The accused was acquitted, and the department for the above and other reasons disapproved the findings and acquittal. C. M. O. 27, 1913, 10, 11.
9. **Same**—The entry referring to the arraignment of the accused was incomplete, as it was not shown that the accused was arraigned on the charge. The entry upon the record showed that the accused was arraigned upon the specification of the charge, and stood mute; it should also show that he was arraigned upon the charge. C. M. O. 14, 1910, 8.
10. **Same**—The record of proceedings in this case shows that the accused was arraigned on the first, second, and third specifications of the charge, and the charge, but does not disclose an arraignment on the fourth specification of the charge. He pleaded "guilty" to the charge and to the specifications on which he was arraigned. The court found all four specifications "proved by plea" and the accused "guilty" of the charge. If, as appears from the record, the accused was not arraigned upon the fourth specification of the charge preferred against him, such omission constitutes a fatal defect as to that specification, and for this reason the finding on the fourth specification is set aside. (*See* Forms of Procedure, 1910, p. 24; C. M. O. 28, 1902; 51, 1905, 1; 49, 1910, 14; 14, 1910, 8; 27, 1913, 11; G. C. M. Rec. No. 27273; Shelp *v.* U. S., 81 Fed., 701; Harv. Law Review, June, 1914, p. 760). This irregularity in the proceedings does not vitiate the findings as to the remainder of the specifications or the charge nor affect the legality of the sentence. (*See* Carter *v.* McClaughry, 183 U. S., 365.) C. M. O. 17, 1915, 1-2.
11. **Same**—The department disapproved the findings on a charge and specification thereunder when the accused was not arraigned on the charge. C. M. O. 28, 1894, 4.
12. **Same**—Where the record did not show that the accused was arraigned on the third specification of the third charge the department returned the record, and the court in revision made a notation that the accused was arraigned on this specification. File 26251-8344, Sec. Navy, Apr. 14, 1914; G. C. M. Rec. No. 28681.
13. **Failure to arraign.** *See* ARRAIGNMENT, 2-12.
14. **Findings set aside.** *See* ARRAIGNMENT, 10.
15. **Irregular pleading**—The accused, upon being arraigned, pleaded to the first charge and specification as follows: "To the specification, 'not guilty'; to the charge, 'guilty.'" Such a plea should not be allowed by the court, as the form of the plea is strictly inadmissible. It neither confesses anything nor contests anything, but consists of two incompatible answers which nullify the issue, and can not be admitted as pleas by the court. In view of the above the findings on the first charge and specification thereunder were disapproved. C. M. O. 8, 1897, 2; 146, 1901, 4.
16. **Same**—The arraignment of the accused was carelessly conducted, the accused being called upon to plead to the "first specification" of both charges, whereas there was but one specification under each charge; and the plea of the accused to the first charge and specification was irregular in form, his answer to the specification being "guilty in a less degree than chargerd," and to the charge "guilty in less degree." Neither of these irregularities were sufficient to invalidate. C. M. O. 35, 1900, 1. *See also* ARRAIGNMENT, 3, 6, 28, 29.
17. **Joinder, trial in.** *See* JOINDER, TRIAL IN.

Digitized by Google

18. **Mute**—Procedure where accused stands mute after withdrawing a plea of nolo contendere—Where an accused withdraws a plea of "nolo contendere," stating "The accused withdraws his plea of 'nolo contendere' and stands mute," he should be arraigned on both the specification and the charge, and if he made no answer to either, the fact of his having stood mute on both occasions should have been entered upon the record, and the trial should have proceeded as if he had not pleaded "not guilty." It would be improper for the judge advocate to enter a plea of "not guilty." C. M. O. 26, 1910, 6. *See also* NOLO CONTENDERE.
19. **Same**—When the accused stands mute on arraignment, it should be so entered upon the record, and the trial then proceed as though the accused had pleaded "not guilty." It is improper for the court to direct the judge advocate to enter a plea of "not guilty." C. M. O. 14, 1910, 8; 26, 1910, 7. *See also* C. M. O. 28, 1891, 2; 90, 1897, 4; Jeopardy, Former, 38.
20. **Same**—"The accused stood mute when asked to plead to the first charge and specification." C. M. O. 9, 1908, 1.
21. **Same**—"To which charges and specifications thereunder the accused, when called upon to plead, stood mute." C. M. O. 18, 1907. *See also* C. M. O. 55, 1904; 56, 1904.
22. **Same**—In joinder, the accused were arraigned together instead of separately, but inasmuch as they stood mute, this arraignment was sufficient in law.
23. **Same**—When accused stands mute on arraignment, no comment should be made, as he is within his rights in so doing. C. M. O. 76, 1901.
24. **Same**—When the accused stands mute when arraigned on the specification, he should also be arraigned on the charge and the record should show that he was arraigned on both the charge and the specification. C. M. O. 14, 1910, 8. *See also* C. M. O. 26, 1910, 6-7.
25. **Name of accused**—Should be spelled correctly in the arraignment. C. M. O. 28, 1910, 7.
26. **Same**—The name used in the arraignment, findings, and sentence should agree with that in the specification if the latter is the correct name of the accused. C. M. O. 15, 1910, 7.
27. **Name and designation of the accused**—Shall be included in the arraignment. C. M. O. 49, 1910, 14.
28. **One charge and specification**—Where only one charge with but one specification thereunder, the word "first" should not be used in the arraignment. C. M. O. 21, 1910, 11. *See also* ARRAIGNMENT, 3, 6, 16, 29.
29. **Same**—Do not use "charges and specifications." C. M. O. 78, 1905, 1. *See also* C. M. O. 35, 1900; ARRAIGNMENT, 3, 6, 16, 28.
30. **Plea not accepted or withdrawn**—The accused should be rearraigned when an irregular plea is not accepted or plea is withdrawn. C. M. O. 26, 1910, 6.
31. **Record**—The questions constituting the arraignment and the answers to them must be distinctly recorded. C. M. O. 47, 1892; 102, 1893; 104, 1893; 1, 1894, 3; 13, 1894, 2; 24, 1894, 2; 38, 1895, 2.
32. **Summary court-martial**—If there are two or more specifications, the accused should be arraigned upon each separately, referring to each of them by number, and the general form of arraignment should be the same as in general courts-martial. C. M. O. 5, 1914, 4.
33. **Warning**—When record did not show that the accused, upon his plea of "guilty," was warned by the court of the consequences of so pleading and of the further fact that the questions and answers constituting the arraignment did not appear upon the record, the proceedings, finding, and sentence were disapproved. *See* ACCUSED, 64; WARNING, 2.

ARREST.

1. **Army**—Deserters from—Civil authorities have authority to arrest deserters from the Army. C. M. O. 22, 1915, 7. *See also* DESERTERS, 2.
2. **Breaking arrest**—Should be charged as "breaking arrest." *See* BREAKING ARREST, 2.
3. **Civil authorities**—Arrest by. *See* DESERTERS, 2-6; CIVIL AUTHORITIES, 17; JURISDICTION, 16.
4. **Same**—Court-martial prisoners. *See* CIVIL AUTHORITIES, 37; GENERAL ORDER NO. 121, September 17, 1914, 16.
5. **Same**—Arrest by civil authorities no defense to unauthorized absence if convicted; otherwise if acquitted. *See* ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED, 3-5. *See also* ARREST, 7; COMMANDING OFFICERS, 2.
6. **Same**—Persons on naval territory. *See* JURISDICTION, 9, 12, 13, 22-24, 69, 83-87, 90-96, 103, 105, 108, 117-122.

Digitized by Google

7. **Commanding officer**—Arrested by civil authorities and acquitted—No defense to unauthorized absence because he failed to report his whereabouts either to his immediate superior or to the Secretary of the Navy. *See* COMMANDING OFFICERS, 2.
8. **Convening authority**—In proper cases in his action on general court-martial cases should release accused from arrest and restore him to duty. *See* CONVENING AUTHORITY, 4.
9. **Court-martial orders**—Should show, in proper cases, that the accused (officer) was released from arrest and restored to duty. C. M. O. 40, 1915. *See also* C. M. O. 32, 1915; 14, 1916, where this was not done. *See also* CONVENING AUTHORITY, 4; COURT-MARTIAL ORDERS, 22.
10. **Definition**—The question of what constitutes an arrest has been considered by the civil courts in numerous decisions and may now be regarded as finally settled.

"An arrest in the strict legal sense of the term involves three elements—authority, intention, and a restraint of the person.

"The authority must exist: Without it there may be a false imprisonment, but not an arrest. This authority may be either real or assumed.

"The intention: There must be an intention, understood by the one arrested, to accomplish the arrest.

"Restraint is necessary: A restriction of the right of locomotion is the most characteristic element of the arrest." (2 A. & E. Enc. L. 834.)

"Except in the case of a submission, there must be either a physical touching or restraint, mere words addressed to the person said to be arrested not being sufficient. Such words are enough, however, if there is also submission to one who has the apparent power of carrying his design into effect." (2 A. & E. Enc. L. 838.)

"The merest touch, however, without restraint, will suffice to constitute an arrest." (2 A. & E. Enc. L. 836.)

If the person making the arrest "placed his hand upon the shoulder of the accused when putting him under arrest," this must be accepted as sufficient to constitute an arrest, in the technical or "strict legal sense of the term," provided that the intention of the person making the arrest thereby to place the accused under arrest was "understood by the one arrested," i. e., the accused. (C. M. O. 7, 1911, 11–12.)

"A consciousness of restraint in the party arrested or detained is essential to constitute an arrest." (Herring *v.* Boyle, 1 C. M. & R., 377; 2 A. & E. E., 834, note.) C. M. O. 7, 1911, 11–12. *See also* BREAKING ARREST, 14.

11. **Definition in A. G. N. 43**—"Arrest," as used in A. G. N. 43, does not relate to preliminary arrest or detention of accused but to the arrest resulting from preferring charges by proper authority and convening of court-martial. (19 Op. Atty. Gen., 472; U. S. *v.* Smith, 197 U. S., 386.) *See* ARREST, 26, 39.
12. **Same**—Surrender of sword. *See* ARREST, 26, 39.
13. **Deserters from Army.** *See* DESERTERS, 2.
14. **Deserters from naval service.** *See* DESERTERS, 2–6.
15. **Drunken enlisted men**—Arrest of. *See* DRUNKENNESS, 6, 87, 90.
16. **Duty**—An officer or enlisted man may be tried by general court-martial who refuses, or fails to use his utmost exertions to detect, apprehend, and bring to punishment all offenders, or to aid all persons appointed for that purpose. (A. G. N. 8 (17).) File 26251, Sec. Navy, July 7, 1913.
17. **Evidence**—Of person arresting accused should be corroborated if practicable. C. M. O. 7, 1911, 10–12. *See also* File 26262–1065; EVIDENCE, 6, 33, 34.
18. **Habeas corpus**—The question of whether or not a commanding officer should deliver up a person in the naval service to the civil authorities is completely covered in General Order No. 121, September 17, 1914. *See* GENERAL ORDER NO. 121, September 17, 1914, 11, 12.
19. **Same**—Arrest of petitioner after discharge. *See* HABEAS CORPUS, 2.
20. **Insular authorities**—San Juan, P. R.—By service of process. *See* JURISDICTION, 108.
21. **Leave of absence**—Persons arrested by civil authorities may be granted leave of absence. *See* GENERAL ORDER NO. 121, September 17, 1914, 14.
22. **Midshipmen**—Status of, while under arrest. *See* MIDSHIPMEN, 17.
23. **Same**—Midshipmen arrested by civil authorities. C. M. O. 10, 1909.
24. **Military service**—Deserters from. *See* DESERTERS, 2.
25. **Naval service**—Deserters from. *See* DESERTERS, 2–6.
26. **Officers**—An officer need only be required to deliver his sword to his commanding officer when he is placed under arrest at the time the charges and specifications are given him preliminary to his trial by a general court-martial, and such procedure is not necessary or proper in placing an officer under suspension. File 26806–78, J. A. G., Feb. 13, 1911. *See also* ARREST, 39.

Digitized by Google

27. **Same**—Court-martial orders should show in proper cases that officers were released from arrest and restored to duty. *See* ARREST, 9; CONVENING AUTHORITY, 4; COURT-MARTIAL ORDERS, 22.
28. **Same**—Arrested by civil authorities. C. M. O. 24, 1886; 10, 1909; 4, 1913, 3; 7, 1914; 19, 1915, 8–9; G. C. M. Rec. 31509.
29. **Officer serving in a fleet.** File 27958–4, Sec. Navy, Aug. 18, 1916.
30. **Pay**—During unauthorized absence if acquitted. *See* PAY, 1.
31. **Prisoners, court-martial.** *See* JURISDICTION, 109–111. *See also* GENERAL ORDER No. 121, September 17, 1914, 16, 23.
32. **Record of proceedings**—Should show that accused (officer) in proper cases was released from arrest and restored to duty. C. M. O. 40, 1915. *See also* C. M. O. 32, 1915; 14, 1916, where this was not done. *See also* CONVENING AUTHORITY, 4.
33. **Resisting arrest.** *See* RESISTING ARREST.
34. **Reward for arrest of deserters.** *See* REWARDS.
35. **Sword**—Delivery of sword to commanding officer when placed under arrest. *See* ARREST, 26, 39.
36. **Testimony**—Of person arresting accused should be corroborated if practicable. *See* ARREST, 17; EVIDENCE, 6, 33, 34.
37. **Unjust arrest**—By civil authorities of a petty officer. File 7657–330, Sec. Navy, Dec 29, 1915.
38. **What constitutes arrest**—Where accused was charged with "breaking arrest" and the evidence showed that the master at arms had merely placed his hand on the shoulder of accused, telling him that he was under arrest and to stand where he was while the master at arms "tried to stop the further gathering of a crowd in the street"; that the accused apparently did not comprehend that he was under arrest; and that he left the scene of the affray, but voluntarily returned to his ship the next morning. *Held*, That the evidence was not sufficient to show that the accused had "a criminal intent to evade the due course of justice," and that the charge of "breaking arrest" was not proved. File 26262–1065. *See also* C. M. O. 7, 1911, 4–13; ARREST, 10; BREAKING ARREST, 14.
39. **Same**—Of an officer preparatory to trial by general court-martial—The Attorney General has construed the provisions of arts. 24, 43, and 44 of the Articles for the Government of the Navy, and the conclusions announced in that opinion (19 Op. Atty. Gen. 472) have been approved by the Supreme Court in United States *v.* Smith (197 U. S., 386). The Attorney General said (lb., 475): Construing articles 24, 43, and 44 together, it is, in my opinion, clear that there may be two arrests—first, an arrest in an emergency or upon the discovery of the alleged wrongdoing, with a view to a preliminary examination, and if necessary the formulation and specification of charges; and, second, in the language of article 44, "an arrest for trial." I think it equally clear that article 43, providing that "the accused person shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest" has reference to the second and formal arrest for trial, as referred to in article 44. File 26806–78, J. A. G., Feb. 13, 1911, p. 2. *See also* ARREST, 26.

ARSON. *See* CORPUS DELICTI, 1, 2.

ARTICLE 4893, NAVAL INSTRUCTIONS, 1913. *See* NAVAL INSTRUCTIONS, 1913, I–4893.

ARTICLES OF WAR.

1. **Army Code.** C. M. O. 31, 1915, 9. *See also* C. M. O. 49, 1915, 23.
2. **Marine Corps**—Subject to, when detached by order of the President for service with the Army. C. M. O. 31, 1915, 7–11. *See also* MARINE CORPS, 85–99; MARINES SERVING WITH ARMY.
3. **Sentence**—It has been held by the Attorney General that officers of the Army who are authorized to convene general courts-martial have no power under the One Hundred and Twelfth Article of War to mitigate the punishment adjudged by such courts after final approval by them (19 Op. Atty. Gen. 106). It will be noted in this connection that this article of war does not in express terms require that the convening authority's power of mitigation be exercised on revision of the court's proceedings, as does article 54 of the Articles for the Government of the Navy. C. M. O. 1, 1912, 4.

ASSAULT.

1. **Aiding and abetting.** *See* AIDING AND ABETTING, 1, 2.
2. **"And strike"**—Found not proved. *See* AIDING AND ABETTING, 2.

Digitized by Google

3. **"Assault" and "maliciously" found not proved**—An enlisted man was tried by general court-martial under the charges (1) "Using obscene language toward his superior officer" and (2) "Assaulting and striking his superior officer while in the execution of the duties of his office."

The specification of the second charge alleged that the accused did willfully and maliciously and without justifiable cause assult and strike his superior officer, who was in the discharge of his duties.

The court found the specification of the second charge proved in part, proved except the words "and maliciously" and the words "assault and," which words the court found not proved.

The court accordingly found the accused of the second charge "guilty in less degree than charged," guilty of "striking his superior officer while in the execution of the duties of his office."

With reference to the finding of the court upon the second charge the department is of opinion that such is inconsistent. In other words, the court goes on record as being of the opinion that the accused is guilty of striking but not assaulting his superior officer. It is not apparent to the reviewing authority that a man may intentionally and wrongfully strike another person without assaulting him.

An assault is an attempt or even an *offer* to strike the person of another, and of course includes a successful attempt or an actual striking. (1 Words and Phrases, 523.)

The record was therefore returned to the court for the purpose of revising its findings and sentence. C. M. O. 30, 1910, 8–9.

4. **"Assaulting and" found not proved**—An accused was charged with "assaulting and striking another person in the service," and the court found the accused guilty of the charge except the words "assaulting and." The department stated in part: "It is difficult to understand how the accused could be found guilty of striking another person in the service and at the same time not guilty of assaulting such person. There may be an 'assault' without a 'striking' or 'battery.' An assault is included in every battery. Subject to the above remarks, the proceedings, findings, and sentence of the court in this case are approved, and the sentence will be duly executed." C. M. O. 43, 1894, 3.

5. **Battery**—An assault is included in every battery. C. M. O. 43, 1894, 3; 10, 1912, 6. *See also* BATTERY, 1.

6. **Same**—Distinguished from assault. *See* BATTERY, 1.

7. **Definition**—An assault is "an attempt or *offer* with force and violence to do a corporal hurt to another." (Clark's Criminal Law, 224.) 2 Bishop New Criminal Law, paragraph 23, states that "an assault is an unlawful physical force *partly* or fully put in motion, *creating a reasonable apprehension of immediate physical injury to a human being.*" "(*a*) An attempt unlawfuily to apply the *least actual force* to the person of another, directly or indirectly; (*b*) the act of using a *gesture* toward another, giving him reasonable grounds to believe that the gesture means to apply such actual force to his person as aforesaid." (Stephen's Digest of Criminal Law, art. 241.) In State *v.* Hampton (63 N. C., 13) it was held that a turning about with the hand clenched and bent at one's side, but not drawn back, and saying "I have a great mind to strike you," whereupon prosecutor walks away in another direction, amounts to an offer of violence and constitutes, therefore, an assault. "It is very generally held that where a threatening act is done, the effect of which is to create a well-grounded apprehension of danger and cause the person threatened to act on the defensive or retreat there is an assault." (Clark's Cr. Law, pp. 226–227; *See also* 3 Cyc., 1025–1026.) C. M. O. 8, 1911, 6–7.

8. **Same**—"An offer or an attempt to do a corporal injury to another." (United States *v.* Hand, 26 Fed. Cas. No. 15297.)

"An assault is any attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness, with such circumstances as denote, at the time, an intention to do it, coupled with a present ability to carry such intention into effect." (3 Cyc., 1020.) C. M. O. 10, 1912, 6.

9. **Same**—An actual striking, or a motion of striking, which creates in the person struck or menaced a reasonable apprehension of immediate physical injury, constitutes *assault*, even though the person striking, or making a motion as if to strike, does so jokingly. However, if jokingly done, and if the court so believes, such may be considered as good grounds for recommendation to clemency. C. M. O. 8, 1911, 6–7. *See also* G. C. M. Rec. 21453, 21454, 22369, 23409; CLEMENCY, 6.

10. **Drunkenness**—As a defense. *See* ASSAULT, 17, 18; DRUNKENNESS, 7–9; INTENT, 5, 42.

11. **Enlisted man**—Charged with "assault" C. M. O. 33, 1893; 8, 1913, 5.

Digitized by Google

12. **Feint to strike is an assault**—The accused was charged with "Assaulting and striking a sentinel," the specification thereunder alleging that he willfully and maliciously and without justifiable cause assaulted and struck another enlisted man who was regularly on duty as a sentinel. The evidence clearly established the fact that the accused made a motion with his hand, that is, "feint," with his hand partly open, at the sentinel, and it would seem that the accused was at least guilty of assault. The court, however, acquitted the accused and the department returned the record for a reconsideration of the finding and sentence. The court, in revision, revoked its former finding and acquittal and found the accused guilty as charged. C. M. O. 8, 1911, 6-7.

13. **Felonious intent**—Accused was charged with "assaulting and attempting to kill another person in the Navy," the specification alleging that the accused did "while being searched as a preliminary to being placed in confinement for drunkenness, assault with a knife and attempt to kill" the chief master-at-arms. The department disapproved the findings on this charge and specification because the felonious intent on the part of the accused was not charged. C. M. O. 15, 1895, 2. *See in this connection* ASSAULT, 14; FELONIOUSLY, 2.

14. **"Feloniously"**—Not necessary to allege that the act was committed feloniously or with intent to commit a felony under a charge of "assaulting with a deadly weapon and wounding another person in the service." C. M. O. 8, 1911, 5. *See also* ASSAULT, 24; FELONIOUSLY, 2; U. S. *v.* Gallagher, 2 Paine, 447, Fed. Cas. No. 15185.

15. **General intent**—In the offense of simple assault, the *general* intent to commit the act is presumed and evidence to show drunkenness when the act was committed is inadmissible and does not form ground for clemency. C. M. O. 7, 1911, 13; 8, 1911, 4-6. *See also* DRUNKENNESS, 9.

16. **Intent**—In simple assault the general intent is presumed though the accused was drunk when committing act. *See* ASSAULT, 15; DRUNKENNESS, 9; INTENT, 5, 42.

17. **Intent to kill**—The accused was tried under the charges (1) assault with intent to kill and (2) assaulting with a deadly weapon and wounding another person in the service. It was noticed that the specification under the two charges is identical with the exception that the specification of the charge of assault with intent to kill includes the words "with intent to kill him, the said * * *." The court found that specification proved except the words quoted, and acquitted the accused of that charge, but found the specification of the second charge proved and the accused of that charge guilty.

A careful consideration of the evidence adduced in this case raises a serious doubt as to the propriety of the acquittal. It was clearly shown that the accused, while in company with another enlisted man, unjustifiably and without warrant viciously attacked Private * * * with a deadly weapon (a large knife) and, after having knocked him down, while calling him vile names inflicted 27 stab wounds upon * * *, from the results of which * * * life was endangered. These facts standing unrebutted would undoubtedly justify a finding of guilty of assault with intent to kill. The rule has been observed in the Federal courts, that in a case of assault with intent to kill, the act itself, when proved, offers circumstantial evidence of the specific intent, and that the inference that every sane man intends the natural and necessary consequences of his own acts is entitled to weight, but that the intent must be found from a consideration of all the evidence. (Acers *v.* U. S., 164 U. S., 388; U. S. *v.* Riddle, 27 Fed. Cas., 16,162, p. 809.)

While it was shown that the accused at the time of the stabbing was under the influence of intoxicating liquor, it was not shown that he was so far intoxicated as to be disabled from entertaining the degree of intent required. The fact that one was drunk at the time of the commission of the act will, *in certain cases*, constitute a good defense, but such is a matter of defense only, and the burden of proving drunkenness is upon the party claiming such to be the fact. "It is a well-settled general rule that voluntary drunkenness at the time a crime was committed is no defense. If a person voluntarily drinks and becomes intoxicated, and while in that condition commits an act which would be a crime if he were sober, he is fully responsible unless his drunkenness had resulted *in insanity*, or unless it rendered him incapable of entertaining a specific intent which is an essential ingredient of the offense." (12 Cyc., 170.) Drunkenness will be a defense in those crimes in the commission of which a specific intent is requisite, but it must be shown that the accused "was by drink *so entirely deprived of his reason* that he did not have the mental capacity to entertain the necessary specific intent required to constitute the crime" (12 Cyc., 172), and the burden of showing such to have been the case, being a matter of defense

Digitized by Google

merely, rests upon the defendant. A résumé of the evidence as to the drunkenness of the accused at the time of the stabbing will, it is believed, fail to disclose that his drunkenness had resulted "in insanity" or that he was "so entirely deprived of his reason as to be thereby rendered incapable of entertaining the specific intent requisite to constitute the crime." The department disapproved the finding upon the first charge and the specification thereunder and approved the proceedings, the findings upon the second charge and specification thereunder and the sentence. C. M. O. 19, 1912, 6–8. *See also* DRUNKENNESS, 50.

18. **Intoxication is no defense to simple assault**—In order to commit the offense of simple assault it is not necessary to entertain the specific intent. "The condition of the prisoner's mind not being an element of the offense of assault and battery, evidence of intoxication at the time of the alleged offense is not admissible." (17 A. & E. Enc. 412.) C. M. O. 8, 1911, 5. *See also* ASSAULT, 17, 19; DRUNKENNESS, 7–9; INTENT, 5, 42.
19. **"Maliciously" found not proved**—Accused was charged with "assaulting with a deadly weapon and wounding another person in the United States naval service" and "drunkenness on post." Court found him guilty of the second charge, found the word "maliciously" not proved in the specification under the first charge, and, in lieu of that charge, found him guilty of wilfully and without justifiable cause shooting and wounding another person in the naval service. The only explanation for the elimination of the word "maliciously" would appear that the accused was drunk, while a sentry on post, when he shot and wounded the other man. "A drunken man equally with a sober man is presumed to intend his acts." (Clark's Crim. Law, 71.) Department approved the proceedings, findings, and sentence subject to the above remarks. C. M. O. 7, 1911, 13–14. *See also* MALICIOUSLY, 1.
20. **Officer**—Assaulting a civilian. C. M. O. 26, 1914.
    The Forms of Procedure, 1910, p. 90, furnishes a form for a charge of "assault."
21. **"Ruffianly assault"**—Committed by accused upon a brother officer. G. O. 157, May 24, 1870.
22. **Sailmaker**—Charged with. C. M. O. 90, 1897.
23. **Specific intent**—Not necessary to prove the specific intent in assault and battery. C. M. O. 8, 1911, 5.
24. **Same**—No specific intent necessary in order to complete the commission of the assault and wounding under a charge of "assaulting with a deadly weapon and wounding another person in the service," the specification thereunder alleging that the accused did "wilfully, maliciously, and feloniously and without justifiable cause, assault and cut with a knife or other sharp instrument" another person in the service. It is not necessary to allege that the act was done with any *specific* intent, and in the case of United States *v.* Gallagher (2 Paine, 447; Fed. Cas. No. 15185), which was a case of assault with a dangerous weapon, the court held that it was not necessary to charge that the assault was committed feloniously, or *with intent* to commit a felony. C. M. O. 8, 1911, 4, 5.
25. **Stabbing**—Is an assault. C. M. O. 10, 1912, 5–6. *See also* ASSAULT, 28.
26. **Striking**—Is an assault. C. M. O. 30, 1910, 8–9. *See also* ASSAULT, 3, 4.
27. **"Unjustifiable"**—Found not proved in assault—Effect of. *See* C. M. O. 30, 1910, 9; 8, 1911, 7. *See* FINDINGS, 62, where "without justifiable cause" was found not proved.
28. **"Wilfully and maliciously" and "assault and" not proved**—Accused was charged with "assaulting with a deadly weapon and wounding another person," the specification thereunder alleging that accused did "wilfully and maliciously, and without justifiable cause, assault and stab with a knife" a civilian. The court found this specification proved in part, proved except the words "wilfully and maliciously, and" also, except the words "assault and"; all of which words were found not proved; and that the accused was of this charge "guilty in a less degree than charged, guilty of wounding another person with a deadly weapon."
    With respect to the foregoing finding that the word "assault" was found not proved, it is evident that the court was not aware of the fact that the battery, i. e., the stabbing, necessarily included an assault.
    The finding would indicate that the court believed that the stabbing or cutting was neither consciously nor designedly nor knowingly done by the accused, and also that it was done without legal malice—i. e., without the willful purpose to stab, which he must have known would be liable to injure his adversary. It is not believed that such a finding was really intended by the court. The department accordingly disapproved the finding on this charge and specification. C. M. O. 10, 1912, 5–7. *See also* C. M. O. 146, 1901, 4; 120, 1898, 1; 41, 1903; WILFULLY AND MALICIOUSLY, 2.

Digitized by Google

ASSAULT AND BATTERY. *See also* ASSAULT. C. M. O. 7, 1905, 3.
1. **Gunner**—Charged with "assault and battery, in violation of article" 8, A. G. N. C. M. O. 96, 1907. *See also* FORMS OF PROCEDURE, p. 315; NAVY REGULATIONS 1913, R-900 (LIMITATIONS TO PUNISHMENT UNDER ARTICLE 8.)
2. **Officer**—Charged as above. G. C. M. Rec. 9505.

ASSAULT WITH INTENT TO COMMIT RAPE.
1. **Paymaster's clerk**—Charged with. C. M. O. 35, 1913.

ASSAULT WITH INTENT TO COMMIT SODOMY.
1. **Enlisted man**—Charged with. G. C. M. Rec. 30035.

ASSAULT WITH INTENT TO KILL.
1. **Enlisted man**—Charged with. C. M. O. 19, 1912, 6.
2. **Intent**—Is inferred from act. C. M. O. 19, 1912, 7. *See also* ASSAULT, 17.

ASSAULTING AND STRIKING A SENTINEL.
1. **Enlisted man**—Charged with. C. M. O. 8, 1911, 6. *See also* C. M. O. 1, 1917.
2. **"Feint"**—Is an assault. C. M. O. 8, 1911, 6-7. *See also* ASSAULT, 12.

ASSAULTING AND STRIKING AN ENLISTED MAN IN THE NAVY.
1. **Officer**—Charged with. C. M. O. 1, 1883.

ASSAULTING AND STRIKING ANOTHER PERSON IN THE NAVY.
1. **Warrant officer**—Charged with. C. M. O. 69, 1904; 212, 1901; G. C. M. Rec. 11583; 22718.
2. **Warrant officer (commissioned)**—Charged with. C. M. O. 28, 1915.

ASSAULTING AND STRIKING ANOTHER PERSON IN THE SERVICE.
1. **Warrant officer**—Charged with. C. M. O. 42, 1909; 43, 1909.

ASSAULTING AND STRIKING HIS SUPERIOR OFFICER WHILE IN THE EXECUTION OF THE DUTIES OF HIS OFFICE.
1. **"And strike"**—Found not proved in specification. C. M. O. 55, 1910, 5-6. *See also* AIDING AND ABETTING, 2.
2. **Enlisted men**—Charged with. C. M. O. 47, 1910, 8; 55, 1910, 5; 30, 1910, 8.
3. **"Striking"**—Is an assault. C. M. O. 30, 1910, 8-9. *See also* ASSAULT, 3, 4, 26.
4. **Officer**—Charged with. G. C. M. Rec. 8363.

ASSAULTING ANOTHER PERSON IN THE NAVY.
1. **Enlisted man**—Charged with. C. M. O. 21, 1910, 10; File 26251-12171, Sec. Navy, Aug. 10, 1916.

ASSAULTING ANOTHER PERSON IN THE SERVICE.
1. **Enlisted man**—Charged with. C. M. O. 41, 1903, 2.
2. **Gunner**—Charged with. G. C. M. Rec. 11989.
3. **Warrant officer, acting**—Charged with. G. C. M. Rec. 9077.

ASSAULTING WITH A DEADLY WEAPON AND WOUNDING ANOTHER PERSON IN THE NAVY.
1. **Enlisted man**—Charged with. C. M. O. 31, 1915, 6-7.

ASSAULTING WITH A DEADLY WEAPON AND WOUNDING ANOTHER PERSON IN THE SERVICE.
1. **Enlisted man**—Charged with. C. M. O. 8, 1911, 4; 19, 1912, 6.

ASSAULTING WITH A DEADLY WEAPON HIS SUPERIOR OFFICER WHILE IN THE EXECUTION OF THE DUTIES OF HIS OFFICE.
1. **Enlisted man**—Charged with. C. M. O. 25, 1914, 3.

ASSAULTING WITH A DEADLY WEAPON ANOTHER PERSON IN THE NAVY.
1. **Warrant officer**—Charged with. C. M. O. 8, 1904.

ASSAULTING WITH A DEADLY WEAPON AND WOUNDING ANOTHER PERSON IN THE UNITED STATES NAVAL SERVICE.
1. **Enlisted men**—Charged with. C. M. O. 7, 1911, 13; 8, 1911, 4; 10, 1912, 5; 19, 1912, 6.
2. **"Feloniously"**—Not necessary to allege. C. M. O. 8, 1911, 5. *See also* ASSAULT, 14, 24.
3. **Specific intent**—Not necessary. C. M. O. 8, 1911, 5-6; 19, 1912, 6-8.
4. **Stabbing**—Is an assault. C. M. O. 10, 1912, 5-6. *See also* ASSAULT, 25, 28.

Digitized by Google

ASSIGNMENT OF WAGES.

1. **Enlisted man of Marine Corps**—Contrary to law—Where an assignment of wages is made by an enlisted man of the Marine Corps it should be disregarded, as such assignment is contrary to law. *See* 2 A. and E. Enc., 2d Ed., 1033; File 8269–2, M. C. and Bureau Books No. 55, p. 9; File 8269–2, J. A. G.; 26251–797; ALLOTMENTS, 4.

ASSISTANT GENERAL STOREKEEPER.

1. **Drunkenness on duty**—Tried by general court-martial. C. M. O., 5, 1915.

ASSISTANT PAYMASTERS.

1. **Appointment of**—Midshipmen eligible for. *See* MIDSHIPMEN, 18, 83.
2. **Same**—Board found him mentally, morally, and physically qualified, but in view of his record in the army, which was unsatisfactory, reported that he had failed to establish his fitness for appointment. Department approved the finding. File 26544–293, Sec. Navy, 1916.
3. **Same**—Age of appointment—The invariable practice of this department has always been to construe the law providing for appointment of assistant paymasters as excluding all candidates who are "more than twenty-six years of age"—that is to say, who have passed their twenty-sixth birthday—and not as including candidates who are in their twenty-seventh year. This practice is known to Congress, and has received its sanction in the form of special legislation authorizing the appointment of a candidate in his twenty-seventh year. The same practice has been applied to the laws fixing the age limit for appointment to other offices in the Navy, and is supported by opinions of the Attorney General as well as by decisions of the courts involving substantially the same question. File 27223–12, Sec. Navy, Jan. 28, 1915; C. M. O. 6, 1915, 15–16. *See also* File 26544–301: 8, J. A. G., Feb. 23, 1916.
4. **Instruction of**—Assistant paymasters sent to Auditor's office for instruction. C. M. O. 17, 1915.
5. **Promotion**—Advanced in rank but not in grade. *See* COMMISSIONS, 9.
6. **United States Marine Corps**—Clerks to Assistant Paymasters. *See* PAYMASTER'S CLERKS, MARINE CORPS, 4, 5.

ASSUMED NAMES.

1. **Enlistment of applicants**—Under assumed names properly refused. *See* NAME, CHANGE OF, 5.

ATTACHÉS. *See* COMMERCIAL ATTACHÉ; NAVAL ATTACHÉS; RETIRED OFFICERS, 13.

ATTEMPT TO COMMIT FRAUD. C. M. O. 4, 1916. *See also* FRAUD, 5.

ATTEMPTED BRIBERY. *See* BRIBERY, ATTEMPTED.

ATTEMPTED SUICIDE.

1. **Scandalous conduct tending to the destruction of good morals**—Enlisted man tried by general court-martial. C. M. O. 9, 1916, 3; G. C. M. Rec. 28659.

ATTEMPTING TO ABSENT HIMSELF FROM HIS STATION AND DUTY WITHOUT LEAVE.

1. **Enlisted man**—Charged with. C. M. O. 15, 1889.

ATTEMPTING TO ASSAULT HIS SUPERIOR OFFICER WHILE IN THE EXECUTION OF HIS OFFICE.

1. **Gunner**—Charged with. C. M. O. 1, 1893.

ATTEMPTING TO ASSAULT WITH A KNIFE ANOTHER PERSON IN THE SERVICE.

1. **Officer**—Charged with. C. M. O. 60, 1904.

ATTEMPTING TO BRIBE ANOTHER PERSON IN THE NAVY.

1. **Officer**—Charged with. C. M. O. 23, 1886.

ATTEMPTING TO DESERT.

1. **Enlisted men**—Charged with. C. M. O. 7, 1881; 21, 1881; 54, 1882; 11, 1883; 33, 1886; 46, 1888; 15, 1889; 54, 1890; 35, 1891; 36, 1891; 138, 1896; 46, 1903, 4; 29, 1904, 3; 54, 1904, 1; 48, 1906; 55, 1907, 3; 23, 1910, 6; G. C. M. Rec. 382 (1821).
2. **Irregular**—To charge an accused with "attempting to desert," and "absence from his station and duty without leave from proper authority," for same period of unauthorized absence is irregular. Charge should be "desertion," and where this was not done the findings upon the second charge and specification thereunder were disapproved. C. M. O. 23, 1910, 6. *See also* DESERTION, 20.

Digitized by Google

ATTEMPTING TO SMUGGLE LIQUOR.
1. **Enlisted man—Charged with.** C. M. O. 31, 1888.

ATTEMPTING TO STRIKE HIS SUPERIOR OFFICER WHILE IN THE EXECUTION OF HIS OFFICE.
1. **Master—Charged with.** C. M. O. 21, 1882.

ATTORNEY. *See also* COUNSEL; PRIVILEGE; WORDS AND PHRASES.
1. **Fees—For influencing legislation.** *See* DEBTS, 18; LEGISLATION, 2.
2. **Influencing legislation.** *See* DEBTS, 18; LEGISLATION, 2.
3. **Records of the department—Examination of.** *See* RECORDS OF THE DEPARTMENT, 6, 7.

ATTORNEY GENERAL. *See also* DEPARTMENT OF JUSTICE.
1. **Blank forms**—The law does not require the Attorney General to examine and approve forms of obligations, permits, bonds, and affidavits for future use in the other departments. The establishment of such a practice would require his entire time and necessitate the imagining of the various contingencies in which their validity might in future be questioned and passing judgment on these possible future problems. (20 Op. Atty. Gen., 738. *But see* 27 Op. Atty. Gen., 173; File 3355–88, Nov. 7, 1906.)
2. **Bound by the decisions of United States courts of competent jurisdiction**—The Attorney General has himself repeatedly held that he is bound by the decisions of the United States courts of competent jurisdiction. C. M. O. 42, 1915, 12.
3. **Changing the law**—Questions as to desirability of changing the law—On May 27, 1909, the Attorney General submitted draft of a bill to the Secretary of the Navy, with suggestion that it be introduced in Congress for purpose of curing defects in a law considered by him in an official opinion. File 22724–7 1. *But see* 19 Op. Atty. Gen., 598; 6 Op. Atty. Gen., 432; 22 Op. Atty. Gen., 512; 24 Op. Atty. Gen., 69; 25 Op. Atty. Gen., 98.
4. **Collision of naval vessel**—Notwithstanding the fact that the damages suffered by a naval vessel as the result of a collision is small, the Department of Justice will take cognizance of the matter, and instruct the United States Attorney to bring suit against a private vessel responsible for the loss. File 2337–97; 199–97.
5. **Comptroller of the Treasury**—Attorney General's jurisdiction not curtailed by powers given Comptroller—The Comptroller of the Treasury has uniformly recognized the superior facilities of the Department of Justice to decide important questions of law even where disbursements are involved; while, on the other hand, the Attorney General has repeatedly recognized the superior qualifications of the Comptroller of the Treasury to decide certain classes of questions which involve the use of appropriations and technical questions of accounting. (*See for example* 21 Op. Atty. Gen., 405.) File 26254–1451:11, J. A. G., Apr. 12, 1915. *See also* REGULATIONS, NAVY, 10.
6. **Same**—Upon request of the Secretary of the Navy the Attorney General reviewed and reversed several decisions of the Comptroller of the Treasury concerning the legality of a Navy regulation, although the comptroller declined to concur in a reference of the matter to the Attorney General, holding that his decisions were final and conclusive upon the executive branch of the Government. (30 Op. Atty. Gen., ——; 21 Comp. Dec., 554, 357, 245.) File 26254–1451:11, J. A. G., Apr. 12, 1915, p. 19.
7. **Department declined to request opinion**—Upon a question concerning pay of the personnel which has been decided by the Comptroller of the Treasury, as the Attorney General has held that he will not render an opinion upon such a question "except in matters of great importance" or "without being advised that it would be entirely agreeable" to the comptroller to do so. File 26254–517:1, Sec. Navy, Jan. 17, 1911, citing 20 Op. Atty. Gen., 129.
8. **District attorney**—To assist court of inquiry—Procedure to secure. File 9608–44:3, Sec. Navy, Mar. 21, 1914.
9. **Same**—The Attorney General will not authorize the appointment of a person to assist a United States district attorney in the preparation of a case unless requested by the district attorney. File 536–4, Oct. 18, 1907.
10. **Embezzlement**—Attorney General's opinion with reference to. C. M. O. 4, 1913; 39, 1913; 25, 1916; EMBEZZLEMENT, 20, 25; 28 Op. Atty. Gen., 286; 29 Op. Atty. Gen., 563.
11. **Foreign law**—The existence of a foreign law is a question of fact to be proved by competent evidence. The Attorney General can not give an opinion as to the law of a foreign nation. Whether the statements of a foreign ambassador as to the true construction of the legislation of his own Government and the practice thereunder should be accepted as true is a question to be decided by the Secretary of State and not by the Attorney General. *See* File 26543–124, Aug. 4, 1914.

Digitized by Google

12. **Jurisdiction**—The Attorney General has held that he does not possess the power to review decisions rendered by the head of another department. He has also held that he has no jurisdiction to decide questions of pay, with certain exceptions. File 11130–23, Sec. Navy, Feb. 25, 1914. *See also* File 26253–391:1, Sec. Navy, Aug. 21, 1915.
13. **Navy Regulation, validity of**—Whether a Navy regulation has binding force as law on the accounting officers of the Government is a question of law and not one of accounting, and the Attorney General will render an opinion thereon upon request of the Secretary of the Navy, although the Comptroller of the Treasury claims his jurisdiction to be exclusive and declines to concur in the submission to the Attorney General. (30 Op. Atty. Gen., ——; 21 Comp. Dec., 554, 560.) *See* File 26254–1451:11, Apr. 13, 1915. *See also* REGULATIONS, NAVY, 10.
14. **Question judicially determined**—Opinion of Attorney General should not be asked where question has been judicially determined. C. M. O. 42, 1915, 12.
15. **Regulations**—The Attorney General can not be required to interpret executive regulations. (18 Op. Atty. Gen., 521; 20 Op. Atty. Gen., 649; 21 Op. Atty. Gen., 36, 255; 25 Op. Atty. Gen., 183.) The Attorney General, however, will consider and has repeatedly rendered opinions upon the question whether a proposed or existing regulation is legal. (20 Op. Atty. Gen., 649; 22 Op. Atty. Gen., 163; 29 Op. Atty. Gen., 264; 30 Op. Atty. Gen., 234.) Even the fact that a particular regulation relates to the compensation of Government employees does not oust the Attorney General's jurisdiction to render an opinion upon the question of its legality. (22 Op. Atty. Gen., 163.) File 26254–1451:11, J. A. G., Apr. 12, 1915, p. 18.
16. **Requests for opinions of**—"When an opinion is requested of the Department of Justice on behalf of the head of another executive department, the facts must be definitely formulated and clearly stated by the person asking the opinion. The Attorney General can not be required to extract a finding of facts from correspondence or reports." (22 Op. Atty. Gen., 342.) "The unvarying practice of the Attorney General, from the foundation of the Government, has been to require a succinct statement of the facts and of the question of law arising thereupon upon which an opinion is desired." (20 Op. Atty. Gen., 493.) File 26254–1263, Sec. Navy, Aug. 19, 1913. *See also* File 26254–1661, Sec. Navy, Nov. 5, 1914; C. M. O. 10, 1915, 7.
17. **Same**—It is directed that all requests for opinions of the Attorney General be accompanied by the written opinion of the Judge Advocate General or the Solicitor, who will also prepare the request for the Attorney General's opinion in accordance with articles R–117 (1) and R–134 (2), Navy Regulations, 1913. File 22991:1, Sec. Navy, Jan. 15, 1915.

    In accordance with a rule of the Department of Justice, which has been in effect since 1906, the written opinion of the law officer of the Navy Department (Judge Advocate General or the Solicitor as the case may be) must accompany the request of the Secretary of the Navy for an opinion of the Attorney General on any subject. File 27223–12, Sec. Navy, Jan. 28, 1915.

    A question which is not a "pending question" in the Navy Department is not within section 356, Revised Statutes, which authorizes the heads of departments to require opinions of the Attorney General. File 27223–12, Sec. Navy, Jan. 28, 1915; C. M. O. 6, 1915, 7.
18. **Same**—The Attorney General has requested that the opinion of the law officer of a department accompany the request for his opinion by the head of such department; and has declined to render an opinion upon a question of law involving the personnel of the Navy until an opinion on such question has been prepared by the Judge Advocate General of the Navy. File 22724–16:1, Jan. 25, 1911; 27223–12, Jan. 20, 1915.
19. **Required to render his opinion**—The Attorney General is required by R. S. 356 to render his opinion to the head of any Executive department "on any question of law arising in the administration of his department." File 26254–1451:11, J. A. G., Apr. 12, 1915, p. 18. *See also* SECRETARY OF THE NAVY, 39.
20. **Reviewing decisions of other executive departments**—In a long line of cases extending from the early history of the Government to recent times, the Attorney General has consistently declined to render opinions, even when requested by the head of a department, where it appears that the officer requesting the opinion has already decided the case, and requests the opinion of the Attorney General merely at the instance of the claimants, or interested parties, who seek to have the existing decision reversed. File 27231–51:6, Sec. Navy, July 15, 1915, C. M. O. 27, 1915, 6–7.

Digitized by Google

AUCTION.

1. **Clothing**—Of former enlisted man. File 27222–41, Sec. Navy, July 1, 1916.

AUCTIONEER.

1. **Appointment of, and commissions for**—To make sale of vessels condemned as prizes. File 3977–98; 5933–98. *See also* Revised Statutes 4650.

AUDITOR FOR THE NAVY DEPARTMENT.

1. **Appeals**—By the Secretary of the Navy from auditor's action to the Comptroller of the Treasury. File 26254–431:1; 26254–509; 26254–1003.
2. **Assistant paymasters**—Sent to Auditor's Office for instruction. C. M. O. 17, 1915, 2.
3. **Death gratuity**—Act of July 31, 1894 (28 Stat. 205–211) quoted and discussed in reference to payment of death gratuities and power of auditor to review. *See* DEATH GRATUITY, 6, 23.
4. **Same**—Payment of death gratuity is under cognizance of Paymaster General of the Navy. *See* DEATH GRATUITY, 21–23.
5. **Jurisdiction of**—The Navy Department maintains that the promotion of officers of the Navy and the determination of all questions relating thereto, including the qualification of the officer, the existence of the vacancy, and the application of section 1505 R. S., are matters exclusively within the jurisdiction of the Navy Department, whose action thereupon is not subject to review by any other executive department of the Government or office thereof. The Navy Department accordingly would not furnish the Auditor for the Navy Department with certain information which he requested for the evident purpose of reviewing and possibly overruling the action taken by the Secretary of the Navy in the case presented. File 26260–347:C, Sec. Navy, Oct. 20, 1909. *See also* DEATH GRATUITY, 23; SECRETARY OF THE NAVY, 50.
6. **Pay erroneously checked**—Where a pay officer erroneously checks the accounts of an enlisted man for additional pay under continuous service and G. O. No. 34, because of alleged unauthorized extension of enlistment, basing his action upon the comptroller's decision of June 13, 1913 (148 S. & A. Memo., 2653), and overlooking that this decision was expressly modified by the comptroller in his decision of November 10, 1913 (154 S. & A. Memo., 2919), there is no reason why the man should be required by the pay officer to make claim on the auditor for the amount due him, which was erroneously checked by the pay officer, since the extension of his enlistment for one year was legal; and he is, therefore, entitled to all the benefits of such extension under the comptroller's decision last cited. File 7657–281, J. A. G., Feb. 27, 1915; C. M. O. 10, 1915, 12.

AUTHENTICATION OF COURTS OF INQUIRY. *See* COURTS OF INQUIRY, 4.

AUTHENTICATION OF DOCUMENTS. *See* EVIDENCE, DOCUMENTARY, 2, 3.

AUTHENTICATION OF RECORDS OF PROCEEDINGS. *See* RECORDS OF PROCEEDINGS, 10–16.

AUTHENTICATION OF SENTENCES.

1. **Follow immediately**—"It is considered desirable that the authentication of the sentence should follow *immediately* after the recording thereof," and it is particularly undesirable that a blank space of practically an entire page be left between the recording of the sentence and the authentication thereof. C. M. O. 6, 1913, 3. *See also* C. M. O. 78, 1905, 1; COURT, 175; MEMBERS OF COURTS-MARTIAL, 12, 24, 48; SUMMARY COURTS-MARTIAL, 4.
2. **Judge advocate**—Must sign sentence. C. M. O. 30, 1900.
3. **Members**—May be ordered to sign. *See* MEMBERS OF COURTS-MARTIAL, 48.

AUTOMOBILE.

1. **Officer**—Killed while speeding. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 87.
2. **Same**—Tried by general court-martial for exceeding speed limit. G. C. M. Rec. 31509, p. 6 of charges and specifications.
3. **Taxation by States**—Of automobiles owned by Federal Government. (28 Op. Atty. Gen., 604.) File 28028–241.

AUTOPSY.

1. **Discussion and general rules**—For discussion of the general rules and decisions bearing upon the question of the legality of making autopsies and post-mortem examinations where there are and where there are not circumstances indicating that death

Digitized by Google

resulted from violent or unlawful means, in cases where the law requires the coroner or attending physician to make a report showing the cause of death, cases where the law requires a burial certificate to be issued before interment of the remains, etc. *See* File 13673–1587, J. A. G.

2. **Evidence**—Disclosed by autopsy. C. M. O. 128, 1905, 4.

AVIATION.

1. **Naval Militia.** *See* AIR SERVICE; AIRCRAFT; NAVAL MILITIA, 1.

AWAITING SENTENCE.

1. **Prisoners**—Pay of. *See* PAY, 15.

BAD-CONDUCT DISCHARGE.

1. **Ambiguous**—Courts-martial should indicate in sentences the character of discharge in order to avoid ambiguity. C. M. O. 49, 1910, 14–15. *See also* DISCHARGE, 3.
2. **Deck courts**—A deck court is not authorized to adjudge a sentence including bad-conduct discharge. C. M. O. 24, 1909, 3; 1, 1914, 5; 35, 1915, 7.
3. **Execution of**—Where discharge is executed before sufficient pay has accumulated under the provisions of I–4893 to execute total loss of pay adjudged by sentence, the bad-conduct discharge operates itself as a remission of the balance. C. M. O. 53, 1914, 6; 22, 1915, 5. *See also* DISCHARGE, 19, 21; SET OFF, 1.
4. **Foreign countries**—Summary courts-martial may sentence petty officers and persons of inferior ratings to discharge from the service with bad-conduct discharge; but the sentence shall not be carried into effect in a foreign country. *See* File 26287–580; 26287–800; A. G. N. 30.
5. **General court-martial**—May adjudge a sentence including bad-conduct discharge. *See* C. M. O. 92, 1895; 17, 1910, 7; 33, 1914, 4; 36, 1914, 2; 49, 1914, 1, 2; 3, 1916, 1.
6. **Same**—The department has returned cases for revision in which bad-conduct discharges have been adjudged where the schedule of punishments in General Order No. 110 prescribes that a dishonorable discharge should be a portion of the sentence. (*See* File 26251–11322, Sec. Navy, Dec. 16, 1915; G. C. M. Rec. 31401. *See also* File 26251–11343.) C. M. O. 49, 1915, 11–12. *See also* GENERAL ORDER NO. 110, July 27, 1914, 20.
7. **Same**—Should adjudge only bad-conduct and dishonorable discharges. C. M. O. 49, 1910, 14–15. *See also* DISCHARGE, 3.
8. **General Order No. 110.** *See* GENERAL ORDER NO. 110, July 27, 1914, 19.
9. **Pay, forfeiture of**—Remitted by the execution of bad-conduct discharge. *See* BAD-CONDUCT DISCHARGE, 3; PAY, 87.
10. **Summary courts-martial**—In *every case* where a sentence involving bad-conduct discharge has been imposed, it shall be the duty of the convening authority, *before acting upon the proceedings*, to spread upon the record a brief synopsis of the service of the accused and of the offenses committed by him during his current enlistment. C. M. O. 1, 1914, 4; 36, 1914, 3, 4.
11. **Same**—This shall be done even when the bad-conduct discharge has been conditionally remitted under the provisions of General Order No. 110. C. M. O. 36, 1914, 3–4.

BADGES, CAMPAIGN. *See* CAMPAIGN BADGES; CHINA CAMPAIGN BADGES; PHILIPPINE CAMPAIGN BADGES.

BADGES OF MOURNING.

1. **Officer**—Failing to wear, for death of naval officer when ordered—Tried by general court-martial. C. M. O. 35, 1892.

BAIL.

1. **Enlisted man**—Who, after arrest by the civil authorities while on leave for a criminal offense, is granted bail and returns to his ship, may be allowed leave of absence to appear for trial, upon an official statement from the court as to the facts. File 4496–7. *See also* File 5322, May 23, 1906; 26254–45, June 19, 1912; GENERAL ORDER NO. 121, Sept. 17, 1914, 14; JURISDICTION, 8.
2. **Same**—An enlisted man of the naval service, released from the custody of the civil authorities on bail, who reports at his regular station for duty, is not to be deprived of his pay after so reporting simply because, due solely to the fact that he was on bail no naval duty was assigned him. (22 Comp. Dec., 374. *See also* File 9663–31.) C. M. O. 3, 1916, 3. *See also* File 26524–222:4.

Digitized by Google

BALL AND CHAIN.

1. **Sentence of general court-martial**—Held to be fatally defective and set aside. G. O. 116, March 23, 1869. *See also* C. M. O. 29, 1890.

BALL PLAYING.

1. **Sunday, on**—Navy yards, at. *See* SUNDAY LAWS.

BANDS.

1. **Marine Band**—The President has authority, as Commander in Chief, to order Marine Band to Raleigh, N. C. (File 3679–2), and to detail it to appropriate duty anywhere (File 4288–6, April 22, 1907), including its participation in a charity fête. (File 4288–4, April 18, 1907.) *See also* PRESIDENT OF THE UNITED STATES, 4.
2. **Same**—"The most famous organization of the kind connected with the public establishment." 14 Sol. 27, May 27, 1908 (14 J. A. G., 27).
3. **Same**—The Marine Band and members thereof are not prohibited from engaging in their profession in civil life by sec. 35 of the act of June 3, 1916 (39 Stat., 158–189), *without remuneration*, even though this may possibly interfere to some extent with the employment of local civilians. File 4924–435, J. A. G., June 20, 1916; 4850–219, J. A. G., Jan., 1917. *See also* C. M. O. 3, 1917, 6.
4. **Navy bands**—*Held:* That the term "Navy bands" includes the U. S. Marine Band within the meaning of the act of May 13, 1908 (35 Stat., 127, 153); 14 Sol. 24, May 27, 1908 (14 J. A. G., 27).
5. **Same**—The act of May 13, 1908 (35 Stat., 127, 153), as held by the Attorney General, is to be "strictly construed" (27 Op. Atty. Gen., 90, 95), and certainly can not be held to prohibit any member of a Navy band from instructing amateur bands, as the giving of lessons or instructions does not constitute "furnishing music." File 4850–210, J. A. G., April 22, 1916. *See in this connection* the Act of Aug. 29, 1916 (39 Stat., 612).

BANISHMENT.

1. **Guam**—In the case of an enlisted man of the Marine Corps who was tried by the civil courts of Guam for an offense and sentenced to banishment for six months and payment of costs, it was *recommended* "that the governor of the island of Guam be directed to issue immediately the necessary order or decree abolishing the punishment of banishment as an appropriate sentence to be adjudged by the civil courts of said island in the cases of all persons in the naval or military service of the United States," and "that the governor be directed, under the paramount authority of the department, and under his authority to grant reprieves and pardons, to remit that part of the sentence adjudged" in this man's case, so far as it relates to banishment. File 9351–976, J. A. G., Dec. 3, 1910.
2. **Subig Bay Naval Reservation.** *See* JURISDICTION, 96.

BAPTISM, CERTIFICATE OF. C. M. O. 217, 1902, 3.

BAR OF TRIAL, PLEA IN. *See* JEOPARDY, FORMER; PLEA IN BAR.

BARGE, NAVY COAL.

1. **Capsized and lost in typhoon.** C. M. O. 7, 1915.

BARRACKS, MARINE. *See* MARINE CORPS.

BASEBALL ON SUNDAY AT NAVY YARDS. *See* SUNDAY LAWS.

BASKET BILGE STRAINERS.

1. **Chief machinist**—Installed one in main feed tank improper for purpose. C. M. O. 36, 1915, 1–2.

BATTALIONS.

1. **Separate or detached**—Convening of summary courts-martial. *See* SUMMARY COURTS-MARTIAL, 22.

BATTERY.

1. **Definition**—"Two offenses against the person and personal security, usually existing in the facts of cases together, and practically regarded by the law as one, are asssault and battery. A battery is any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent; an assault is less than a battery, where the violence is cut short before actually falling; being committed whenever a reasonable apprehension of immediate physical injury, from a force already partly or fully put in motion, is created. An assault is included in every battery." (1 Bish. Cr. L., sec. 548.)

Digitized by Google

"A battery, or, as it is sometimes called, an assault and battery, is an unlawful touching of the person of another by the aggressor himself, or by any other substance put in motion by him." (3 Cyc., 1021.)

"In most instances a battery is an assault which has traveled to the accomplishment of its purpose; being the substantive offense, to commit which the assault is the attempt. The distinction appears to be that in every battery there is an assault." (2 Bish. Cr. L., sec. 71.)

2. **Drunkenness—As a defense.** C. M. O. 8, 1911, 5. *See also* ASSAULT, 17, 18; DRUNKENNESS, 7–9.
3. **"Mere battery."** C. M. O. 42, 1909, 10.

BATTERIES, STORAGE.

1. **Submarines**—Officer tried by general court-martial for faulty inspection of. C. M. O. 41, 1915.

BATTLE.

1. **Battle signal book**—Officers tried by general court-martial for loss of. C. M. O. 7, 1916; 8, 1916. *See also* BOOKS, 6; CONFIDENTIAL PUBLICATIONS, 1, 3.
2. **Commanding officers**—General rule to observe should be "Fight if there is a chance of victory" and not "Do not fight if there is a chance of defeat." G. O. 68, Dec. 6, 1865.

BAYMAN.

1. **Hospital Corps, of**—Tried by general court-martial. *See* C. M. O. 29, 1880; 29, 1890; 132, 1896.
2. **Same**—Enlistment of. U. S. Reg. Navy Cir. No. 5, June 1, 1877.

BEER.

1. **Specifications**—Under "Drunkenness" alleged that accused was under influence of beer. C. M. O. 20, 1888. *See also* DRUNKENNESS, 10.

BEGGING.

1. **Enlisted man**—Tried by general court-martial under charge of "Scandalous conduct tending to the destruction of good morals." C. M. O. 31, 1915, 2.

BEING DISRESPECTFUL TO HIS SUPERIOR OFFICER IN LANGUAGE AND DEPORTMENT WHILE IN THE EXECUTION OF THE DUTIES OF HIS OFFICE.

1. **Officer**—Charged with. C. M. O. 15, 1914, 1.

BENEFICIARY. *See* DEATH GRATUITY; WILLS.

BENEFICIARY SLIPS. *See* DEATH GRATUITY, 8.

"BEST EVIDENCE RULE." *See* CARBON COPIES.

BETTER EVIDENCE.

1. **Court-martial**—Should call for it if it is available. C. M. O. 28, 1909, 3; 37, 1909, 5, 9.

BIBLE.

1. **Acting master's mate**—Dismissed for teaching disbelief in Bible and God. File 26367–2, J. A. G., July 8, 1909. *See also* File 26256–111:2.

BICHLORIDE OF MERCURY.

1. **Death**—Hospital apprentice administered to patient (enlisted man) by mistake. C. M. O. 6, 1915, 12. *See also* LINE OF DUTY AND MISCONDUCT CONSTRUED, 74, 75.

BILLS.

1. **Mess bills.** *See* MESSES.

BILLS OF EXCEPTIONS.

1. **No such thing**—As a bill of exceptions in naval court-martial proceedings. C. M. O. 31, 1911, 7. *See also* EXCEPTIONS, 2, 3.

BINDING OF COURT-MARTIAL RECORDS.

1. **Records should be bound properly**—Forms of Procedure, 1910, page 10, provide that "the record, before being forwarded to the convening authority, must have all the pages, documents, and exhibits securely bound together by at least two *through* fasteners at the top margin, and care shall be exercised to see that the fasteners are *through*

Digitized by Google

every such page, document, and exhibit." Navy Regulations provide that "records of proceedings of summary courts-martial shall be kept and made up in the manner hereinafter prescribed for records of general courts-martial and in *accordance with the instructions contained in the authorized forms of procedure*" (Navy Regulations, 1913, R–624), and they also provide that "the record of all naval courts-matrial" shall leave a margin at the top of each leaf of 2½ inches, through which margin, "the leaves are to be fastened." (Navy Regulations, 1913, R–826.) It is, therefore, improper to use "clips" instead of "fasteners" since the former do not comply with the instructions above outlined. The above regulations are held to be binding upon convening authorities and senior officers present as well as the members and recorders of summary courts-martial. File 26287–2985, J. A. G., Mar. 22, 1915; C. M. O. 16, 1915. *See also* G. C. M. Rec. 30485; Naval Courts and Boards, 1917, p. 137.

2. **Same**—Should be bound at top, not left, margin. C. M. O. 20, 1915, 5.

BINNACLE LIST. *See* ORDERS, 38.

BIRTH.

1. **Applicant for enlistment**—Date and place of. *See* OATHS, 39.

BIRTH CERTIFICATE.

1. **Minor**—Enlistment of—Birth certificate as proof of minority. C. M. O. 6, 1915, 14. *See also* FRAUDULENT ENLISTMENT, 59.

BLACKMAIL. *See* File 26251–12159, Sec. Navy, Oct. 7, 1916; LIBEL; PRIVILEGE.

BLANK FORMS. *See* ATTORNEY GENERAL, 1.

BLOCKADES.

1. **"Blockading vessels and cruisers"**—Instructions for. *See* General Order No. 492, June 20, 1898. *See also* File 4496–60, June 15, 1907.

BLOTTER.

1. **Gouging by warrant officer**—A warrant officer (gunner) was tried by general court-martial on the charges of "Conduct to the prejudice of good order and discipline" and "Conduct unbecoming an officer and a gentleman," the specifications thereunder alleging that he did, while undergoing a written professional examination, knowingly, wilfully, corruptly, fraudulently, secretly, and without the knowledge or permission of the examining board, take into examining room four blotters, having written and copied upon them facts in answer to questions that might be asked him. He was found guilty and dismissed. File 26251–11982, June 23, 1916; G. C. M. Rec. 32300; C. M. O. 20, 1916. *See also* GOUGING; MIDSHIPMEN, 22; OFFICERS, 13.

BOARDS.

1. **Constitution of**—Certain boards, not existing or convened by statutory authority as boards of survey on equipage or supplies, may consist of a single officer. Boards of medical survey may consist of a single officer. Some statutory boards, consisting of several members, may act when but one member is present, in certain exceptional cases, by act of July 25, 1882 (22 Stat., 175). Some statutory boards, consisting of several members, may act when a specified quorum is present, or by some definite number, by sections 2039, 2041, 2042, 4827, 5582 of the Revised Statutes. But where the language of the statute is couched in the plural number, more than one member of the board is required for the board to act. But the *intent* of the law would be the controlling principle in determining whether one medical officer can constitute a *"board* of naval surgeons," and it is not believed to be the intent of the law that one medical officer can constitute a *board* as provided for in section 1493, R. S. File 26521–30, J. A. G., Jan. 25, 1912. *See also* BOARD OF MEDICAL EXAMINERS, 2.
2. **Members**—It is not necessary that all the members of a court or board sitting at a navy yard or naval station should first report to the commandant, but the president should do so, giving the commandant a list of the officers on such court or board. File 811–04.
3. **Precedence of members.** *See* PRECEDENCE, 10.
4. **Statutory**—Constitution of. *See* BOARDS, 1.

BOARD, ACADEMIC BOARD OF THE NAVAL ACADEMY. *See* ACADEMIC BOARD OF THE NAVAL ACADEMY.

BOARDS, EXAMINING. *See* MARINE EXAMINING BOARDS; NAVAL EXAMINING BOARDS.

Digitized by Google

BOARDS OF INQUEST.

1. **Constitution of**—Boards of inquest shall be composed of not less than three commissioned officers, of whom one at least shall be of the Medical Corps. (R-321.)
2. **Judge Advocate General**—Shall revise and report upon the legal features of and have recorded the proceedings of boards of inquest. (R-134.)
3. **Nature of**—The proceedings of a board of inquest is in no sense a trial of an issue or of an accused person. This board performs no real judicial function, but is convened only for the purpose of informing the department in a preliminary way as to the facts involved in the inquiry. C. M. O. 7, 1914, 6.

   The evidence adduced before a board of inquest in the Navy, no member of the board or any witness being sworn "is solely for the information of the Navy Department and for the purpose of enabling the department to decide as to the necessity and expediency of further action." File 26250-839:4, Sec. Navy, Oct. 9, 1916.
4. **Oaths not authorized**—Neither the members of the board nor any person that may be examined may be sworn. (R-321(3).) File 26250-839:4, Sec. Navy, Oct. 9, 1916.
5. **Opinion to be expressed on line of duty and misconduct**—In every case the board shall carefully investigate and state in the record, whether or to what extent, in their opinion, the death of the individual was due to disease contracted or casualties or injuries received while in the line of his duty and not the result of his own misconduct. In all cases where the board of inquest expresses the opinion that death was not in the line of duty, the board will, in addition to such opinion, state whether or not, in its opinion, the deceased met his death as the result of his own misconduct. C. M. O. 42, 1915, 9. *See also* File 26250-735, Sec. Navy, Nov. 30, 1915; 26250-812, Sec. Navy, June 6, 1916.
6. **Private litigation**—Where a copy of the record of a board of inquest was requested for use "in connection with possible private litigation by 'the parents of this young man' against" a city street railway company, the department declined to grant the request. File 26250-839:2, J. A. G., Sept. 27, 1916.
7. **Revision**—The record may be returned to the board for such revision as is thought necessary.

"BOARD OF INQUIRY."

1. **Naval Academy**—The act of April 9, 1906 (34 Stat. 104), provides that the truth of any issue of fact raised as to whether the continued presence of any midshipman at the Naval Academy is contrary to the best interests of the service, "shall be determined by a board of inquiry convened by the Secretary of the Navy under the rules and regulations for the government of the Navy." C. M. O. 31, 1915, 11.

BOARDS OF INSPECTION AND SURVEY FOR SHIPS. C. M. O. 41, 1915.

BOARDS OF INVESTIGATION

1. **Approval or disapproval**—Neither approval or disapproval is mandatory upon the department. File 26283-522, J. A. G., Feb. 12, 1913.
2. **Civil employee**—Under the law and regulations all boards of investigation in the naval service are to be revised and reported upon by the Office of the Judge Advocate General. Although such boards may be convened to investigate the conduct of civilian employees at navy yards, they should be reviewed and reported upon by the Judge Advocate General, not only because of the express provisions of law and regulation, but also because of the fact that the commandant of the yard, or other persons in the Navy may be responsible for the irregularities or misconduct of civilian employees as well as other subordinates. (*See* C. M. O. 129, 1898.) File 26283-789, J. A. G., May 17, 1915.
3. **Collision**—Board inquiring into circumstances. *See* COLLISION, 3.
4. **Counsel**—A midshipman under investigation was represented by counsel of his own choice. File 5252-73, Oct. 2, 1915.
5. **Evidence, as**—The statement made by an accused before a board of investigation, when such statement takes the complexion of an admission against interest or a confession, is admissible as evidence before courts-martial. G. C. M. Rec. No. 11279.
6. **Same**—A court-martial erred in excluding evidence of the statement of the accused to the investigating board, but the court properly excluded the conclusions of that board and the comments thereon of the commander in chief and the Secretary of the Navy. C. M. O. 101, 1903, 10.
7. **Same**—The proceedings of the court were regular, but an error was made in not admitting in evidence the statements made by the accused before the board that investigated the circumstances leading to the present trial. Statements of this character are uniformly admitted by courts-martial, as, for instance, the statement made by

Digitized by Google

an accused person, a deserter, upon investigation by the commanding officer of the vessel on board of which he is delivered. C. M. O. 43, 1906.

8. **Same**—The judge advocate was unable to locate or secure two witnesses who had testified under oath before a board of investigation involving the subject matter for which the accused was undergoing trial by general court-martial. The judge advocate, therefore, offered in evidence the sworn testimony of these two witnesses before this board of investigation. Counsel for accused objected but the court admitted the evidence, whereupon counsel for accused withdrew the objection. G. C. M. Rec. 30684, pp. 294, 306, 307.
9. **False statements** –Before a board of investigation. *See* FALSE STATEMENTS, 1.
10. **Index for**—When over 20 pages. *See* INDEX, 3.
11. **Judge Advocate General**—Under the law and regulations should revise and report upon all boards of investigation. *See* BOARDS OF INVESTIGATION, 2.
12. **Junior officer**—Investigating senior. *See* File 26283-945, Sec. Navy, Dec. 9, 1915.
13. **Nature of** –A board of investigation is convened to enable those in authority to obtain accurate information in order that responsibility may be properly placed, if any exists, to take appropriate action in the premises, and when strangers are involved to protect the Government from unjust claims. This can not be done unless the board performs its duty with great care and thoughtfulness. File 26835-525:1, Sec. Navy, Nov. 30, 1915.
14. **Oaths.** *See* OATHS, 7.
15. **"One officer" boards of investigation**—An officer was tried by general court-martial, but before final action was taken the department appointed one officer as a board to conduct a searching investigation into all matters pertaining to the case. C. M. O. 26, 1914, 2. *See also* File 28478-15:1; 26543-151:1; Bd. of Invest. No. 5301; 6134; File 16711:3, July 12, 1911; 28478-34:2, July 7, 1916; 9351-1564, Aug. 15, 1916; R-316.
16. **Reconvene**—Because of the "careless manner" in which the investigation was conducted and for failing "to carry out provisions of the precept," and for conducting the investigation in a "careless," "cursory," and "perfunctory" manner. File 26835-525:1, Sec. Navy, Nov. 30, 1915.

BOARDS OF MEDICAL EXAMINERS.

1. **Commander in chief** –Not authorized to make changes in. *See* BOARDS OF MEDICAL EXAMINERS, 5.
2. **Constitution of** –The board of naval surgeons prescribed by section 1493, Revised Statutes, should consist of more than one medical officer. While in a number of cases the convening of such a board composed of but a single officer has been sanctioned *on grounds of convenience*, it is believed that the plain intent of Congress is clearly stated to be that such a board should consist of more than one naval surgeon. Had Congress intended otherwise, it might well have made such intent evident. File 26521-30, J. A. G., Jan. 25, 1912. *See also* File 8006-1, Sept. 6, 1907; 28687-14; J. A. G., Dec. 14, 1916, p. 2; BOARDS, 1.
3. **Marine Corps.** *See* PROMOTION, 165.
4. **Medical Reserve Corps** –An officer of the Medical Reserve Corps is available for any naval (military) service that could be properly assigned to any naval medical officer, or, as designated in section 1493, Revised Statutes, any naval surgeon, provided he be upon active duty and the duty be appropriate to his grade, and there be no specific restriction in law prohibiting such assignment. It was therefore *held:* That there is no restriction upon a member of the Medical Reserve Corps, on active duty, acting as a member of a board of medical examiners where duly authorized. File 26521-128, J. A. G., Oct. 20, 1915; C. M. O. 35, 1915, 10.
5. **Nature of, and law authorizing**—Section 1493 of the Revised Statutes provides for examinations by boards of medical examiners as follows: "No officer shall be promoted to a higher grade on the active list of the Navy, except in the case provided in the next section [physical disqualification occasioned by wounds received in line of duty], until he has been examined by a board of naval surgeons and pronounced physically qualified to perform all his duties at sea." Although the language of this section of the Revised Statutes does not specifically require the President, or the Secretary acting for him, to sign precepts convening boards of medical examiners, the fact that the Secretary of the Navy does sign the precept convening them has become such an established custom as to have the force of law. In view of the above the department held that the commander in chief of a fleet has no authority, nor can he legally be granted authority by the department, to make changes in the constitution of naval examining boards and boards of medical examiners. File 26026-1066:2, Sec. Navy, Aug. 4, 1915; C. M. O. 29, 1915, 6.

Digitized by Google

6. **Officer**—Has not a legal right to be ordered before a board of medical examiners for promotion instead of being ordered before a retiring board, where he is due for promotion, but the records of the department in his case are such as to establish prima facie his physical incapacity for active duty. C. M. O. 22, 1915, 10.
7. **Same**—An officer is ordered before a board of medical examiners with a view to determining his physical fitness for promotion; in other words, this examination is made for the sole purpose of establishing whether or not an officer is qualified for the duties of a higher grade, and is not, and never was intended to be, a useless formality which must be observed, despite the fact that the department's records already fully establish that the officer is *prima facie* not physically qualified for active duty. File 27231-63, J. A. G., May 27, 1915.
8. **"One officer" board.** *See* BOARDS, 1; BOARDS OF MEDICAL EXAMINERS, 2.

BOARDS OF OFFICERS OF THE REGULAR NAVY.
1. **Naval Militia**—Physical examination prescribed by General Order No. 150. *See* NAVAL MILITIA, 29.

BOARDS OF NAVAL SURGEONS. *See* BOARDS OF MEDICAL EXAMINERS.

BOARDS OF SURVEY.
1. **Lloyds**—Officer granted permission to accept fee. *See* MERCHANT VESSELS, 4.
2. **One officer**—May consist of a single officer. *See* BOARDS, 1.

BOARDS, RETIRING. *See* MARINE RETIRING BOARDS; NAVAL RETIRING BOARDS.

BOARDING CALLS.
1. **Officer drunk**—Tried by general court-martial. C. M. O. 39, 1909.

BOATSWAINS. *See also* WARRANT OFFICERS.
1. **Acting boatswain**—Tried by general court-martial. C. M. O. 102, 1905.
2. **Same**—Sentence of dismissal confirmed by the President. C. M. O. 102, 1905.
3. **Chief boatswains.** *See* CHIEF BOATSWAINS.
4. **Deck courts**—Boatswain actually in command of a naval vessel may convene. *See* DECK COURTS, 4.
5. **Deck court officer**—Boatswain not authorized to act as. *See* DECK COURTS, 62.
6. **General courts-martial**—Not eligible to sit as member of. C. M. O. 7, 1914, 11.
7. **Same**—Boatswains tried by. C. M. O. 11, 1915; 13, 1915.
8. **Promotion of.** Suspension from promotion. *See* PROMOTION, 205.
9. **Same**—To ensign. *See* APPOINTMENTS, 18.
10. **Summary courts-martial**—Boatswain actually in command of a naval vessel may convene. C. M. O. 6, 1915, 5. *See also* SUMMARY COURTS-MARTIAL, 7, 21.
11. **Same**—Not eligible to sit as member of. C. M. O. 7, 1914, 11; 6, 1915, 5. *See also* SUMMARY COURTS-MARTIAL, 7, 21.

BODIES, DISPOSITION OF. *See* DISPOSITION OF BODIES.

BOILERS.
1. **Explosions.** *See* C. M. O. 36, 1915; 37, 1915; 38, 1915; LINE OF DUTY AND MISCONDUCT CONSTRUED, 6.
2. **Naval Instructions, 1913**—It is provided that "should any difficulty be experienced in feeding a boiler, the combustion shall be checked at once, by closing the dampers and ash-pan doors if necessary, and steps taken to find the cause." (I-3117 (1).) It is further provided that, "whenever the water in any water-tube boiler falls below the lowest try cock and out of sight in the gauge glasses the fires shall be hauled. * * * No attempt shall be made to restore the normal water level by increasing the supply of feed water. Fire extinguishers, if fitted, or otherwise a fire hose or wet ashes, shall be used to quench or deaden coal fires before hauling them. (I-3118 (2).) C. M. O. 37, 1915.
3. **Tubes.** *See* VESSELS, 1, 2.

BOOKS.
1. **Battle signal books**—Officers tried by general court-martial for loss of. C. M. O. 7, 1916; 8, 1916. *See also* CONFIDENTIAL PUBLICATIONS, 1.
2. **Law books.** *See* LAW BOOKS.
3. **Library book lost**—Checkage of pay. *See* PAY, 18.
4. **Obscene book**—Sending through mails. *See* OBSCENE BOOKS AND POSTAL CARDS.
5. **Officers publishing**—Permission granted to publish specific articles or books, but must first be submitted to the department. File 2479-3, 5, 1907.
6. **Tactical signal book**—Officer tried by general court-martial for loss of. C. M. O. 12, 1910. *See also* BATTLE, 1; CONFIDENTIAL PUBLICATIONS, 1, 3.

Digitized by Google

BORROWING MONEY.

1. **Master-at-arms**—Charged with "Violation of a lawful regulation issued by the Secretary of the Navy," the specifications thereunder alleging that accused loaned money at interest to crew. C. M. O. 21, 1910, 6. *See also* LENDING MONEY.
2. **Officer from enlisted man**—Officer borrowed money from ward-room steward, giving his commission as security. Tried by general court-martial and dismissed. G. O. 150, Feb. 11, 1870.
3. **Warrant officer from enlisted men**—Tried by general court-martial under "Violation of a lawful order issued by the Secretary of the Navy." Lost numbers and publicly reprimanded. C. M. O. 7, 1909; 34, 1916, 2. *See also* C. M. O. 121, 1907.

BOUNTY.

1. **Clothing outfits**—On enlistment. *See* CLOTHING OUTFITS.

BOXING.

1. **Line of duty and misconduct.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 7-9.
2. **Manslaughter.** *See* MANSLAUGHTER. 13.

BRACKETS.

1. **Findings**—Use of brackets in findings. *See* FINDINGS, 9.

BREACH OF TRUST.

1. **Never trivial**—A breach of financial trust or misuse of public funds is never trivial. C. M. O. 107, 1901, 2.

BREAD AND WATER. *See* G. O. Navy Dept., No. 553, Nov. 15, 1920.

1. **Confinement on bread and water**—Summary courts-martial will exercise care and discretion in resorting to this punishment, and not award it in any case for a longer period, consecutively, than five days. Cir., Sec. Navy, May 18, 1872; R-619 (4).
2. **General courts-martial**—May impose a sentence including bread and water. C. M. O. 15, 1890; 26, 1893; 103, 1893; 112, 1903, 2; 1, 1914, 4; 9, 1914, 3.
3. **Severe punishment**—"The frequency with which punishment, by solitary confinement on bread and water, or on diminished rations, is imposed by the sentences of summary courts-martial, meets with the disapprobation of the department. This punishment is a severe one; and it was not, probably, contemplated by the law that it should be generally resorted to for the correction of offenders. It is believed that other authorized punishments will, in most cases, prove more effectual than this. In cases where punishment by confinement on bread and water or diminished rations is imposed by sentence of courts-martial, that portion of such sentences will be disapproved by the department." G. O. 287, Feb. 3, 1882. *But see* A. G. N. 30.
4. **"Solitary" confinement**—An enlisted man of the Navy was tried by summary court-martial and sentenced to confinement for fifteen days on bread and water, with full ration every third day. Since sentences involving confinement on bread and water or on diminished rations are illegal unless it is expressly provided that such confinement is to be "solitary" (A. G. N. 30; Navy Regulations, 1913, R-619 (1); Forms of Procedure, 1910, p. 162; C. M. O. 15, 1910, p. 11), the department directed that the sentence be set aside. File 26287-3017, Sec. Navy, June 25, 1915; C. M. O. 22, 1915, 5.
5. **Same**—Certificate of medical officer. *See* CONFINEMENT, 5.

BREAKING ARREST. *See also* ARREST.

1. **Articles for the Government of the Navy**—"Breaking arrest" is not specifically mentioned in the Articles for the Government of the Navy. C. M. O. 7, 1911, 12.
2. **Charge**—The offense of breaking arrest should be specified under the charge, "Breaking arrest." While the offense of "breaking arrest" is not specifically mentioned in the Articles for the Government of the Navy, it is in the Limitation of Punishment prescribed thereunder by the President. (Navy Regulations, 1913, R-900, page 93 R; Forms of Procedure, 1910, p. 319.) A form of specifications is also shown under the caption "Breaking Arrest" on page 92, Forms of Procedure, 1910. Instructions were issued in Court-Martial Order No. 7, 1911, p. 12 (Case of Bryhn) to the effect that "while a form of specification is shown under the caption 'Breaking arrest' in the 'Forms of Procedure' issued by the department, and many precedents exist for so charging this offense, it would seem that it should more properly be charged as 'conduct to the prejudice of good order and discipline,' in conformity with article 1705, paragraph 4, of the Navy Regulations, 1909 [Navy Regulations, 1913, R-712 (4)]." *See* File 26262-1065. These instructions, however, were issued prior to November 9, 1911, the date of C. N. R. No. 17, which added the offense of "Breaking arrest,"

Digitized by Google

and a punishment therefor, to the Limitation of Punishment. The offense of "Breaking arrest" should, therefore, be specified under the charge of "Breaking arrest" and not under "Conduct to the prejudice of good order and discipline." *See* C. M. O. 7, 1911, 10–13. *See also* ARREST, 38.

3. **Same**—Where an enlisted man was held pending investigation of a report of misconduct against him, after expiration of enlistment, and broke arrest and deserted before the determination of the advisability of his trial by general court-martial for said misconduct, *Held*, that the breaking of arrest should be charged as "Conduct to the prejudice of good order and discipline" and that, although such occurred after expiration of term of enlistment, he was amenable to trial therefor, since the misconduct occurred before he had been discharged. An enlistment can be terminated by death or discharge only, and the enlisted man can not himself terminate the enlistment. File 26251-5447, J. A. G., Dec. 8, 1911. *See also* BREAKING ARREST, 2.
4. **"Conduct to the prejudice of good order and discipline"**—"Breaking arrest" should not be charged under. *See* BREAKING ARREST, 2.
5. **Enlisted men**—Charged with. C. M. O. 208, 1902, 2; 209, 1902, 2; 23, 1910, 6; 7, 1911, 5; 5, 1914, 2; 14, 1914, 1; 5, 1916, 1.
6. **Escape**—Breaking arrest was designated as escape at common law. File 26262-1065, J. A. G. *See also* ESCAPE, 1, 2.
6. **Midshipman**—Charged with. G. C. M. Rec. 25104.
7. **Officer**—Breaking arrest after being placed under arrest by Mexican civil authorities. C. M. O. 7, 1914.
8. **Pharmacist**—Charged with. C. M. O. 96, 1906, 1.
9. **Proof of**—Before the charge of "Breaking arrest" can be proved, it must appear that the accused was *actually* placed under arrest. C. M. O. 7, 1911, 10–12. *See also* ARREST, 38; BREAKING ARREST, 14.
10. **Suspension from duty.** *See* SUSPENSION FROM DUTY, 6.
11. **Technical.** C. M. O. 7, 1911, 12.
12. **Warrant officer**—Charged with breaking arrest under "Conduct to the prejudice of good order and discipline." C. M. O. 17, 1912, 1. *But see* BREAKING ARREST, 2.
13. **Same**—Charged with "breaking arrest." C. M. O. 30, 1905.
14. **What constitutes**—Where accused was charged with "breaking arrest" and evidence showed that the master-at-arms had merely placed his hand on the accused's shoulder, telling him that he was under arrest and to stand where he was while the master-at-arms "tried to stop the further gathering of a crowd in the street"; that the accused apparently did not comprehend that he was under arrest; and that he left the scene of the affray but voluntarily returned to his ship the next morning, *Held*, that the evidence was not sufficient to show that the accused had a "criminal intent to evade the due course of justice" and that the charge of "breaking arrest" was not proved. C. M. O. 7, 1911, 10–13. *See also* File 26262-1065; ARREST, 10, 38.

BRIBE.

1. **Acting ensign**—Dismissed by general court-martial for taking $50 from recruits in return for using his influence to have them transferred. G. O. 46, Jan. 5, 1865.
2. **Enlisted man**—Charged with accepting a bribe under "Scandalous conduct tending to the destruction of good morals." C. M. O. 42, 1915, 5.

BRIBERY. *See* C. M. O. 22, 1915, 3; 42, 1915, 5.

BRIBERY, ATTEMPTED.

1. **Upon person**—In naval service, by civilians. File 7657-142, J. A. G., March 21, 1912.

BRIBING PATROL. *See* C. M. O. 22, 1915, 3.

BRIEFS. *See also* APPEALS.

1. **Arguments**—Oral arguments upon the admissibility of evidence and upon interlocutory proceedings may be allowed, but shall not be recorded; briefs of such arguments, if prepared at his own expense and subsequently submitted to the court by the party who made the same shall be appended to the record. C. M. O. 27, 1913, 12; 31, 1914, 2; 49, 1915, 9. *See also* ARGUMENTS, 4.
2. **Civilian counsel**—Briefs submitted to department. C. M. O. 129, 1898, 7; 4, 1914; 7, 1914, 4.
3. **Officers acting as counsel**—Briefs submitted to department. C. M. O. 6, 1915, 6.

Digitized by Google

BRIG OF RECEIVING SHIP.
1. **Prisoners in**—Treatment of, while awaiting trial. *See* PRISONERS, 4.
2. **"Sweat box."** *See* SWEAT BOXES, 1.

BRIGADES, MARINE. *See* CONVENING AUTHORITY, 27; JURISDICTION, 77; MARINE CORPS, 9, 10.

BRIGADIER GENERAL.
1. **Marine Corps.** *See* MARINE CORPS, 11, 36; PROMOTION, 16–18.

BROMIDE OF POTASH AND CHLORAL.
1. **Officer**—Taken by. C. M. O. 56, 1880, 2.

BROTHER.
1. **Death gratuity**—Beneficiary. *See* DEATH GRATUITY, 9.

"BRUTAL" HAZING. *See* HAZING, 6.

BUGLER, UNITED STATES NAVY.
1. **General court-martial**—Tried by. C. M. O. 91, 1902; 6, 1915, 8.

BULLETIN IN COURT-MARTIAL ORDERS.
1. **Explanatory note concerning**—The following digest is published for the information of the service in general. Heretofore the practice has been to limit "Remarks" in Court-Martial Orders to questions growing out of the records of courts-martial which have been reviewed, which practice will be continued. However, there being many important decisions and opinions involving matters of law and precedent which are not presented in the review of court-martial records, it has been decided to publish a digest thereof as a "Bulletin" in the monthly Court-Martial Orders. These cases will be separated from the Court-Martial "Remarks" and are published in the Court-Martial Orders merely as a matter of convenience; they are not intended to have the full force and effect of regulations as do "Remarks" forming a part of Court-Martial Orders proper under article R–901 (3), Navy Regulations, 1913. C. M. O. 6, 1915, 7.
2. **Original bulletin**—In Court-Martial Order No. 6, 1915, 7.
3. **Regulations, not**—Cases in bulletin have not the force of regulations. *See* BULLETIN IN COURT-MARTIAL ORDERS, 1.

BULLY.
1. **Hazer**—A hazer is essentially a bully. C. M. O. 12, 1913, 2.

BURDEN OF PROOF.
1. **Desertion.** C. M. O. 30, 1910, 10. *See also* DESERTION, 103, 104.
2. **Citizenship.** *See* CITIZENSHIP, 6.
3. **Drunkenness.** *See* DRUNKENNESS, 11.
4. **Embezzlement**—Authorities hold that accused must satisfactorily explain shortage. C. M. O. 39, 1913, 5. *See also* EMBEZZLEMENT, 3, 24, 25.
5. **Same**—When shortage is proved, paymaster is prima facie guilty and must show what has become of the missing funds. G. C. M. Rec. 27899. *See also* EMBEZZLEMENT, 27.
6. **Fraudulent enlistment.** *See* FRAUDULENT ENLISTMENT, 12.
7. **Promotion**—Burden of proving fitness is on the candidate. *See* PROMOTION, 19–21.
8. **Shifting.** *See* C. M. O. 42, 1909, 4; 49, 1910, 6; 30, 1910, 10.
9. **Theft.** C. M. O. 42, 1909, 4; 49, 1910, 6. *See also* THEFT, 17.

BURDEN OF ASCERTAINING TIME OF EXPIRATION OF LEAVE OR LIBERTY. *See* LEAVE OF ABSENCE, 3.

BUREAU.
1. **Marine Corps**—Not a bureau. *See* MARINE CORPS, 12.

BUREAU CHIEFS.
1. **Civil War service.** *See* BUREAU CHIEFS, 8, 10.
2. **Construction and Repair.** *See* BUREAU CHIEFS, 9.
3. **Depositions.** *See* **Depositions**, 4.
4. **Medicine and Surgery.** *See* BUREAU CHIEFS, 9; BUREAU OF MEDICINE AND SURGERY.
5. **Navigation.** *See* BUREAU CHIEFS, 8, 10; BUREAU OF NAVIGATION.
6. **Ordnance.** *See* BUREAU CHIEFS, 10.

Digitized by Google

7. **Promotion examinations**—Of chiefs of bureaus while serving as such—For enumeration of those cases of officers examined for promotion while serving as chiefs of bureaus. *See* 15 J. A. G., 292, May 31, 1911.
8. **Rank and Commissions for**—Under appropriation act of June 24, 1910 (36 Stat., 605)—The Chief of the Bureau of Supplies and Accounts should be given a new commission as paymaster general with the rank of commodore from the date of his appointment as such chief of bureau.

   The Chief of the Bureau of Navigation should receive a new commission with the rank of rear admiral from June 24, 1910, upon the ground of his having had Civil War service.

   That the advancement and commissioning of the Chief of the Bureau of Navigation with the rank of rear admiral would create a vacancy in the grade of captain in such sense as to authorize the promotion of an officer to fill the vacancy.

   The commissioning of the Chief of the Bureau of Navigation as a rear admiral would operate to make him an additional number on the active list in the already existing grade of rear admiral.

   The Chief of the Bureau of Navigation will continue to be an additional number so long as he remains on the active list.

   The Chief of the Bureau of Navigation should be advanced to the upper nine in the grade of rear admiral with the regular number next following him on the list of officers of that grade. [*But see* ADDITIONAL NUMBERS, 1.]

   The Chief of the Bureau of Navigation is not required to be examined for his advancement to the grade of rear admiral in accordance with the provisions of sections 1493 and 1496 of the Revised Statutes.

   The advancement in numbers and precedence of the Chief of the Bureau of Navigation will be permanent. File 22724–16:1, J. A. G., Feb. 13, 1911. *See also* File 4649–02, July 17, 1902; 22724–16:3; 22724–18, Dec. 4, 6, 1911, and Jan. 3, 1912; 5038–19, Feb. 29, 1912; 28025–385:5, Oct. 30, 1915; 22724–33, J. A. G., Aug. 22, 1916.
9. **Same**—Section 1473 of the Revised Statutes is the only statute providing as to rank upon retirement for age or length of service in the cases of the Chiefs of the Bureaus of Medicine and Surgery, Supplies and Accounts (formerly Provisions and Clothing), Steam Engineering, and Construction and Repairs. Other bureau chiefs are governed by the provisions of sections 1443, 1444, and 1457 of the Revised Statutes and act of May 13, 1908 (35 Stat., 128). File 22724–16:1, J. A. G., Apr. 24, 1911.
10. **Same**—The Chief of the Bureau of Navigation and the Chief of the Bureau of Ordnance are not entitled (act of June 24, 1910, 36 Stat., 605) to be retired for age or length of service with rank of such bureau chief unless such officer had Civil War service. File 22724–16:1, J. A. G., Apr. 24, 1911.
11. **Same**—The clause relating to chiefs of bureaus in the act of June 24, 1910 (36 Stat., 605), was not meant to affect any officers subordinate to such chiefs of bureaus. File 5038–18 and 19, J. A. G., Feb. 29, 1912.
12. **Same**—Under the provisions of the clause in the act of June 24, 1910 (36 Stat., 605, 607), it is necessary to determine in the case of each chief of bureau just what would be the rank and title of the particular officer if he were now retired for age or for length of service. File 22724–16:1, J. A. G., Apr. 24, 1911.
13. **Same**—When a chief of a bureau is given a commission as such with the rank of rear admiral under the act of June 24, 1910 (36 Stat., 605), such commission does not create a vacancy in the grade which said chief of bureau holds when made and commissioned as chief of bureau. File 5038–18 and 19, J. A. G., Feb. 29, 1912.
14. **Retired officers**—As chiefs of bureaus. File 21, Nov. 25, 1902. *See also* File 21–5, Dec. 11, 1907, Op. Sol.; 15315–5.
15. **Retirement of.** *See* RETIREMENT OF OFFICERS, 14.
16. **Status of**—A chief of a bureau has a dual status: (1) He occupies a position of an officer of the Navy of the grade from which he is appointed as chief of bureau, or of the grade to which he may be promoted thereafter, and holds a commission as of such grade. (2) He also temporarily occupies a separate and distinct office as chief of bureau, and holds a separate commission as such for the term of four years. 15 J. A. G., 290, May 31, 1911.
17. **Steam Engineering.** *See* BUREAU CHIEFS, 9.
18. **Supplies and Accounts.** *See* BUREAU CHIEFS, 9; BUREAU OF SUPPLIES AND ACCOUNTS.
19. **Titles**—Brief history of controversy regarding titles. 13 J. A. G., 385, Nov. 29, 1904; 13 J. A. G., 393.

Digitized by Google

BUREAU OF MEDICINE AND SURGERY. *See also* HOSPITALS; HOSPITAL FUND; HOSPITAL SHIPS; MEDICAL ATTENDANCE; MEDICAL OFFICERS OF THE NAVY; MEDICAL RECORDS; MEDICAL RESERVE CORPS OF THE NAVY.

1. **Chief of**—Supplying enlisted men's records. *See* MEDICAL RECORDS, 3–6.
2. **Health records.** *See* MEDICAL RECORDS, 1.
3. **Hospitals.** *See* GOVERNMENT HOSPITAL FOR THE INSANE; HOSPITALS.
4. **Hospital ships.** *See* HOSPITAL SHIPS.
5. **Medical treatment**—Of officers' families. *See* FAMILIES; MEDICAL ATTENDANCE.
6. **Nurse Corps**—"United States citizenship will be a required qualification for admission to the Navy Nurse Corps" and one who is not a citizen of the United States "is ineligible for appointment at this time." File 26252–110, Sec. Navy, Jan. 6, 1917. *See also* MEDICAL OFFICERS OF THE NAVY, 11.

BUREAU OF NAVIGATION.

1. **Court-martial orders**—Indorsements published in C. M. O. 41, 1915, 4; 43, 1915; 44, 1915; 6, 1916, 2; 12, 1916, 2; 19, 1916, 2; 23, 1916, 4; 27, 1916, 5; 28, 1916; 31, 1916; 38, 1916.
2. **Same**—All court-martial orders, after printing, shall be distributed by. (R–602.)
3. **Courts of inquiry records**—Referred to. *See* BUREAU OF NAVIGATION, 7.
4. **General court-martial records**—Referred to. *See* BUREAU OF NAVIGATION, 7.
5. **Indorsement of**—As evidence. *See* INDORSEMENTS, 2.
6. **Orders of**—Not sufficient to make an officer a member or a judge advocate of a general court-martial. *See* COURT, 37, 38, 40.
7. **Questions of discipline**—Questions of naval discipline, rewards, and punishments shall be submitted by this bureau for the action of the Secretary of the Navy. The records of all general courts-martial and courts of inquiry involving the personnel of the Navy shall, before final action, be referred to this bureau for comment as to disciplinary features. (R–132.)
8. **Rank and commission for chief of.** *See* BUREAU CHIEFS, 8, 10.

BUREAU OF ORDNANCE.

1. **Rank and commission**—For chief of. *See* BUREAU CHIEFS, 10.

BUREAU OF STEAM ENGINEERING.

1. **Inspection officer**—Tried by general court-martial for not properly informing bureau. C. M. O. 41, 1915.
2. **Rank and commission**—For chief of bureau. *See* BUREAU CHIEFS, 9.

BUREAU OF SUPPLIES AND ACCOUNTS.

1. **Court-martial order**—Remarks published in. C. M. O. 17, 1915, 2.
2. **Rank and commission**—For chief of. *See* BUREAU CHIEFS, 9.

BURGLARY.

1. **Attempted burglary.** C. M. O. 14, 1908, 3.
2. **Corpus delicti.** *See* CORPUS DELICTI, 2.
3. **Drunkenness**—There are crimes which can be consummated only where a peculiar and distinctive intent, or a conscious deliberation or premeditation, has concurred with the act, which could not well be possessed or entertained by an intoxicated person. Thus in cases of such offenses as larceny, robbery, or burglary, which require for their commission a certain specific intent, evidence of drunkenness is admissible as indicating whether the offender was capable of entertaining this intent, or whether the act was anything more than a mere battery, trespass, or mistake. C. M. O. 42, 1909, 10. *See also* C. M. O. 8, 1911, 5; DRUNKENNESS, 49; INTENT, 2, 5.
4. **Enlisted man**—Charged with. C. M. O. 13, 1916, 1; G. C. M. Rec. 29071.
5. **Same**—Charged with "Burglary in violation of the Twenty-second Article for the Government of the Navy." C. M. O. 7, 1890.
6. **Specific intent**—Required. C. M. O. 42, 1909, 10; 8, 1911, 5. *See also* BURGLARY, 3.
7. **Time**—As essence of, material. File 26287–1125, J. A. G., March 19, 1912.

BURIAL CERTIFICATE. *See* AUTOPSY, 1.

BURIAL EXPENSES. *See* DEATH GRATUITY, 21.

BYSTANDER.

1. **Killed**—When member of guard shot at escaping prisoner. C. M. O. 49, 1915, 12. *See also* MANSLAUGHTER, 9.

Digitized by Google

CADETS, NAVAL. *See* NAVAL CADETS.

CALLS FOR EVIDENCE BY COURT OF CLAIMS. *See* COURT OF CLAIMS.

CAMPAIGNS.
1. **China.** *See* CHINA CAMPAIGN BADGES.
2. **Philippine.** *See* PHILIPPINE CAMPAIGN BADGES.

CAMPAIGN BADGES.
1. **China Campaign Badge.** *See* CHINA CAMPAIGN BADGES.
2. **New York State Campaign Badge.** File 19245-54, J. A. G., March 2, 1916.
3. **Philippine Campaign Badge.** *See* PHILIPPINE CAMPAIGN BADGES.

CAPITATION TAXES. *See* POLL TAXES.

CAPTAIN. *See* COMMANDING OFFICERS.

CAPTAIN OF FORECASTLE, U. S. NAVY.
1. **General court-martial**—Tried by. C. M. O. 20, 1889.

CAPTAIN OF THE AFTERGUARD.
1. **General court-martial**—Tried by. C. M. O. 23, 1879.

CAPTAIN OF THE HOLD, U. S. NAVY.
1. **General court-martial**—Tried by. C. M. O. 11, 1879.

"CAPTAIN OF TOP."
1. **General court-martial**—Tried by. C. M. O. 58, 1880; 15, 1887; 35, 1889; 37, 1892.

CARBOLIC ACID.
1. **Suicide**—Enlisted man committed suicide by drinking. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 75.

CARBON COPIES.
1. **Evidence, as**—Letterpress copies are at best secondary evidence. Carbon copies signed in carbon by the same act as the signing of the original, or signed separately in the same manner as the original, are counterparts or duplicate originals.

Papers prepared in duplicate or multiplicate requiring no signature to complete them are all original duplicates.

For the purpose of this office, having in mind the character of the papers prepared herein, carbon copies would have to be signed either in carbon by the same act as the signing of the original, or signed separately in the same manner as the original, to become primary evidence. Unless so signed they would simply be secondary evidence, to be used in the same manner as letterpress copies, and as between the two, as secondary evidence, letterpress copies would be more easily identified and would present less chance of errors by reason of the fact that it frequently happens that changes made in the original are overlooked and not made in the carbon copies.

The press copy is secondary evidence, and can be used in evidence only after proof of the loss or destruction of the original, or notice to the opposite party to produce it when it is shown to have been in his possession.

Under the "Best Evidence Rule" the highest degree of proof of which the case from its nature is susceptible must, if accessible, be produced.

As between a press copy and a carbon copy the press copy is the better in cases where resort must be to secondary evidence. File 28067-27:15, J. A. G., Nov. 17, 1911.

CARELESS AND NEGLIGENT IN THE PERFORMANCE OF DUTY.
1. **Officers**—Charged with. G. C. M. Rec. 7220; 7221.

CARELESS IN THE PERFORMANCE OF DUTY. C. M. O. 11, 1908.

CARELESSNESS. *See also* MISCONDUCT, 3.
1. **Court.** *See* COURT, 10; CRITICISM OF COURTS-MARTIAL, 5, 25.
2. **Death**—Carelessness causing death. C. M. O. 33, 1914, 11; 49, 1915, 12. *See also* MANSLAUGHTER, 12.
3. **Intent**—Replacing criminal intent. *See* INTENT, 12.
4. **Judge advocate.** *See* CERTIFIED COPIES, 1; COURT, 10; JUDGE ADVOCATE, 13.

CARELESSNESS IN OBEYING ORDERS.
1. **Gunner**—Charged with. C. M. O. 65, 1903.
2. **What constitutes**—Carelessness in obeying orders. File 26251-668:a.

Digitized by Google

CARPENTERS.
1. **Chief carpenters.** *See* CHIEF CARPENTERS.
2. **General court-martial—Tried by.** C. M. O. 32, 1914.

CARRYING CONCEALED WEAPONS.
1. **Midshipmen**—Tried by general court-martial—"Carrying concealed weapons is an offense of which civil courts take cognizance, indicating, moreover, a readiness to resort to murder on fancied or real provocation. The procedure of the accused in deliberately arming himself with a concealed revolver before he went into a disreputable quarter of * * *, his very presence therein amidst enlisted men, clearly indicates deficiency of moral sentiment, self-restraint, and gentlemanlike qualities." The charge in this case was conduct unbecoming an officer and a gentleman. C. M. O. 7, 1912; 8, 1912, 3.

CASHIERED. *See* Rules and Regulations of the Continental Army, Art. LI, June 30, 1775.
1. **Defined**—Dismissal and cashiering were formerly regarded as quite distinct in military law; the latter involving in addition to a dishonorable separation from the service a disability to hold military office. There is now no practical difference in the use of the terms. Naval courts-martial should adjudge "dismissal."
   In G. O. 52, April 15, 1865, where an officer was *cashiered* the department in the same order referred to him as having been "*dismissed.*"
2. **Officer**—Sentenced to be cashiered. G. O. 44, Dec. 7, 1864; 52, Apr. 15, 1865; C. M. O. 125, 1900, 2.
3. **Same**—Sentenced "to be cashiered, and forever disqualified from holding any office or appointment under the Government of the United States." Department held that "a court-martial can not disqualify any person in this manner," and remitted that part of the sentence. G. O. 44, December 7, 1864.
4. **Same**—Members of general courts-martial may be cashiered. *See* COURT, 170; MEMBERS OF COURTS-MARTIAL, 5.

"CATCH-ALL" CLAUSE.
1. **A. G. N. 22**—"All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court-martial may direct." C. M. O. 4, 1913, 45; 49, 1915, 17, 18; File 26251-9280; 26251-12159, p. 18.

CATERER OF THE MESS. C. M. O. 93, 1894, 2.

CAUSING TO BE PREPARED A FALSE AND FRAUDULENT VOUCHER IN VIOLATION OF ARTICLE FOURTEEN, A. G. N.
1. **Officer**—Charged with. C. M. O. 129, 1898.

CAUTION. *See* WARNING.

CELLS.
1. **Brig.** *See* BRIG OR RECEIVING SHIP.
2. **Storage battery.** C. M. O. 41, 1915.

CENSURE. *See* ADEQUATE SENTENCES; CRITICISM OF COURTS-MARTIAL; CERTIFIED COPIES, 2; COURT, 90, 93, 113, 148; JUDGE ADVOCATE, 14, 59, 60; SECRETARY OF THE NAVY, 63.

CEREMONIAL OCCASIONS.
1. **Officer's monument**—The President as Commander in Chief has authority to order a naval detachment to Raleigh, N. C., to participate in ceremonies attending the unveiling of a monument to a deceased naval officer. File 3679-2. *See also* BANDS, 1.

CERTIFICATES.
1. **Baptism.** C. M. O. 217, 1902, 3. *See also* MINORS, 6.
2. **Birth certificates.** *See* FRAUDULENT ENLISTMENT, 59; MINORS, 6.
3. **Civil officer**—It is improper for a judge advocate to read to the court without offering in evidence a certificate from the civil officer to the effect that the accused surrendered himself and when brought on board his ship stated that he considered himself a straggler, or to append a certified copy to the record. C. M. O. 37, 1909, 8.
4. **Same**—It is improper for a judge advocate to introduce as evidence a certificate from a civil officer setting forth the fact that the accused did not surrender himself to the police authorities and that he was a deserter from the naval service. The best evidence of the facts set forth in the certificate should have been obtained by placing the writer thereof on the stand to testify *under oath and subject to cross-examination.* C. M. O. 47, 1910, 4.

Digitized by Google

5. **Same**—It is improper for a judge advocate to refer to a certificate of a civil officer (referring to apprehension and delivery of accused) in his remarks, and append certified copy to record when said document had not been introduced in evidence. The department stated: "There appears to be no authority for the court's action in permitting the judge advocate to arbitrarily append this document to the record, since, under the circumstances, it has no place therein. Had it been attempted to introduce this statement in evidence, it would have been subject to objection as hearsay or secondary evidence." C. M. O. 1, 1911, 4.
6. **Continuous service certificate.** *See* CONTINUOUS SERVICE CERTIFICATE.
7. **Death.** *See* MEDICAL RECORDS, 5.
8. **Deposit**—Certificate of deposit. *See* C. M. O. 4, 1913, 5, 6, 7.
9. **Discharge**—"Certificate of discharge." *See* CIVIL WAR SERVICE, 1.
10. **False certificate**—Specification alleging the making of false certificate upon a quarterly return of clothing, etc. C. M. O. 52, 1910, 1.
11. **Medical officer**—On court-martial records. *See* CONFINEMENT, 5.
12. **Naturalization.** *See* CITIZENSHIP, 23, 26.
13. **Seaman gunner.** *See* SEAMAN GUNNERS, 4.
14. **Witness**—Certificate of claim for civilian witness fee. *See* ADDRESS, 3.

CERTIFIED COPIES.

1. **Document**—When an officer certifies over his signature a document to be a *true copy* of some other writing, it is presumed to be an *exact copy* thereof, and not a summary of the substance of the remarks contained therein.

   The department has frequently noted, in reviewing records of proceedings of general courts-martial that copies of precepts and other documents, purporting to be *true copies* of the original, *and signed as such by the judge advocate of the court*, are not *exact copies*, and often differ materially from the originals. This indicates carelessness on the part of judge advocates, in certifying such documents without first satisfying themselves that they are *exact copies* of the originals. C. M. O. 17, 1910, 3.
2. **Same**—The department noted that an exhibit in a general court-martial case, purporting to be a true copy of an original writing, was in fact not a true and exact copy of such writing, although so certified to by the judge advocate. The department considered such manifest carelessness as deserving of censure. C. M. O. 23, 1910, 3.

   A copy of a document is never good evidence where legally possible to produce original, etc. *See* CARBON COPIES; EVIDENCE, DOCUMENTARY, 10, 58.
3. **Same**—Certified copy of extract read as evidence should be appended to record. C. M. O. 16, 1908; 41, 1914, 4, 5.
4. **Enlistment record**—Certified copy of extract read in desertion case. *See* SERVICE RECORDS, 23.
5. **Indictment**—Certified copy of indictment. *See* CIVIL AUTHORITIES, 16.
6. **Precept**—Certified copy of precept, *not original*, should be appended to record in general court-martial cases. *See* PRECEPTS, 6, 23.
7. **Record of proceedings**—Notation should be made in record whether original or certified copy of document read is appended to record. C. M. O. 16, 1908; 41, 1914, 4–5.
8. **Reports on fitness**—If introduced in evidence, certified copies need not be appended to record. *See* REPORTS ON FITNESS, 5.

CHALLENGES. *See* C. M. O. 128, 1905, 2.

1. **Courts-martial**—Until sworn can only hear and determine challenges. *See* COURT, 120.

   Has no authority to excuse any of its members from sitting in a case except upon challenge duly made and sustained by the court. Therefore, a court-martial commits an error if it excuses a member from sitting, although he requests it and states he investigated the case and believes the accused guilty. C. M. O. 127, 1900, 1. *But see* File 26504–138, Sec. Navy, May 13, 1912, with reference to *self-challenge*, which modifies this.
2. **Courts of inquiry**—Challenge of members. *See* COURTS OF INQUIRY, 5.
3. **Deck Court**—If accused objects to being tried by deck court, he shall be tried by summary court-martial. (R-506.) *See* CHALLENGES, 20; DECK COURTS, 9, 50.
4. **Insisting upon**—The challenger can not insist upon his challenge in opposition to the decision of the court. (R-769.)
5. **Judge advocates**—The judge advocate, or assistant, can not be challenged on any grounds. (R-769.)
6. **Same**—Will properly assist the accused in presenting in due form such challenges as the latter may desire to urge, when the accused is not represented by counsel. C. M. O. 6, 1909, 3.

Digitized by Google

Duty to challenge a member of the court for privately consulting and receiving advice from a medical expert in regard to evidence in the case, whether the irregularity may have tended to the injury of the prosecution or the defense. C. M. O. 128, 1905.

7. **Marine examining board**—Challenge of members by candidate. *See* PROMOTION, 25–27.
8. **Material witness**—G. C. M. Rec. 13370, p. 2. *See also* CHALLENGES, 16.
9. **Member by judge advocate**—At close of case for the prosecution, the judge advocate challenged a member on three grounds: (1) That he had privately consulted and received advice from a medical expert in regard to the evidence in the case; (2) that he had so argued with witnesses as to show he was greatly interested in a certain theory of the case; (3) that he had taken a decided stand either for the prosecution or defense, without saying which. The court did not sustain the challenge. The department held that the court erred in not sustaining the challenge on the first ground. That so far as practicable, nothing affecting the case should be allowed to reach the mind of one member unless it reached all, and the person furnishing it speak under oath, subject to cross-examination. Inasmuch, however, as counsel for the accused objected with emphasis to challenge and argued against its being sustained, the accused must be held to have no right to complain of the court's ruling. C. M. O. 128, 1905. *See also* COUNSEL, 5.
10. **Member withdrawing**—It is customary, though not necessary, that a member objected to should withdraw, after offering such explanation as he may believe necessary, and the court shall then be cleared and proceed to deliberate and decide upon the the validity of the objection. (R–769.) *See also* C. M. O. 128, 1905, 2.
11. **Opinion formed.** *See* CHALLENGES, 16, 17.
12. **Possibility of**—No officer should be named in the precept as a member against whom either the judges advocate or the accused can reasonably object when called upon to exercise the privilege of challenge. (R–702.) *See* COURT, 34.
13. **Prejudice**—Members were challenged for prejudice. Each member was thereupon sworn upon his *voir dire*, and duly interrogated, after which the accused withdrew his challenge. 13 J. A. G., 324, June 11, 1904, p. 2. *See also* CHALLENGES, 9; MEMBERS OF COURTS-MARTIAL, 39.
14. **Quorum**—Court reduced below. *See* CHALLENGES, 22.
15. **Rank, title, or relative position of members**—An error in statement of the rank, title, or relative position of any member in the precept will not affect the validity of the order. Therefore, court erred when it sustained an objection entered by the judge advocate to a member on the ground that his title in the precept read, "second lieutenant," instead of "first lieutenant," his proper title. C. M. O. 100, 1893, 1–2.
16. **Reasonable grounds**—The accused objected to a member of court, a surgeon, on ground that he might be a witness for the prosecution. Court overruled challenge. The department held that this challenge should have been sustained, particularly when it subsequently appeared during the trial that not only might the challenged member have been a material witness, but also that he had expressed very positively in writing an opinion as to the guilt of the accused on at least one of the charges, which opinion was later introduced improperly in evidence. C. M. O. 47, 1910, 6–7.
17. **Same**—A member of the general court-martial admitted, when challenged, that he had stated he hoped the accused would get a general court-martial. The court did not sustain the challenge and the department disapproved the proceedings, findings, and sentence. C. M. O. 34, 1897, 2.
18. **Record of proceedings**—The objection, the cause assigned, the statement, if any, of the challenged member, and the decision of the court shall be regularly and specifically entered on the proceedings. (R–769.)

The record should show affirmatively that accused was given an opportunity to challenge. C. M. O. 37, 1909, 8.

19. **Right of**—The accused and the judge advocate have the mutual right of challenge. It is the duty of the judge advocate to ask the accused if he objects to any member of the court appointed to try him, and a minute of this inquiry and the answer thereto is invariably to be entered upon the record. (R–769.)
20. **Summary courts-martial**—After the precept and orders altering the same have been read, the accused shall be asked if he objects to any member of the court. The recorder may not be challenged on any ground. It is essential for the record to show that the accused was afforded opportunity to challenge. The recorder may also challenge members.

If a challenge is made and the court decides not to sustain it, the case shall proceed. If the challenge is sustained, the case shall be suspended and the recorder shall, as soon as possible, forward the record to the convening authority. If the latter approves the action of the court, he may order a new member in place of the

Digitized by Google

one challenged, or withdraw the specification from the court; if he disapproves the court's action, he shall return the record to the court with his action thereon and the case shall proceed. When a new member is added to the court, the order appointing him shall be read aloud and the accused shall be afforded an opportunity to challenge such member. (47, A. G. N.; R–611.)

21. **Time for exercising right of challenge**—As a general rule, whatever objection either party may make shall be decided upon before the court is sworn; but at any stage of the proceedings prior to the findings challenge may be made, by either the judge advocate or the accused, for cause not previously known. (R–769.)
22. **Valid**—Should the objection be pronounced valid, and the membership of the court be thereby reduced below the legal number, the court shall be adjourned and a report made to the convening authority. (R–769.) *See* COURT, 141; QUORUM, 2.
23. **Same**—Courts-martial should be liberal in passing upon challenges, but should not entertain an objection which is not *specific*, or allow one upon its mere assertion by the accused without proof, and in the absence of any admission on the part of the member. A positive declaration by the challenged member to the effect that he has no prejudice or interest in the case, will, in general, in the absence of material evidence in support of the objection, justify the court in overruling it.

Harwood on Courts-Martial (p. 73), citing De Hart, quotes as follows: "Sir C. J. Napier observes that 'when it is practicable so to do, *all challengers should be admitted.*' It is not only right to be as mild as possible toward a prisoner, but it is right also to let the public and the prisoner *see* that such is the case. A culprit should never be made to appear in the light of a martyr: for when this takes place, much of the advantage of punishment is lost, and it is hard to oblige him so to do, unless the good of the service demands it." C. M. O. 34, 1897, 2.

CHALLENGE TO DUELS. *See* DUELS.

CHANGES OF NAMES. *See* NAME, CHANGE OF.

CHAPLAINS.

1. **Army**—For memorandum comparing naval chaplains with Army chaplains and other corps of the Navy. *See* File 393–03.
2. **Courts-martial**—May serve as members of courts-martial. Letter of September 24, 1898.
3. **General courts-martial**—Tried by. C. M. O. 108, 1898; 74, 1907. *See also* ADDITIONAL CHARGES AND SPECIFICATIONS, 10.
4. **Judge advocate**—Chaplain may act as judge advocate. Letter of September 24, 1898. *See also* File 7214–98.
5. **Number, rank, and pay of.** *See* File 3616–3, September 17, 1907.

CHARACTER.

1. **Accused's character.** *See* EVIDENCE, 12–22.
2. **Admissibility of evidence as to.** *See* EVIDENCE, 12–22.
3. **Clemency**—Recommended because of previous excellent character of accused. *See* CLEMENCY, 8.
4. **Evidence of**—By prosecution, admissible only when, etc. *See* EVIDENCE, 16.
5. **Impeaching**—Character of witnesses. *See* IMPEACHMENT.
6. **Witnesses**—Privilege of witnesses to decline to reply to questions the answers to which would degrade or disgrace them. C. M. O. 29, 1914, 11. *See also* SELF-INCRIMINATION, 11–12.
7. **Same**—As to character of accused. C. M. O. 1, 1914, 5, 7. *See also* EVIDENCE, 12–22.
8. **Same**—Duty of judge advocate to cross-examine. C. M. O. 39, 1915.

CHARGES AND SPECIFICATIONS.

1. **Abbreviation**—Of names. *See* CHARGES AND SPECIFICATIONS, 60.
2. **Absence, unauthorized.** *See* ABSENCE, 10–13; ABSENT FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED; ABSENT FROM STATION AND DUTY WITHOUT LEAVE; DESERTION.
3. **Accumulative**—Offenses shall not be allowed to accumulate in order that sufficient matter may thus be collectively obtained for a trial, without giving due notice to the offender. (R–1411.) C. M. O. 38, 1894, 3. *See also* ACCUMULATION OF OFFENSES.
4. **Accused**—Shall, as soon as practicable after it has been decided to bring him to trial, be furnished with a copy of the charges and specifications preferred against him. (*See* A. G. N. 43.) C. M. O. 10, 1915, 6. *See also* ARREST, 39.
5. **Same**—"In all cases, whether general or summary, the record must state that the accused was furnished with a copy of the charges and specifications *at least one day*

Digitized by Google

before the trial." (G. O. 114, Mar. 22, 1869.) The department now holds that the accused may be tried at any time after he states in open court that he is ready for trial. (R-775.)

6. **Additional charges and specifications.** *See* ADDITIONAL CHARGES AND SPECIFICATIONS.
7. **Admissions in open court**—By accused of certain parts of the specifications. *See* ADMISSIONS, 1.
8. **Alterations in**—How made. *See* CHARGES AND SPECIFICATIONS, 33, 34.
9. **Amendments in**—How made. *See* CHARGES AND SPECIFICATIONS, 33, 34.
10. **Arraignment.** *See* ARRAIGNMENT.
11. **Borrowing money.** *See* BORROWING MONEY, 1; LENDING MONEY.
12. **Breaking arrest.** *See* BREAKING ARREST.
13. **Changes or alterations in**—Authority for. *See* CHARGES AND SPECIFICATIONS, 33, 34.
14. **Conduct unbecoming an officer and a gentleman.**—*See* CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN.
15. **Convening authorities**—Should follow prescribed forms.—In reviewing records of general courts-martial during the past year the department has noted that convening authorities have not conformed to the phraseology for charges as outlined in the Forms of Procedure, 1910. Wherever possible the Forms of Procedure should be followed. Convening authorities should never lose sight of the fact at any time as expressly stated in the department's order promulgating the Forms of Procedure, 1910, that "deviation therefrom may be fatally irregular and erroneous." (Forms of Procedure, 1910, p. 3.) C. M. O. 49, 1915, 9. *See also* C. M. O. 35, 1915, 6-7; CHARGES AND SPECIFICATIONS, 43, 44, 47, 48.
16. **Same**—Time and place of signing by convening authority should be stated. C. M. O. 159, 1897, 2; 160, 1897, 2.
17. **Copy of**—To be furnished accused. *See* CHARGES AND SPECIFICATIONS, 4, 5, 18; ARREST, 39.
18. **Same**—Received by accused 10 days before his trial—The accused is solely responsible for informing his natural or legal guardians or relatives of the fact that he is to be tried by general court-martial. The department has held that an accused had ample time to send such information when he was delivered a copy of the charges and specifications 10 days before he was brought to trial. File 26251-6020:11, Sec. Navy, July 7, 1913; C. M. O. 27, 1915, 10. *See also* CHARGES AND SPECIFICATIONS, 4, 5.
19. **Corrections to.** *See* CHARGES AND SPECIFICATIONS, 33, 34.
20. **Date**—Accused received copy of charges and specifications should be entered on record. C. M. O. 17, 1910, 15.
21. **Same**—Of identification of accused while serving in Army should be alleged in the specification under a charge of "desertion." C. M. O. 33, 1912, 2. *See also* ARMY, 9; DESERTION, 17.
22. **Same**—Should be written in specifications. C. M. O. 28, 1910, 5.
23. **Same**—Alleging of dates in specifications. *See* FINDINGS, 18, 27, 32, 33, 35.
24. **Debts.** *See* DEBTS, 12, 13, 21, 22, 24, 27.
25. **Deceit.** *See* DECEIT.
26. **Deck court.** *See* DECK COURTS.
27. **Defects in**—Waived by plea of "guilty." *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 29.
28. **Desertion.** *See* DESERTION.
29. **Drawn, how.** *See* CHARGES AND SPECIFICATIONS, 15, 16, 38, 39, 40, 43, 47, 48, 49, 52, 53, 60, 61-68, 70, 74, 78, 91, 92, 93, 99, 102, 103, 105, 106.
30. **Drunkenness on duty.** *See* DRUNKENNESS ON DUTY, 4.
31. **Duplication**—Of charges should be avoided. C. M. O. 49, 1915, 18. *See* CHARGES AND SPECIFICATIONS, 32, 61-68.
32. **Duplicity.** C. M. O. 150, 1897; 160, 1897; 35, 1915, 6-7; 49, 1915, 18. *See also* CHARGES AND SPECIFICATIONS, 31, 61-68.
33. **Errors in**—After a charge and specification has been signed by the proper convening authority and ordered to be investigated, it is not competent for any person to make alteration therein without first having obtained the consent of such authority, except that the judge advocate may, with the approval of the court, correct manifest clerical errors. (Navy Regulations, 1913, R-715 (1-2); R-774 (2); Forms of Procedure, 1910, p. 21.)

If a court-martial considers other alterations necessary in a charge or specification laid before it, the same must be submitted for the approval of the authority by whom the original charge was sanctioned, previous to the arraignment of the accused. (R-715 (2).) (*See* G. C. M. Rec. 16098, Exhibits "G" and "H"; File 26251-12309.)

Digitized by Google

Errors in charges and specifications are classified in two groups—clerical and technical. Clerical errors are those of spelling, punctuation, etc., correction of which *does not alter facts:* and those may, with the approval of the court, be corrected by the judge advocate. (Forms of Procedure, 1910, p. 21.)

Technical errors are, in general, those which the charges and specifications disclose, and which would be sufficient to sustain a demurrer or special plea: such as a charge not supported by the specification, uncertainty as to the time or place of the offense, lack of jurisdiction of the court, etc. (Forms of Procedure, 1910, p. 21.)

All corrections to charges and specifications should be made on accused's copy.

It is not within the discretion of either the judge advocate, court, or any other party to correct technical errors in the charges and specifications without the consent of the convening authority. If the court is in doubt as to whether an error in the charges and specifications is clerical or technical it should treat it as a technical error and thus avoid any possibility of having the case disapproved on a technicality of this nature. C. M. O. 42, 1914, 3. *See also* C. M. O. 27, 1898, 1; 16, 1911, 4.

34. **Same**—Procedure to correct—If the court decides that a charge and specification contains a technical error it should suspend proceedings and follow the procedure laid down in Forms of Procedure, 1910, p. 21. If the court follows this procedure in every case where it is not absolutely certain that the error is clerical, the convening authority will then have an opportunity to amend the charge and specification. (C. M. O. 16, 1911, p. 4.) C. M. O. 42, 1914, 3. *See also* CHARGES AND SPECIFICATIONS, 33.
35. **Same**—Court errs if it pronounces faulty charges and specifications in "due form and technically correct." C. M. O. 16, 1911, 4; 35, 1915, 6–7.
36. **Same**—Faulty specifications. *See* CHARGES AND SPECIFICATIONS, 92.
37. **Same**—Waived by plea of "guilty." *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 29.
38. **Essentials**—Of offense must be set forth in a deck-court specification. *See* DECK COURTS, 59.
39. **Same**—In reviewing the case the department noted that the three specifications under a charge did not designate the party accused nor set forth the time of the alleged offenses, the ship on which the alleged offenses took place, nor the attending circumstances, as required by the provisions of the Navy Regulations, and as they contain no allegation of any offense committed by the accused, the findings thereon and upon the charge were disapproved. C. M. O. 3, 1907, 1. *See also* File 26287–1041.
40. **Extraneous matter**—In drawing up the charges and specifications, all extraneous matter is to be carefully avoided, and nothing shall be alleged but that which is culpable and which makes a prima facie case which the prosecution may reasonably expect to substantiate before a court-martial. C. M. O. 4, 1916, 3. *See also* CHARGES AND SPECIFICATIONS, 58; 23 J. A. G., 376.
41. **"Fatally defective."** *See* File 27217–1611. *See also* FRAUD, 5.
42. **Findings**—When the accused pleads "guilty," the proper finding for the specification is "proved by plea," and for the charge "guilty." *See* FINDINGS, 12.
43. **Form of**—Accused may be tried at the same time for more than one offense, but each offense must be separately charged, and each charge must be followed by a separate specification, so that the party accused may be able to plead separately to each charge and specification. G. O. 114, March 22, 1869. *See also* CHARGES AND SPECIFICATIONS, 15, 39, 44, 45.
44. **Same**—Convening authorities should follow prescribed forms. *See* CHARGES AND SPECIFICATIONS, 15, 39, 43, 45.
45. **Same**—Summary court-martial—The specification shall be framed in accordance with the provisions of R–712 and R–713 (general courts-martial charges and specifications), a separate specification shall be used for each distinct offense, and two or more such specifications may be joined for a single trial. C. M. O. 16, 1916, 6–7.
46. **"Guilty," plea of**—Waives defects in specifications. *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 29.
47. **Higher criminality**—In all cases in which the law attaches higher criminality to acts committed under particular circumstances, the act must, to bring the person within the higher degree of punishment, be charged to have been committed under those circumstances, which must be stated with certainty and precision. For instance, by sections 6 and 7, article 4, Articles for the Government of the Navy (R–4), the penalty of death shall, in time of war, be inflicted for desertion, betrayal of trust, or enticing others to commit these crimes; in a charge, therefore, under one of these sections, it must be laid that the offense was committed in time of war. C. M. O. 8, 1913, 7.
48. **Highest crime**—It is not necessary to charge an accused with the highest crime which the facts known at the time of drawing up the charges and specifications seem to indi-

Digitized by Google

cate; this is within the discretion of the convening authority or the Secretary of the Navy; and the fact that an accused may be guilty of murder, for example, does not prevent him from being charged with manslaughter. File 148-04, J. A. G., Jan. 7, 1904. *See also* MURDER, 11, 16, 22, 24, 25.

49. **Immaterial allegations**—An offense is charged by the statement of the material facts which constitute it, and not by the statement of a mere conclusion of law. Nevertheless, particularity of description in charges and specifications is to be preferred and is sustained by practice. (*See* 7 Op. Atty. Gen., 601, 605; 28 Op. Atty. Gen. 292.) C. M. O. 8, 1913, 6-7; 4, 1914, 1, 7.

If the charge and specification taken together amount to a statement of an offense cognizable under the Articles for the Government of the Navy, either under a specific or the general article, it will properly be held sufficient as a legal basis for trial and sentence. File 27217-1611.

50. **"In violation of regulation"**—Is equivalent to "without authority." C. M. O. 21, 1910, 6.

51. **Indefinite**—A specification of a charge alleging that the accused did "use abusive and profane language toward a person unknown" is vague and indefinite, does not properly inform the accused of the specific offense with which he is charged and against which he must defend himself, and is not in accordance with the department's instructions, which require the objectionable language used should be alleged. C. M. O. 7, 1911, 12. *See also* C. M. O. 78, 1905, 1.

52. **Intent**—In cases where the law has adopted certain expressions to show the intent with which an offense is committed, the intent shall be expressed by the technical word prescribed, as "willfully," "knowingly," "corruptly," "maliciously," "intentionally," "wrongfully," "carelessly." For example, a charge made against an officer for making or for signing a false muster must be laid to have been done "knowingly." (R-712.) *See* JOINDER, TRIAL IN, 19.

53. **Irregular**—Convening authority and members of court responsible—The accused (enlisted man) was tried by general court-martial by order of the Commander-in-Chief, United States Pacific Fleet, and found guilty of the following charges: "Absence without leave and out of uniform ashore," and "Resisting arrest and assaulting a chief petty officer." The accused was represented by civilian counsel and made no objection to the charges and specifications. The court sentenced the accused, and the proceedings, findings, and sentence were approved without comment by the commander-in-chief.

A reference to the Navy Regulations, 1913, Forms of Procedure, 1910, and court-martial orders will show that both of the above charges are extremely irregular, in that each charge contains more than one offense "of a perfectly distinct nature" (Navy Regulations, 1913, R-712 (2)) and is not phrased in the form prescribed. (*See* Navy Regulations, 1913, R-900, Limitation of Punishment; Forms of Procedure, 1910, pp. 89-131, Specimen Charges and Specifications; pp. 313-319, Limitation of Punishment; *see also* tabulations in monthly court-martial orders.)

It is obvious that the court erred when it "found the charges and specifications in due form and technically correct." (*See* Forms of Procedure, 1910, p. 21. *See also* G. C. M. Rec. Nos. 31019; 31020; File 26262-2366; 26262-2367.) C. M. O. 35, 1915, 6-7.

54. **Joinder.** *See* JOINDER, TRIAL IN.

55. **Judge Advocate**—May correct clerical errors, etc. *See* CHARGES AND SPECIFICATIONS, 33.

56. **Language**—The objectionable language used by the accused must be set forth in the specifications alleging its use. *See* CHARGES AND SPECIFICATIONS, 51.

57. **Letter of transmittal**—The letter to the judge advocate of the court transmitting the charges and specifications on which a person is to be tried, or a properly authenticated copy of the same, must in every case be filed with the charges as a part of the record of the court. (R-716.) *See* CHARGES AND SPECIFICATIONS, 59; LETTERS, 27-30.

58. **Manslaughter**—The department is reluctant to prepare a charge of "Manslaughter" or any other charge which there is not a reasonable expectation of proving, and such action, if taken, would be contrary to R-712 (1). File 26250-802:7, Sec. Navy, Aug. 5, 1916. *See also* CHARGES AND SPECIFICATIONS, 40.

59. **Marking of**—The only requirement in the "Forms of Procedure, 1910," as to marking charges and specifications and letters of transmittal, is that documents relating to the organization of the court shall be marked with capital letters, and instruments of evidence with numbers. While the letter of transmittal and the charge and specification are not, perhaps, strictly within either of the above-mentioned classes, yet

Digitized by Google

they more nearly resemble documents relating to the organization of the court than otherwise; certainly they are not instruments of evidence. The letter of transmittal is the document that gives the court jurisdiction in that particular case over the person named therein, and therefore it is considered proper that such papers should be marked in the same manner as are documents relating to the organization of the court. C. M. O. 8, 1911, 6.

60. **Middle names**—Christian names, other than the first, may be indicated by initial letters in specifications. C. M. O. 36, 1914, 6, 7; 4, 1916, 5; 14, 1916; File 26287–2104, Sec. Navy, July 22, 1914. *See also* C. M. O. 150, 1897, 3; 1, 1914, 4; 5, 1914, 7; 40, 1914; G. C. M. Rec. 29584.

61. **Multiplicity or plurality**—For same offense should be avoided—The law permits as many charges to be preferred as are necessary to provide for every possible contingency in the evidence. Where the offense falls apparently equally within the scope of two or more articles of the Articles for the Government of the Navy, or where the legal character of the offense can not be precisely known or defined until developed by the proof, it is quite proper in important cases to specify the offense under two or more charges. (C. M. O. 19, 1911, 3–4.) There is no rule of law which prohibits the formulation of the same charge under more than one article. (C. M. O. 4, 1913, 46.)

The department's instructions merely mean that as a matter of policy the rule which permits such duplication of charges is not to be availed of when the offense falls quite clearly within the definition of a specific article, where there are no aggravating circumstances distinguishing it from the ordinary case contemplated by such article, and when there is no necessity to resort to multiplicity or plurality of charges. C. M. O. 42, 1914, 7; 49, 1915, 18.

62. **Same**—Department does not approve of trying an accused on two or more charges where the identical facts are made the basis of both—Department's policy is opposed to duplicating charges based on identical facts, where there are no aggravating circumstances set forth under one charge which distinguishes it from the other. Where an objection is made to charges and specifications on this ground, if the court finds that the charges and specifications have apparently violated the department's policy, the case should be referred without delay to the convening authority in the manner prescribed by R–774 (2). C. M. O. 5, 1914, 7; 42, 1914, 7; 49, 1915, 18. *See also* File 26262–2338; G. C. M. Rec. 30929.

An accused was tried by general court-martial by order of the Commander-in-Chief U. S. Asiatic Fleet, upon charges among which was one of "drunkenness." Under this charge there were three specifications, the first one alleging that the accused was under the influence of intoxicating liquor at or about 5.20 p. m. February 15, 1916; the second specification alleging that he was under such influence at 5.45 p. m. on the same date; and the third alleging that he was under such influence at about 6 p. m. on the same date.

Since it seems impossible that a man could become three times intoxicated and twice sober during so short a period as 40 minutes, it would appear that the facts alleged in the three specifications all relate to the original state of intoxication continuing during this 40-minute period, and that there had been but one act of becoming intoxicated and but one resulting state of intoxication. The mere fact that the location of the accused may have changed while intoxicated does not in itself constitute a distinct offense. Also, when one has become intoxicated, his continuance in this state until sufficient time has elapsed to permit of his becoming sobered, is to be presumed, and such a continuance forms a necessary part of each single offense of "drunkenness" and should not be separately alleged. To hold otherwise would be, in effect, to allow a different specification for every second a man's intoxication might continue. G. C. M. Rec. 32124; C. M. O. 17, 1916, 9.

63. **Same**—An accused should not be charged with both "Absence from station and duty without leave" and "Conduct to the prejudice of good order and discipline" where he is guilty of only simple absence without leave. C. M. O. 5, 1914, 7; 25, 1914, 5. *See also* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 12; CHARGES AND SPECIFICATIONS, 64–68.

64. **Same**—In a case where an accused was charged with both "Absence from station and duty without leave" and "Conduct to the prejudice of good order and dicipline" for the same period of unauthorized absence, and no aggravating circumstances were present, the department disapproved the finding on the second charge. C. M. O. 42, 1909, 9, 11. *See also* C. M. O. 51, 1910, 2.

65. **Same**—Accused should not be charged with both "Desertion "and "Absence from station and duty after his leave had expired" for the same period of unauthorized absence. C. M. O. 49, 1910, 15–16; 5, 1914, 7. *See also* DESERTION, 5.

Digitized by Google

66. **Same**—Accused should not be charged with both "Attempting to desert" and "Absence from station and duty without leave from proper authority" for the same period of unauthorized absence. C. M. O. 23, 1910, 6.
67. **Same**—Accused should not be charged with both "Falsehood" and "Conduct to the prejudice of good order and discipline" for the same identical offense—It is frequently advisable, when the crime is of a complicated nature, or it is uncertain whether the evidence will support the higher and more criminal part of the charge or the charge precisely as laid, to insert two or more specifications under the charge. Every cautious pleader will insert as many specifications as will be necessary to provide for every possible contingency in the evidence, and this the law permits. In naval cases where the offense falls apparently equally within the purview of two or more Articles for the Government of the Navy, or where the legal character of the act of the accused can not be precisely known or defined until developed by the proof, it is not infrequent in cases of importance to state the accusation under two or more charges. If the two articles impose different penalties, it may, for this additional reason, be desirable to prefer separate charges, since the court will be invested with a wider discretion as to the punishment. Where, however, the case falls quite clearly within the definition of a certain specific article, to resort to plural charges is neither good pleading nor just to the accused. C. M. O. 19, 1911, 3-4.
68. **Same**—It is neither good pleading nor just to the accused to resort to plural charges for the same offence when the offense is clearly defined. An *unnecessary* multiplication of forms of charge for the same offense is always to be avoided. C. M. O. 19, 1911, 3.
69. **Names**—Middle names may be abbreviated in specifications. *See* CHARGES AND SPECIFICATIONS, 60.
70. **Neglect or disorder not specially provided for**—When the offense is a neglect or disorder not specially provided for, it shall be charged as "Scandalous conduct tending to the destruction of good morals," or "Conduct to the prejudice of good order and discipline." C. M. O. 4, 1913, 45; 49, 1915, 17, 18; File 26251-92.0; 26262-1920, 1921, Sec. Navy, Jan. 5, 1914. *See also* "CATCH-ALL" CLAUSE, 1.
71. **"Negligence in the performance of duty"**—Is a lesser degree of the charge "Culpable inefficiency in the performance of duty." C. M. O. 12, 1910, 1.
72. **Nolle Prosequi.** *See* NOLLE PROSEQUI.
73. **Objections to**—Procedure in case of. *See* CHARGES AND SPECIFICATIONS, 33, 34.
74. **Offense**—Charge should contain only one offense—Offenses of a perfectly distinct nature must not be included in one and the same charge and specification of a charge, but each offense of a different kind shall be the subject of a distinct charge and specification. C. M. O. 35, 1915, 6-7; 16, 1916. *See also* CHARGES AND SPECIFICATIONS, 53.
75. **Same**—Must allege an offense. *See* CHARGES AND SPECIFICATIONS, 39.
76. **One charge**—The figure "I" should not be used. *See* C. M. O. 32, 1915, where this was erroneously done.
77. **One offense**—Specification should contain only one offense. C. M. O. 16, 1916, 6-7. *See also* CHARGES AND SPECIFICATIONS, 53, 74.
78. **Particular words**—Where particular words form the gist of the offense, they must be set forth with particularity, or declared to be of the like meaning and purport. (R-714 (3).)
79. **Particularity of description**—Is desirable. *See* CHARGES AND SPECIFICATIONS, 49.
80. **Period of unauthorized absence**—Should be alleged. *See* ABSENCE, 10, 11; ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 29.
81. **Perjury.** *See* PERJURY, 1, 3, 16.
82. **Place**—Of offense should be alleged in specifications. (G. C. M. Rec. 23743.) C. M. O. 10, 1901, 7; 3, 1907, 1; 10, 1911, 7. *See also* CHARGES AND SPECIFICATIONS, 39, 92.
83. **Plea of "guilty"**—Waives defects in specifications. *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 29.
84. **Plurality or multiplicity of charges.** *See* CHARGES AND SPECIFICATIONS, 31-32, 61-68.
85. **Record of proceedings**—The original charges and specifications should be prefixed not appended to the record of proceedings. C. M. O. 24, 1909, 3; 28, 1910, 5. *See also* G. O. 114, March 22, 1869. This overrules C. M. O. 1, 1894, 3; 3, 1894; 62, 1894; 54, 1898.
86. **Same**—The date the accused received a copy of the charges and specifications should be entered on the record of proceedings. C. M. O. 36, 1905, 3; 17, 1910, 5. *See also* RECORD OF PROCEEDINGS, 44.
87. **Reiteration**—Of charges and specifications. C. M. O. 42, 1909, 9; 51, 1910, 2; 23, 1910, 6. *See also* CHARGES AND SPECIFICATIONS, 31-32, 61-68.

Digitized by Google

88. **Robbery.** C. M. O. 8, 1913, 5-7. *See also* CHARGES AND SPECIFICATIONS, 92; ROBBERY.
89. **Sentence**—Maximum sentence that may be adjudged where there is a multiplicity of charges. *See* EXCESSIVE SENTENCES, 2, 3.
90. **Service on accused.** *See* CHARGES AND SPECIFICATIONS, 4, 5, 18.
91. **Signing of, by convening authority**—Time and place of signing charges and specifications by convening authority should be stated. C. M. O. 159, 1897, 2; 160, 1897, 2.

Precepts and charges and specifications must affirmatively show on their face that the officer signing was one of those mentioned in the law authorized to convene naval courts-martial. The single word "Acting" beneath the signature does not indicate in any way that the officer signing has the necessary authority. File 26262-1920, 1921, Sec. Navy, Jan. 5, 1914. *See also* CONVENING AUTHORITY, 63.

92. **Specifications**—The department has criticized faulty specifications for the following reasons:

Absence, unauthorized. *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 10, 12, 13, 29.

Dates.—Must be written in specifications. C. M. O. 28, 1910, 5.

Desertion.—Date of identification of accused while serving in Army must be alleged in specification. C. M. O. 33, 1912, 2; 6, 1913, 4.

A specification which simply alleges that the accused deserted from a certain ship, continuing in desertion until after departure of said vessel, and which does not further allege that he deserted *from the United States Navy*, or more properly that he continued in such unauthorized absence with intent to permanently abandon the naval service, is not sufficient to sustain a charge of desertion. C. M. O. 49, 1910, 9.

Drunkenness on duty.—The specification under a charge of "Drunkenness on duty" did not specify any duty that the accused was performing, simply stating that he was so much under the influence of some intoxicant as to be unfit for the proper performance of his duty. C. M. O. 12, 1909, 1; 23, 1910, 4.

Each specification must support charge.—Each specification standing alone must contain sufficient allegations to support the charge under which it appears. C. M. O. 107, 1894, 2; 21, 1910, 7, 8, 11.

Language.—Objectionable language used by accused must be set forth. C. M. O. 7, 1911, 12.

Multiplicity of specifications. *See* CHARGES AND SPECIFICATIONS, 31-32, 61-68.

Names.—Middle names may be abbreviated. C. M. O. 36, 1914, 6, 7; 4, 1916. *See also* C. M. O. 150, 1897, 3; 1, 1914, 4; 5, 1914, 7; 40, 1914.

Not well drawn. C. M. O. 34, 1900, 1.

One charge.—Figure "I" not to be used. *See* C. M. O. 32, 1915.

One offense.—Specification should contain only one offense. C. M. O. 8, 1911, 8; 16, 1911, 3; G. O. 114, Mar. 22, 1869; C. M. O. 16, 1916, 6-7.

Party accused.—Specification must designate party accused. C. M. O. 3, 1907, 1.

Perjury.—A specification of the charge alleging perjury was faulty, in that, while it properly alleged that the testimony given by the accused was false, it did not set forth what was the truth in regard to the matter. (U. S. *v.* Pettus, 84 Fed. Rep., 791, 794; Bartlett *v.* U. S., 106 Fed. Rep., 884.) C. M. O. 47, 1910, 5.

Place of offense.—The specification must show the place where the offense was committed. C. M. O. 3, 1907, 1; 10, 1901, 7; 10, 1911, 7; G. C. M. Rec. 23743.

Plurality of specifications. *See* CHARGES AND SPECIFICATIONS, 31, 32, 61-68.

Robbery.—The essential feature of the crime of robbery which distinguishes it from theft both in common law and statutory law is the taking from the person or in the presence of the owner or custodian, and as this very essential and necessary element was not alleged in the specification the department held that it did not support the charge and that there had not been a legal trial and conviction and disapproved the finding on that charge and specification. C. M. O. 8, 1913, 5-7.

Seditious words.—Specification did not allege that the words uttered were either known to be seditious, or that they were spoken with that intent; such an allegation is essential. C. M. O. 14, 1910, 14.

Time of offense.—The specification must show, at least approximately, the time of the commission of the offense. C. M. O. 33, 1914, 6. *See also* C. M. O. 3, 1907, 1; 10 1911, 7; 19, 1912, 5; File 26287-2121, Sec. Navy, Aug. 5, 1914; 26251-12309, October, 1916.

Two offenses in one specification.—A specification is faulty which alleges two separate and distinct offenses. C. M. O. 8, 1911, 8; 16, 1911, 3. *See also* G. O. 114, Mar. 22, 1869.

Accused was tried by summary court-martial under one specification which alleged "his return to said ship from special liberty drunk and disorderly;" and that he did, "while being placed in confinement * * * forcibly resist arrest." Thus two dis-

Digitized by Google

tinct offenses were set forth in a single specification, whereas "each offense of a different kind shall be the subject of a distinct specification." This error of setting forth several offenses in the same summary court-martial specification is generally committed in joining "absence over leave" with such offenses as "drunk and disorderly," "returning on board drunk and unfit for duty," and "breaking arrest." Each of the latter offenses is distinct in itself, and should be set forth in a separate specification. (*See* R–608.) C. M. O. 16, 1916, 6–7.

93. **Specifications, drawing of**—The specifications of each charge, one or more, must be:

a. Brief, clear, and explicit.—The facts, circumstances, and intent constituting the offense must be set forth with certainty and precision, and the accused charged directly and positively with having committed it. [*See* CHARGES AND SPECIFICATIONS, 92.]

b. Certain as to the party accused.—He must be described by his title and rank, or rating, *Christian name* and *surname written* at full length, with the addition of his vessel or service at the time the offenses with which he shall be charged took place. (*See* C. M. O. 3, 1907, 1.)

c. Certain as to time.—The time when the alleged offenses occurred should be set forth minutely and precisely. Should any doubt exist in regard to the time, it may set forth in the specification that the act was committed "on or about" such a time, but the limitation as to date must embrace a reasonable time only. (*See* CHARGES AND SPECIFICATIONS, 92; FINDINGS, 18, 27, 32, 33, 35.)

d. Certain as to place.—The place where the alleged offenses occurred should be set forth minutely and precisely. Should any doubt exist in regard to the place, it may be set forth in the specification that the act was committed "at or near" such a place. But when the geographical position of a ship is not material to a complete description of the offense, such *as the theft of another's clothing* or *any other act committed wholly on board ship, such particular geographical position need not be specified.*

e. Certain as to the person against whom the offense was committed.—In the case of offenses against the person or property of individuals, the *Christian name and surname* with the rank and station or duty of such person, if he have any, must be stated at length, if known. If not known, the party injured must be described as a "person unknown."

f. Certain as to the facts, circumstances, and, where intent forms an ingredient of the offense, the intent constituting the offense.—It is not sufficient that the accused be charged generally with having committed an offense, as for instance, with habitual violation of orders or neglect of duty, but the particular acts or circumstances constituting such offenses must be distinctly set forth in the specification. (*See* C. M. O. 3, 1907, 1; G. O. 114, March 22, 1869; File 26251-12309, J. A. G., October, 1916.)

94. **Statute, breach of**—It is not necessary to specify in a charge that an offense was committed in breach of any particular statute or Article for the Government of the Navy, but whenever the allegation comes directly under any enactment it shall be set forth in the terms used therein. (R–712.)

95. **Struck out by court.** C. M. O. 16, 1911, 2–3. *See also* NOLLE PROSEQUI, 8.

96. **Substitutes and exceptions**—Made in findings of court. *See* FINDINGS, 27–37.

97. **Summary court-martial**—No charges should be used. *See* SUMMARY COURTS-MARTIAL, 10.

98. **Same**—Form of specifications. *See* CHARGES AND SPECIFICATIONS, 45, 92.

99. **Support charge**—*The specification must support the charge*—Fleet convening authority preferred charges and specifications against an officer. The Secretary of the Navy in revising the record decided that the specification did not support the charge and set the sentence aside. C. M. O. 4, 1916. *See also* FRAUD, 5; C. M. O. 107, 1894, 2.

"All the technicalities which have been applied to common-law indictments are not required in specifications in court-martial proceedings. Here it is sufficient if the facts constituting the offense be described with such certainty as to clearly inform the accused of his alleged misconduct and of the offense with which he is charged." (28 Op. Atty. Gen., 292. *See also* 7 Op. Atty. Gen., 605.) C. M. O. 8, 1913, 6–7; File 26251-12309.

100. **Time**—Of the commission of the offense should be alleged. *See* CHARGES AND SPECIFICATIONS, 92, 93; FINDINGS, 27, 32, 35.

101. **Vague**—Specifications. C. M. O. 78, 1905, 1; 7, 1911, 12; File 26262–1065, J. A. G. *See also* CHARGES AND SPECIFICATIONS, 51; File 26262–729:2, Sec. Navy, Feb. 25, 1910.

102. **Valid**—A specification of charge is good and will support the finding and sentence upon it with or without descriptive designation of the quality of the imputed criminal act, provided it appear that the facts alleged and proved constitute, in any point of view, the offense charged. (*See* 7 Op. Atty. Gen., 601.) C. M. O. 4, 1914, 7. *See also* CHARGES AND SPECIFICATIONS, 49.

Digitized by Google

103. **Same**—The specification must on its face, allege facts which constitute a violation o some law, regulation, or custom of the service. If the offense committed does not constitute a violation of some law, regulation, or well-known custom of the service, of which judicial notice can be taken, the facts must be alleged with particularity in order to show that some offense was committed. C. M. O. 33, 1914, 6.
It is entirely and properly the province of the court to decide the issue, when such is raised, as to the validity of a specification. C. M. O. 16, 1911, 4.
104. **Withdrawal**—Of charges and specifications by convening authority. *See* NOLLE PROSEQUI.
105. **Witness**—When may be read to—Before a witness shall be examined the general charges may be read to him, if the court thinks proper; but the specifications shall not be read to him, particularly when they are so worded as to instruct him how to answer or to make known to him the minute facts of the case. *See* C. M. O. 40, 1893; 94, 1897, 2.
106. **Written instruments**—Written instruments, or so much thereof as form part of the gist of the offense charged, must be set out *verbatim*, with care and accuracy.
When the substance only is intended to be set out, it should be introduced by the words "in substance as follows." The word "tenor" implies that a correct copy is set out. (R-717.)

CHARTS. *See also* COAST AND GEODETIC SURVEY.
1. **Coast Survey Charts.** C. M. O. 29, 1909, 1; 30, 1909, 2; 24, 1911; 31, 1916.
2. **Commanding officer**—Tried by general court-martial for neglecting to supply the officer of the deck with proper chart. C. M. O. 29, 1909, 1.
3. **Hydrographic Office Chart**—No. 967. C. M. O. 2, 1914, 2; 3, 1914.

CHEATING. *See* BLOTTER; GOUGING; MIDSHIPMEN, 22; OFFICERS, 13.

CHECKS.
1. **Allotment checks**—Minors. *See* ALLOTMENTS, 5.
2. **Cashing**—Minors would have trouble in cashing allotment checks. *See* ALLOTMENTS, 5.
3. **Certified checks.** *See* WORDS AND PHRASES.
4. **Custom**—Of marking checks as exchanged for cash. C. M. O. 4, 1913, 6.
5. **Death gratuity check.** *See* DEATH GRATUITY, 13.
6. **Photographic copies**—Of checks as evidence. *See* EVIDENCE, DOCUMENTARY, 37.
7. **Worthless checks**—Retired chief boatswain tried by general court-martial for passing worthless checks. C. M. O. 15, 1915.

CHECKING PAY.
1. **Enlisted man**—Paymaster erroneously checked pay. C. M. O. 10, 1915, 12. *See also* AUDITOR FOR THE NAVY DEPARTMENT, 6.
2. **Lost property.** *See* PAY, 17, 18.

CHIEF BOATSWAINS.
1. **General court-martial**—Tried by. C. M. O. 16, 1914; 18, 1914; 21, 1914; 23, 1915; 25, 1915; 21, 1916.
2. **Same**—Chief boatswains are commissioned officers and are therefore entitled to serve as members of general courts-martial under A. G. N. 39. File 5819–2, Oct. 30, 1906.
3. **Promotion**—Examination for. *See* PROMOTION, 206, 216.
4. **Retired chief boatswain**—Tried by general court-martial. C. M. O. 15, 1915.

CHIEF CARPENTERS.
1. **General court-martial**—Tried by. C. M. O. 37, 1914; 48, 1914; 21, 1915.

CHIEF CLERK, NAVY DEPARTMENT.
1. **Duties of**—To facilitate and aid the Secretary of the Navy in the exercise of his many and varied important duties and responsibilities, he has an office force, supervised by the chief clerk of the department, which is required to determine and pass upon all matters requiring his action which by law or regulation, are not otherwise required to be handled. File 22353–13.

CHIEF CLERKS OF BUREAUS.
1. **Acting chiefs**—In certain bureaus the chief clerk of the bureau becomes acting chief thereof in case of the absence or sickness of the chief of the bureau, unless otherwise directed by the President under R. S. 179. File 22724–14, Dec. 17, 1909. *See also* Act of August 29, 1916 (39 Stat. 558).

CHIEF ENGINEER.
1. **General court-martial**—Tried by. C. M. O. 25, 1882; 3, 1884; 49, 1884.

Digitized by Google

CHIEF GUNNERS.
1. **General court-martial**—Tried by. C. M. O. 2, 1916.

CHIEF MACHINISTS.
1. **Command**—Exercise of command. *See* COMMAND, 21.
2. **General court-martial**—Tried by. C. M. O. 12, 1914; 52, 1914; 28, 1915; 36, 1915.

CHIEF NAVAL CONSTRUCTOR. *See* BUREAU CHIEFS, 9.

CHIEFS OF BUREAUS. *See* BUREAU CHIEFS.

CHIEF OF BUREAU OF MEDICINE AND SURGERY. *See* BUREAU OF MEDICINE AND SURGERY, 1. 2; MEDICAL RECORDS, 1, 3, 4, 5.

CHIEF OF NAVAL OPERATIONS.
1. **Court-martial order**—Recommendation published in. C. M. O. 41, 1915, 3; 26, 1916, 3; 27, 1916, 4.
2. **Commission for.** *See* COMMISSIONS, 25.

CHIEF OF STAFF.
1. **Title of**—"The title of Fleet Captain is changed to that of Chief of Staff." G. O. 122, April 26, 1869.

CHIEFS OF STAFF CORPS.
1. **Retirement of**—For abstract of laws relating to. *See* 14 J. A. G., 292, February 9, 1910.

CHIEF PAY CLERKS.
1. **Appointment of.** *See* PAY CLERKS AND CHIEF PAY CLERKS, 1-3.
2. **General court-martial**—Tried by. C. M. O. 46, 1915; 28, 1916; 36, 1916.

CHIEF PHARMACISTS. *See* PHARMACISTS AND CHIEF PHARMACISTS.

CHIEF PRINTERS.
1. **Rating**—Establishment of. *See* RATING, 2.

CHIEF SAILMAKERS.
1. **General court-martial**—Tried by. C. M. O. 73, 1901; 4, 1908.

CHIEF YEOMEN.
1. **Acting pay clerk**—Chief yeomen holding an acting appointment as such are eligible for appointment as acting pay clerks if otherwise eligible. *See* PAY CLERKS AND CHIEF PAY CLERKS, 2.

CHILEAN INDEMNITY FUND.
1. **U. S. S. "Baltimore"**—The sum of $75,000 was informally appropriated by Chile to be distributed among the crew of the U. S. S. *Baltimore* who received personal injuries at Valparaiso in October, 1891. The Secretary of the Navy undertook the distribution of this money. File 8635-1898; 8654-1898. *See also* An. Rep. J. A. G., 1894, p. 5.

CHINA CAMPAIGN. *See* CHINA CAMPAIGN BADGES; WAR, 7.

CHINA CAMPAIGN BADGES.
1. **Revocation of**—Where an enlisted man of the Marine Corps was discharged as "unfit for the service" in order that a life sentence of penal servitude, pursuant to conviction in a civil court on the charge of murder, might be carried into effect, an award of "the China and Philippine campaign badges for his services in those campaigns should be revoked." The authority to revoke under such circumstances in cases of enlisted men in the Marine Corps may be exercised by the Major General Commandant of the Marine Corps. File 26519-3:2, Sec. Navy, March 11, 1915, explaining file 26519-3, Sec. Navy, Dec. 1, 1914; C. M. O. 12, 1915, 8.

CHINAMEN.
1. **Citizenship of.** *See* CITIZENSHIP, 3-6, 11.

CHIROPODISTS.
1. **Law**—No law authorizing the employment of chiropodists in the Navy as such. File 26509-166, Sec. Navy, Aug. 14, 1916.

CIGARETTES.
1. **Smoked by officer of the deck.** *See* OFFICER-OF-THE-DECK, 3.

CIRCULARS OF THE DEPARTMENT.
1. **Civil courts**—Weight given to circulars of the department by civil courts. *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 20.
2. **Waiving of.** *See* ACTING ASSISTANT SURGEONS, 2.

Digitized by Google

CITIZENRY. *See* C. M. O. 14, 1915, 2.

CITIZENSHIP.

1. **Adoption.** *See* CITIZENSHIP, 34.
2. **Aliens**—Naturalization of alien enlisted men under act of June 30, 1914. (38 Stat., 395)—The naval appropriation act, approved June 30, 1914 (38 Stat., 395), provides, among other things, that enlisted men who hold an honorable discharge from the Navy or Marine Corps, or an ordinary discharge with recommendations for reenlistment, may upon application to a court of competent jurisdiction be immediately naturalized, if otherwise eligible, without previous declaration of intention to become a citizen and without proof of residence on shore. An alien who desires to become a citizen under this law should be advised to apply to the clerk of the nearest United States district court for the necessary papers, and any other information to enable him to become a citizen of the United States under the provisions of the above-mentioned law. File 26252-94, J. A. G., Dec. 30, 1914; C. M. O. 6, 1915, 7.
3. **Chinese**—The statutes of the United States with respect to naturalization authorize the naturalization only of white persons, or persons of African nativity or descent, or members of any Indian tribe or nation residing in the Indian Territory. Section 14 of the act of May 6, 1882 (22 Stat., 61), also specifically prohibits the naturalization of Chinese. The naturalization of Chinese and other Mongolians and of all persons not white, nor of African nativity or descent, nor an Indian as aforesaid, is void (*See* R. S. 2169; 26 Stat., 99, sec. 43; 5 Saw., 155; 16 Nev., 50, 61; 84 Cal., 163; 21 Pac Rep., 993; 149 U. S., 716; Instructions to the Dip. Ser. of the U. S., p. 53.)
4. **Same**—A person of the Chinese race, born in the United States of alien parents, subject to the jurisdiction of the United States, is a citizen of the United States by birth without regard to whether or not the laws permit the naturalization of persons of his race. *See* File 26252-68, June 19, 1912; 26252-100, June 1, 1915; 26252-84; 26252-100. *See also* U. S. *v.* LEN JIN, 192 Fed. Rep., 580.
5. **Same**—It is the practice of the Navy Department, where claimants to citizenship have submitted the best evidence they can obtain, after consideration of affidavits submitted by claimants, to refer the papers to the Department of Labor with request for a statement of such pertinent facts as it might be able to furnish. Then, when the papers are returned with additional information, it is usually possible to determine whether the evidence is sufficient to establish citizenship. File 26252-100, June 1, 1900.
6. **Same**—It is held by the Federal courts that in deportation proceedings the burden of proof is upon the Chinese person claiming to be a natural-born citizen and the United States is not bound to establish the contrary. *See* YEE GING *v.* U. S., 190 Fed. Rep., 270; act May 5, 1892, sec. 3, 27 Stat., 25; File 26252-68, J. A. G., June 19, 1912. *See also* PROMOTION, 19.
7. **Desertion**—Effect of conviction of desertion on rights of citizenship. *See* DESERTION, 23-29.
8. **Dishonorable discharge**—Effect on citizenship rights. *See* DISHONORABLE DISCHARGE, 5, 6.
9. **Enlisted men**—Naturalization of alien enlisted men under act June 30, 1914 (38 Stat., 395). *See* CITIZENSHIP, 2.
10. **Same**—Citizenship for pay purposes. File 26252-74, Sec. Navy, Apr. 14, 1913.
11. **Same**—Where the Bureau of Navigation decided, after consideration of all the evidence in the case, that a Chinaman who was an enlisted man in the Navy was a citizen of the United States, and changed his birthplace and citizenship on the department's records accordingly; and the Auditor for the Navy Department, upon a question of pay, decided after consideration of the same evidence, that it was not sufficient to establish the fact of his birth in the United States; it was held by the department that the decision of the accounting officers is not in any sense binding upon the department in its determination of the citizenship or identity of an enlisted man, and that no new evidence having been obtained, the decision of the Bureau of Navigation would not be reopened. File 26252-56, Feb. 1, 1910. Subsequently the Comptroller of the Treasury reversed the auditor's action upon consideration of the same evidence. Comp. Dec. Mar. 12, 1910, File 26254-424.
12. **Enlistments in the Navy**—Inasmuch as persons enlisting in the Navy are not required *by law* to be citizens of the United States, but the matter is merely one of regulation, it is unnecessary that the department should undertake to make any decision concerning the citizenship of men under unusual circumstances. File 26252-104, J. A. G., Apr. 25, 1916. *See also* File 26252-101, Sec. Navy, Nov. 6, 1915.

Digitized by Google

In considering the case of an applicant for enlistment whose citizenship status was doubtful it was said: "In the absence of a specific judicial decision on the subject this department does not feel warranted in extending the statute to include the case presented, the interpretation of statutes conferring citizenship being under the jurisdiction of the courts, whose decisions should be followed rather than anticipated by executive officers." File 26252-101, Sec. Navy, Nov. 6, 1915; 22252-104.

"Except as provided in article R-3527 (1) no person shall be enlisted or reenlisted who is not a citizen of the United States or a native of the insular possessions, and who does not understand and speak the English language." (Navy Regulations, 1913, R-3523 (5).) *See* File 26262-104, J. A. G., April 25, 1916. *See also* ALIENS, 12.

13. **Evidence of.** *See* Comp. Dec. Mar. 21, 1907 (73 S. & A. Memo. 265).
14. **Expatriation.** *See* CITIZENSHIP, 17; EXPATRIATION; RETIRED OFFICERS, 31.
15. **Filipinos.** *See* FILIPINOS.
16. **Foreign-born minor**—Child of alien parents—Mother divorced and married an American citizen. File 26252-101, Sec. Navy, Nov. 6, 1915.

Children born abroad of aliens, who subsequently emigrated to this country with their families, and were naturalized here during the minority of their children, are citizens of the United States. (10 Op. Atty. Gen., 329.) File 26252-62, J. A. G., July 12, 1911, p. 2. *See also* CITIZENSHIP, 25.

17. **Foreign country, living in**—A person who voluntarily takes up his residence in another country, contributing his labor, talents, or wealth to the support of society there, may be regarded as having waived his right of protection from his own country; and such facts may become material upon the question whether he has not expatriated himself and voluntarily relinquished his rights as a citizen of the United States. (*See* 3 Moore's Digest of International Law, pp. 759-760.) C. M. O. 29, 1915, pp. 10-11. *See also* EXPATRIATION, 2; RETIRED OFFICERS, 31.
18. **Same**—By the general law as well as by the decisions of the most enlightened judges both in England and in the United States a neutral engaged in business in an enemy's country during war is regarded as a citizen or subject of that country. C. M. O. 29, 1915, pp. 10-11. *See also* NEUTRAL, 1; RETIRED OFFICERS, 31.
19. **Forfeiture of citizenship.** *See* DESERTION, 23-29; DISHONORABLE DISCHARGE, 5, 6; CITIZENSHIP, 17, 18.
20. **Guam**—Inhabitants of Guam desiring to become citizens of the United States may become naturalized by application to a court of competent jurisdiction in the United States, but can not be naturalized by any court in Guam. File 26252-90, Feb. 27, 1914. *See also* File 26252-96, Feb. 10, 1915.
21. **Hawaii**—The citizens of Hawaii were made citizens of the United States by the act of April 30, 1900 (31 Stat., 141). *See in this connection* File 26252-111, J. A. G., Jan., 1917.

Laws bearing upon the question of citizenship of Hawaiians. *See* File 26254-610:1.

22. **Indians.** *See* INDIANS, 3, 4.
23. **Japanese**—An alien born abroad of Japanese parents is not eligible to become a naturalized citizen of the United States; and where a certificate of naturalization was issued such alien by a court of competent jurisdiction, such certificate is null and void and does not entitle him to the benefits of citizenship. File 26252, Apr. 9, 1908; 85 S. & A. Memo. 622.
24. **Midshipmen.** *See* MIDSHIPMEN, 8.
25. **Minor children**—The children of persons who have been naturalized under any law of the United States, being under the age of 21 at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof. (*See* R. S., 2172.) File 26252-62, J. A. G., July 12, 1911, p. 2. *See also* State *ex rel.* Carey *v.* Andriano (92 Mo., 70); Gumm *v.* Hubbard (97 Mo., 311); U. S. *v.* Kellar (13 Fed. Rep., 82-84). *See also* CITIZENSHIP, 16.
26. **Name misspelled in naturalization certificate**—This defect is not such as to invalidate naturalization (*see* U. S. *v.* ERICKSON, 188 Fed. Rep., 747). The spelling of the man's name in the certificate of naturalization should be regarded as erroneous, but not fatally defective, and the department's records correct. Accordingly in such a case a man may properly be regarded as a citizen of the United States, and the spelling of his name on the department's records need not be changed. File 24368-19, J. A. G., June 20, 1916.
27. **Officer**—Renouncing citizenship by resuming citizenship in a State of which he was formerly a citizen. *See* EXPATRIATION, 3; AN. REP., J. A. G., 1914, p. 24.
28. **Same**—Only a citizen may be an officer. File 26252-105, 105:1, J. A. G., June 10, 1916; 17606-49, J. A. G., Dec. 17, 1912; R-3301; R. S. 1428.
29. **Persons born in United States.** File 26252-89, J. A. G., Jan. 22, 1914. *See also* U. S. *v.* WONG KIM ARK, 169 U. S., 702; CITIZENSHIP, 4.

Digitized by Google

30. **Philippine Islands.** *See* FILIPINOS.
31. **Porto Rico**—A citizen of Porto Rico is not eligible for appointment as a second lieutenant in the Marine Corps. File 6730-04. *See also* DOWNES *v.* BIDWELL, 181 U. S., 244; MARINE CORPS, 68; PORTO RICO, 4.
32. **Same**—As to eligibility of citizens of Porto Rico for employment at navy yards. *See* File 3194-3 and 3194-4.
33. **Renouncing.** *See* EXPATRIATION, 2.
34. **Requirements for**—An enlisted man of the Navy was born in Canada of alien parents, and at the age of 18 was brought by his mother to the United States and was subsequently legally adopted by citizens of the United States. It did not appear that the man's father was ever fully naturalized in the United States, although it was stated that the father died after taking out his "declaration papers." It further appears that his mother is now a citizen of the United States. *Held*, A citizen of the United States can not by adopting a child of foreign nationality, confer on such child the privileges of citizenship in the United States. In order to determine whether or not this enlisted man is a citizen of the United States it must be shown positively, (1) whether or not his father was fully naturalized; (2) if his father was not fully naturalized then his citizenship depends upon whether his mother was lawfully naturalized before he became of age and if she did not become so naturalized before he attained his majority, he is not a citizen of the United States unless he can produce a valid certificate of naturalization. File 26252-62, J. A. G., July 12, 1911. *See also* File 1547-26-32, for the naturalization laws relating to Navy.
35. **Residence abroad.** *See* CITIZENSHIP, 17, 18; EXPATRIATION, 2; RETIRED OFFICERS, 31.
36. **Restoration of rights of citizenship**—To deserter by pardon. *See* DESERTERS, 17-20; DESERTION, 41; PARDON, 2, 11, 37, 39, 52.
37. **Restoration to duty**—Of deserter—Effect of, on citizenship. *See* DESERTERS, 24.
38. **Retired officers**—Living abroad indefinitely. *See* RETIRED OFFICERS, 32.
39. **Widow**—The naturalization of an alien woman, a widow, confers citizenship upon her minor son. (Van Dyne's "Citizenship," p. 118, referring to R. S. 2172). File 26252-62, J. A. G., July 12, 1911, p. 3.
40. **Wife**—Citizenship of. *See* File 26252-62, J. A. G., July 12, 1911, p. 3.

CIVIL ACTIONS.

1. **Liability of officers and enlisted men to.** *See* LEGAL LIABILITY; MEMBERS OF COURTS-MARTIAL, 7; SECRETARY OF THE NAVY, 1.

CIVIL AUTHORITIES. *See also* GENERAL ORDER NO. 121, September 17, 1914.

1. **Action by commanding officers**—Where men convicted by the civil authorities. *See* GENERAL ORDER NO. 121, Sept. 17, 1914, 1, 2, 4-6.
2. **Agreement**—Required of State authorities. *See* GENERAL ORDER NO. 121, Sept. 17, 1914, 1.
3. **Same**—Not required of Federal authorities. *See* GENERAL ORDER NO. 121, Sept. 17, 1914, 2.
4. **Arrest and acquittal by civil authorities**—Is a defense to unauthorized absence but otherwise if convicted. *See* ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED, 3.
5. **Arrest of deserters by civil authorities.** *See* CIVIL OFFICERS, 2; DESERTERS, 2-6.
6. **Bail**—If enlisted man arrested by civil authorites and returns to ship on bail, the commanding officer may grant him leave of absence to appear for trial. *See* BAIL, 1; GENERAL ORDER NO. 121, Sept. 17, 1914, 14; JURISDICTION, 8.
7. **Same**—Pay. *See* BAIL, 2.
8. **Comity between civil and naval authorities**—It is the practice of this department to cooperate to the fullest extent with the civil authorities, both Federal and State, where demand is made for the surrender to them of any person in the naval service who is charged by either of said authorities with crime. To that end the department has issued elaborate instructions on the subject (G. O. 121, Sept. 17, 1914), and in proper cases surrender of the person requested is invariably made upon compliance by the civil authorities with certain conditions exacted by the Secretary of the Navy in the general order cited. The department in some instances has returned parole violators, and assisted in the identification of escaped convicts, who, of course, are very undesirable for the naval service. The civil authorities generally have become very familiar with the department's practice, and in most cases willingly meet the department's demands. On the other hand, where enlisted persons in the naval service are arrested by the civil authorities while away from their commands, the State authorities in many cases, as a matter of comity, inform the accused's commanding officer, and in some instances men

Digitized by Google

have been released and turned over to the custody of their commanding officer until their appearance is desired in the civil court. File 26524-209, Sec. Navy, Dec. 13, 1915.

It is the department's policy and purpose to cooperate with the civil authorities to the fullest extent in proper cases, and upon identification and compliance by the civil authorities with the conditions enacted in General Order No. 121 the men desired are promptly surrendered to the civil authorities, who have become very familiar with the department's practice on the subject. File 26524-207, J. A. G., Nov. 20, 1915.

"It is the policy of the Navy Department at all times to cooperate with the civil authorities, both Federal and State, and not in any manner where it can be avoided to interpose any obstacle to the due course of civil or criminal proceedings." File 26524-275:5, J. A. G., Aug. 8, 1916. *See also* CIVIL AUTHORITIES, 16.

9. **Commanding officer**—Duty of, when civil authorities request delivery of an enlisted man. *See* GENERAL ORDER No. 121, Sept. 17, 1914, 4.
10. **Same**—Arrested by—Should report his whereabouts to proper authorities. *See* ARREST, 7; COMMANDING OFFICERS, 2.
11. **Contempt of court**—An enlisted man was delivered to civil authorities, on proper request being made, for having been "adjudged in contempt of court by the Supreme Court of New York for having failed to make a return to a writ of habeas corpus requiring the production of his infant child before said court," etc. File 26524-191, J. A. G., Oct. 19, 1915.
12. **Convicts**—And fugitives from justice discharged as undesirable—In a case where a request was made upon the Navy Department by the civil authorities for delivery of an enlisted man, the department stated as follows:

"It being established by the foregoing that the above-named man was a convicted criminal and fugitive from justice at the time of his enlistment in the Navy, it is directed that instructions be issued immediately for his discharge from the Navy as undesirable, but that said discharge be held in abeyance until such time as a civil officer may call at the Naval Training Station, Great Lakes, Ill., to apprehend him under the requisition of the governor of Pennsylvania, in order that he may be taken into custody by such officer immediately upon his discharge." File 26524-194, Sec. Navy, Oct. 18, 1915; C. M. O. 35, 1915, 8. *See also* CONVICTS, 2; FUGITIVE FROM JUSTICE.

13. **Cooperation**—Of department with civil authorities. *See* CIVIL AUTHORITIES, 8, 16.
14. **Date**—Fixed for trial of enlisted men desired by civil authorities should be shown in requisition papers. File 26524-259, Sec. Navy, Apr. 18, 1916.
15. **Delivery of men to civil authorities**—Duties of commanding officers. *See* GENERAL ORDER No. 121, Sept. 17, 1914, 4.
16. **Department**—Desires to cooperate with civil authorities—The department desires in every way to cooperate with the civil authorities, but where the civil authorities requested that an enlisted man of the Hospital Corps on duty at a naval station in Cuba be transferred to the United States in order that he might be taken in custody upon bench warrant and certified copy of indictment for trial by the civil authorities, for an offense which is in practice punished by a nominal punishment such as a small fine, the department regretfully declined to do so. Such transfer would necessitate sending a relief for the man, and the action requested would in effect amount to granting the man a leave of absence and visit home at a nominal cost if convicted, and would fail of its purpose as a punitive proceeding. Also men under orders to undesirable duty outside the United States might deliberately avail themselves of the precedent which would be established in this case in order collusively to secure their return after a short tour of duty abroad. File 26524-181:1, Sec. Navy, Oct. 19, 1915; C. M. O. 35, 1915, 8.

In this case the Department of Justice made a further request, stating facts which presented an "exceptional" and "aggravated" case, for which if convicted it would be within the power of the court to impose a sentence of one year's imprisonment. Under these circumstances the department issued the necessary directions to deliver this man to the civil authorities for trial. File 26524-181:2, Sec. Navy, Nov. 1, 1915; C. M. O. 42, 1915, 9. *See also* File 26524-144:4, Sec. Navy, July 8, 1915; CIVIL AUTHORITIES, 8.

17. **Deserters**—Arrest by civil authorities. *See* DESERTERS, 2-6.

Application of the provisions of General Order No. 110. *See* GENERAL ORDER No. 110, July 27, 1914, 20.

Warrant officer (a deserter) apprehended by civil authorities. *See* CIVIL AUTHORITIES, 49.

18. **Enlisted men, delivery to.** C. M. O. 10, 1915, 7; 22, 1915, 6; 27, 1915, 7; 29, 1915, 7; 31, 1915, 5; 35, 1915, 8; 42, 1915, 9. *See also* GENERAL ORDER No. 121, Sept. 17, 1914.

Digitized by Google

19. **Same**—There is no law which relates to the delivery of enlisted men in the naval service to civil authorities, Federal or State, but, as held by the Attorney General, it rests entirely in the discretion of the President in what cases and upon what conditions persons in the Navy shall be so delivered. File 26524-259:1, Sec. Navy, Apr. 25, 1916.
20. **Expedition**—The office of the Judge Advocate General makes every effort to expedite action in cases coming under G. O. 121 in order to avoid friction with the civil authorities, and thereby jeopardize the system embodied in that general order. File 26524-186, J. A. G., Oct. 21, 29, 1915. *See also* CIVIL AUTHORITIES, 29.
21. **Extradition.** *See* CIVIL AUTHORITIES, 8, 16, 42; GENERAL ORDER No. 121, Sept. 17, 1914, 10.
22. **Fugitive from justice**—Discharged as undesirable. *See* CIVIL AUTHORITIES, 12; CONVICTS, 2.
23. **General Order No. 110**—Application of provisions of, to deserters. *See* CIVIL AUTHORITIES, 17; GENERAL ORDER No. 110, July 27, 1914, 20
24. **General Order No. 121**—Exact compliance with directed. *See* GENERAL ORDER No. 121, Sept. 17, 1914, 6.
25. **Governor's requisition**—Necessary in certain cases. *See* GENERAL ORDER No. 121, Sept. 17, 1914, 10.
26. **Habeas corpus proceedings**—Federal courts. *See* GENERAL ORDER No. 121, Sept. 17, 1914, 11.
27. **Same**—State courts. *See* GENERAL ORDER No. 121, Sept. 17, 1914, 12.
28. **Hawaii**—Application of G. O. 121. *See* GENERAL ORDER No. 121, Sept. 17, 1914, 13.
29. **Judge Advocate General's Office**—Delay in civil authorities cases reaching the office. File 12475-73, J. A. G., Mar. 16, 1916. *See also* CIVIL AUTHORITIES, 20.
30. **Las Animas.** File 26524-68, J. A. G., July 25, 1914; 26524-75, Aug. 28, 1914.
31. **Leave of absence**—May be granted by commanding officer to an enlisted man who returns to ship on bail. *See* GENERAL ORDER No. 121, Sept. 17, 1914, 14.
32. **Man in hands of**—Should inform naval authorities. C. M. O. 14, 1914, 4.
33. **Officers arrested by.** C. M. O. 24, 1886; 10, 1909; 7, 1914; 19, 1915, 1, 9; G. C. M. Rec. 31509.
34. **Officer in hands of**—Should report his whereabouts to proper authorities. C. M. O. 19, 1915, 9. *See also* COMMANDING OFFICERS, 2.
35. **Panama**—Application of G. O. 121. *See* GENERAL ORDER No. 121, Sept. 17, 1914, 17.
36. **Parole violators**—Where the civil authorities requested that an enlisted man be turned over to them, as he was a "parole violator," it was directed that he be "discharged from the Navy as undesirable and turned over to a representative" of a certain State reformatory, which institution had been requested to call for him as soon as practicable. File 7657-290:2, Sec. Navy, June 7, 1915; C. M. O. 22, 1915, 6. *See also* File 26524-319, J. A. G., Nov. 17, 1916; CIVIL AUTHORITIES, 8
37. **Prisoners, naval**—Wanted by civil authorities for trial. *See* GENERAL ORDER No. 121, Sept. 17, 1914, 15, 16.
38. **Same**—Wanted as witnesses or parties in civil courts. File 26524-117, J. A. G., Dec. 28, 1915. *See also* GENERAL ORDER No. 121, Sept. 17, 1914, 15, 16, 23.
39. **Process, service by**—Upon court-martial prisoners. *See* GENERAL ORDER No. 121, Sept. 17, 1914, 15, 16.
40. **Records**—Production of records of Navy Department in civil courts. *See* CIVIL COURTS, 2; COURTS OF INQUIRY, 12; GENERAL ORDER No. 121, Sept. 17, 1914, 23.
41. **Same**—Preliminary examination of records. *See* GENERAL ORDER No. 121, Sept. 17, 1914, 23.
42. **Request of civil authorities**—To bring enlisted man into jurisdiction denied—An attorney representing a civilian in divorce proceedings against his wife requested the department to require a certain enlisted man who was named as corespondent serving on board a cruising vessel of the Navy to come to Washington, D. C., and submit to the jurisdiction of the civil court in the District of Columbia, "by permitting personal service of subpœna upon him." *Held*, That it would be contrary to the department's policy to require this enlisted man to come to Washington for the purpose of submitting to the jurisdiction of the civil court, and he must be considered in the same status as witnesses who are desired in private litigation, and who are beyond the jurisdiction of the court in which such litigation is pending. Accordingly, the above request was denied and attention invited to General Order No. 121, par. 18(a). File 26276-112, Sec. Navy, Sept. 16, 1915; C. M. O. 31, 1915, 5.
43. **Requisition of Governor**—Necessary in certain cases. *See* GENERAL ORDER No. 121, Sept. 17, 1914, 10.

Digitized by Google

44. **Samoa**—Application of G. O. 121. *See* GENERAL ORDER No. 121, Sept. 17, 1914, 22.
45. **Subpoenas**—Service of subpoenas by civil authorities on persons in the naval service *See* GENERAL ORDER No. 121, Sept. 17, 1914, 23.
46. **Trial**—Date fixed for trial of enlisted men desired by civil authorities should be shown in requisition. File 26524-259, Sec. Navy, Apr. 18, 1916.
47. **Unjustifiable arrest of a petty officer.** *See* ARREST, 37. *See* File 7657-374:1, Sec. Navy, July 10, 1916, where a police brutally assaulted enlisted men in arresting them without apparent cause.
48. **Unusual circumstances**—In a recent case it developed, after a man had been delivered to the civil authorities, that there were certain unusual circumstances and irregular proceedings connected with the efforts of the civil authorities to secure the delivery of the man, which should have been communicated to the department at the time telegraphic instructions were requested. It is possible that, had the department been fully informed thereof at the time, the delivery of the man to the civil authorities might not have been authorized, at least pending correspondence with the State authorities. File 26524-157:1, Sec. Navy, July 3, 1915; C. M. O. 27, 1915, 7.
49. **Warrant officer (machinist)**—Continued in "Desertion" until delivered by the civil authorities. C. M. O. 17, 1911.
50. **Witnesses**—Enlisted men in naval service desired by civil authorities as witnesses. C. M. O. 31, 1915, 5. *See also* CIVIL AUTHORITIES, 42.
51. **Same**—Enlisted man on duty in Haiti—Department regretfully declined to comply with request of civil authorities. File 26276-126, Sec. Navy, Nov. 27, 1915.
52. **Same**—Prisoners wanted by civil authorities as witnesses. *See* GENERAL ORDER, No. 121, Sept. 17, 1914, 15.

CIVIL COURTS.

1. **Confinement**—By order of civil courts. *See* CONFINEMENT, 6.
2. **Copies**—Of records, documents, etc., furnished on call of—It is the invariable practice of this department to decline to furnish in the case of legal controversies, at the request of the parties litigant, copies of papers or other information to be used in the course of the proceedings; but the department will promptly furnish copies of papers or records in such cases upon call of the court before which the litigation is pending. File 12475-53:1, Sec. Navy, Jan. 30, 1915; letter of Atty. Gen. Jan. 18, 1915, file 12475-53:1. (*See also* G. O. No. 121.) C. M. O. 6, 1915, 8. *See also* File 12475-46, Sec. Navy, July 12, 1913; 26250-839:2, Sec. Navy, Sept. 27, 1916; 26250-839:4, Sec. Navy, Oct. 9, 1916; COURTS OF INQUIRY, 12; GENERAL ORDER No. 121, Sept. 17, 1914, 23; RECORDS OF OFFICERS, 9.
3. **Court of inquiry record**—Copy of requested by civil courts. *See* COURTS OF INQUIRY, 12.
4. **Enlistment of criminals**—To escape prosecution.—*See* CONVICTS, 2, 3; ENLISTMENTS, 5.
5. **Error of procedure**——By naval courts-martial—Can not be reviewed by civil courts *See* JURISDICTION, 18, 26-28, 35, 37, 39.
6. **Fraudulent enlistment**—Of minor—Civil courts will not discharge. *See* FRAUDULENT ENLISTMENT, 57, 58, 59.
7. **Litigation in civil courts**—It is a policy of the department of long standing not to act upon any matters which have been actually presented to the civil courts for adjudication, pending the results of such suits. This policy applied to case where complaint of nonsupport is made against an officer who has instituted divorce proceedings against complainant. File 28478-22:1, Sec. Navy, Apr. 30, 1915; C. M. O. 16, 1915, 5.
8. **Same**—Failure of husband to contribute to wife's support—In a case where a wife of enlisted man appealed to department it was "suggested that your redress lies in the civil courts." (*See* G. O. 121, par. 14.) File 26524-214, Sec. Navy, Dec. 8, 1915.
9. **Matters presented to**—Department's policy outlined. *See* CIVIL COURTS, 7, 8.
10. **Procedure**—Errors of proceedure of naval courts-martial can not be reviewed by civil courts. *See* JURISDICTION, 18, 26-28, 35, 37, 39.
11. **Records**—Papers and information for use in civil courts furnished only upon call of court. *See* CIVIL COURTS, 2; COURTS OF INQUIRY, 12; GENERAL ORDER No. 121, Sept. 17, 1914, 23; RECORDS OF OFFICERS, 9.
12. **Reviewing court-martial trials.** *See* JURISDICTION, 18, 26-39.
13. **Sufficiency of charges and specifications**—Can not be reviewed by the civil courts. (Ex parte Dickey, 204 Fed. Rep., 372.) *See* JURISDICTION, 28, 36, 37, 39.
14. **Supreme court**—Of the District of Columbia. C. M. O. 49, 1915, 23.
15. **United States a party**—Advancement of case on the docket. File 26266-161:4, Sec. Navy, Dec. 19, 1912.

Digitized by Google

16. **United States district courts.** C. M. O. 6, 1915, 7; 31, 1915, 7.

CIVIL DISABILITIES. C. M. O 36, 1901, 2. *See also* DESERTION, 23-29; DISHONORABLE DISCHARGE, 5, 6.

CIVIL EMPLOYEES.
1. **Criticism or commendation**—By the Secretary of the Navy. *See* COMMENDATORY LETTERS, 2. *See also* PUBLIC REPRIMAND; REPRIMAND, 10; SECRETARY OF THE NAVY, 63.
2. **Jury duty.** *See* File 21090-3; 20 Op. Atty. Gen., 618. *See also* JURY, 1.
3. **Leave of absence**—Without pay. *See* LEAVE OF ABSENCE, 2, 13.
4. **Retired enlisted men.** *See* RETIRED ENLISTED MEN, 3.
5. **Vaccination.** *See* VACCINATION.

CIVIL ENGINEER CORPS.
1. **Promotions**—Due to retirement of Civil Engineer Peary. *See* APPOINTMENTS, 13.
2. **Status.** *See* G. O. 274, Nov. 1, 1881.

CIVIL LIABILITY. *See* LEGAL LIABILITY.

CIVIL LIFE.
1. **Appointment as naval officer from**—Constructive service for. *See* CONSTRUCTIVE SERVICE, 1.
2. **Clemency**—Extended because officer having been appointed from civil life had been in service only two weeks. C. M. O. 59, 1904, 2. *See also* CLEMENCY, 10.
3. **Marine officers.** *See* APPOINTMENTS, 20.

CIVIL OFFICE OR EMPLOYMENT.
1. **Enlisted men, retired.** *See* RETIRED ENLISTED MEN.
2. **Officers, retired.** *See* RETIRED OFFICERS.

CIVIL OFFICERS.
1. **Certificates of**—As evidence. C. M. O. 37, 1909, 8; 47, 1910, 4; 1, 1911, 4. *See also* CERTIFICATES, 3, 4, 5.
2. **Definition**—A "pursuer" of a detective agency incorporated under the laws of New Jersey, while not a "civil officer," in the strict sense, is, nevertheless, such a person as contemplated by the act of February 16, 1909 (35 Stat., 621), and therefore entitled to make arrests of deserters. File 26516-38, J. A. G., Dec. 3, 1910, p. 6. *See also* DESERTERS, 2-6.

CIVIL RESPONSIBILITY. *See* LEGAL LIABILITY.

CIVIL RIGHTS. *See* DESERTERS, 13, 14, 17-24; DESERTION, 23-29; DISHONORABLE DISCHARGE, 5, 6.

CIVIL SERVICE.
1. **Civil service act.** *See* CIVIL SERVICE ACT.
2. **Retired enlisted men.** *See* RETIRED ENLISTED MEN, 3.
3. **Retired officer**—Taking examination and accepting a clerical position. *See* RETIRED OFFICERS, 9.

CIVIL SERVICE ACT.
1. **Appointments under**—The Attorney General has held it to be the function and duty of the Civil Service Commission to determine the eligibility of appointees to positions, rather than the officers making the appointments. File 5252-32, J. A. G., Jan. 26, 1910, p. 5.

CIVIL WAR. *See* CIVIL WAR SERVICE; MARK OF DESERTION, 1; NAME, CHANGE OF, 16.

CIVIL WAR CASES.
1. **Removal of mark of desertion.** *See* MARK OF DESERTION, 1, 9.

CIVIL WAR SERVICE.
1. **Certificate of discharge**—Where records show that an enlisted man was appointed an acting third assistant engineer without being discharged from his enlistment, and that he served continuously as such enlisted man and acting officer until discharged from the Navy: *Held*, That a certificate of discharge should not be granted from his enlistment, as a statement of the man's service, as shown by the department's records, is all that is required by the Pension Office in acting upon claims for pensions. The former policy of fixing a fictitious date of discharge and issuing a certificate in cases of this character discontinued. File 26539-481.

Digitized by Google

2. **Chiefs of bureaus**—Retired after Civil War service. *See* BUREAU CHIEFS, 8, 10.
3. **Naval Academy**—A retired naval officer was a student at the Naval Academy during the Civil War; on January 7, 1907, the Court of Claims decided that he was entitled to retirement with the rank and pay of the next higher grade under section 11 of the personnel act (30 Stat., 1007), from which decision no appeal was taken by the Government; on April 20, 1908, in another case, the Court of Claims held that an officer of the Navy who was a student at the Naval Academy during the Civil War was not entitled to the benefits of section 11. Under these circumstances, *advised* that the first-mentioned officer be not given the rank or rear admiral on the retired list. File 27231–8, J. A. G., Jan. 25, 1910. *See also* File 19245–43, J. A. G., Mar. 7, 1912; MOSER *v* U. S., Ct. Cls., 86; U. S. *v* JASPER, 38 Ct. Cls., 202, 40 Ct. Cls., 76, 43 Ct. Cls., 368.
4. **Official records**—*Advised*; That the service of a certain officer during the Civil War, except under his first appointment on board the U. S. S. *Rhode Island*, was as an acting assistant paymaster; that it is contrary to the policy of the department to alter official records; but that there would be no objection to placing the papers embodying this officer's claim with the other papers relating to his case in the files of the department. File 26510–225:1, J. A. G., June 10, 1911. *See also* RECORDS OF THE DEPARTMENT, 4.
5. **Retired officer advanced for Civil War service**—The Army practice has been to *not* commission anew those officers on the retired list who were advanced in rank therefor by the act of April 23, 1904 (33 Stat., 264). The naval practice has been the same since the passage of the act of June 29, 1906. File 26509–33, J. A. G., March 24, 1910, p. 3. The department has held that such officer receives the rank and three-quarters pay of the higher grade, but there is no change in the officer's *grade*. File 26509–33, J. A. G., March 24, 1910, p. 4. The Personnel Act (Mar. 3, 1899, 30 Stat., 1007) provides that officers having had Civil War service may be commissioned without the consent of the Senate. The act of June 29, 1906 (34 Stat., 554), as amended by the act of March 3, 1909 (35 Stat., 753), applies practically to only such officers as were retired prior to March 3, 1899. File 26509–33, J. A. G., March 24, 1910, p. 4. For purposes of retirement in next higher grade, student service at the Naval Academy during the Civil War does not count as service. File 19245–43, J. A. G., March 7, 1912.
6. **Same**—A retired officer of the Navy claimed the rank of the next higher grade on account of Civil War service, under section 11 of the act of March 3, 1899 (30 Stat., 1007), as amended by the act of June 29, 1906 (34 Stat., 554). While the records of the Navy Department did not disclose the service claimed, neither was there any evidence at hand to rebut the evidence offered by the claimant; in order that no injustice might be done the Secretary of the Navy referred the case to the Court of Claims for its finding of facts and conclusion of law. The court first found against the claimant, but new evidence being adduced set aside its former findings and reported that claimant had rendered the service claimed and was entitled to the rank of the next higher grade. *Held*, that, in the absence of evidence to the contrary, the findings and conclusion of the Court of Claims should be treated as final (Berger *v* U. S., 36 Ct. Cls., 243), and the necessary steps should be taken without delay to give claimant the advancement to which it now appears he is entitled. File 26266–311, J. A. G., Feb. 25, 1915; C. M. O. 10, 1915, 13.

CIVILIANS.

1. **Desertion**—Civilians aiding enlisted men of the naval service to desert. *See* DESERTION, 12.
2. **Military commissions**—Trial by. *See* MILITARY COMMISSIONS, 1.
3. **Retired list of officers**—A civilian can not be appointed to the retired list. File 27231–67, J. A. G., Aug. 20, 1915.

CIVILIAN COAL HANDLER.

1. **Death of**—Court of inquiry record—Where sent. Ct. Inq. Rec. 6196.

CIVILIAN COUNSEL. *See* COUNSEL, 15, 16.

CIVILIAN DENTIST AT THE NAVAL ACADEMY. *See* DENTAL SURGEONS, 7.

CIVILIAN OUTFITS.

1. **Prisoners**—On discharge. *See* PRISONERS, 6.

CIVILIAN WITNESSES. *See* WITNESSES, 25–27.

Digitized by Google

CLAIMS. *See also* CLAIMS AGAINST THE UNITED STATES.
1. **Against the Government.** *See* CLAIMS AGAINST THE UNITED STATES.
2. **Household goods**—Where an officer accepts free transportation of his household goods offered by the Government, he assumes any risks involved; the Government does not become an insurer, being a "carrier without hire." File 5459, Sec. Navy, Jan. 8, 1907.
3. **Influencing legislation**—Attorney's claim for fees. *See* DEBTS, 18; LEGISLATION, 2.
4. **Limitations upon claims.** *See* File 9410; 2527–1903; 1370–1903.
5. **Officers, against**—The department will not in any manner lend its aid to the enforcement of any claim against an officer which may be based in whole or in part upon services real or supposed alleged to have been rendered in violation of Navy Regulations, 1913, R–1517. File 13673–3192, Sec. Navy, Nov. 11, 1914.
6. **Payment of**—Authority to make. *See* AUDITOR FOR THE NAVY DEPARTMENT, 5.
7. **Reimbursement.** File 4753–95.

CLAIMS AGAINST THE UNITED STATES. *See also* CLAIMS.
1. **Call for evidence**—By Court of Claims. *See* COURT OF CLAIMS, 1, 3.
2. **Officers' official duties**—Section 5498, Revised Statutes, prohibiting officers of the Government to act as attorneys for claimants or assist them in any manner in the prosecution of their claims against the Government, has no application to any action that may be taken by an officer "in discharge of his proper official duties." Therefore, *advised*, that the action of the Bureau of Navigation in furnishing extracts from records of enlisted men to the Commonwealth of Massachusetts is not in conflict with the above section of the Revised Statutes, even though such information may be indirectly obtained by claimants in connection with applications for pensions. It is a question whether the Bureau of Navigation should continue to furnish such information in view of the uses made thereof by the Adjutant General's Department of Massachusetts. File 16881–2, Sec. Navy, Mar. 30, 1910.
3. **Officer preparing arguments for an allottee**—It is not part of the official duty of a pay officer in the Navy to prepare arguments in support of claim of allottee of an enlisted man and such action is expressly prohibited under penalty of fine and imprisonment by section 5498 of the Revised Statutes. File 26254–419, Sec. Navy, May 10, 1910. *See also* CAPT. TYLER'S MOTION, 18 Ct. Cls., 25; 16 Op. Atty. Gen., 478.
4. **Officer voluntarily paying obligation of United States**—A naval militia officer who voluntarily pays an obligation of the United States is not entitled to reimbursement from the Government. (Comp. Dec., Feb. 17, 1915, Appeal No. 24365, file 26254–1709.) In a reconsideration in this case May 22, 1915, it was held that, owing to exceptional circumstances, reimbursement should be allowed, applying 18 Comp. Dec., 299. *See also* 4 Comp. Dec., 409; 6 Comp. Dec., 594; 8 Comp. Dec., 584; 11 Comp. Dec., 486; 12 Comp. Dec., 48.

CLASSIFICATION TABLES. *See* REDUCTION IN RATING, 42.

CLEARED COURT. *See* COURT, 16, 20–26, 126–128.

CLEMENCY.
1. **Accused**—Copy of record given to accused should not contain the recommendation to clemency. Accused may obtain such from the department after final action. File 26504–96. *See also* CLEMENCY, 47.
2. **Additional evidence**—Warranting exercise of. File 26251–7219; G. C. M. Rec. 26427.
3. **Affidavits**—The admission of an *ex parte* affidavit favorable to the accused does not invalidate the proceedings, and is no ground for clemency by the department; but otherwise if the affidavit is against the accused. File 1009–94. *See also* AFFIDAVITS, 1.
4. **Aptitude for the service.** C. M. O. 58, 1892.
5. **American Indian**—Clemency extended because the accused was a full-blooded American Indian. C. M. O. 114, 1903, 4. *See also* INDIANS, 2.
6. **Assault, jocular**—An assault in "jest" by the person committing the assault does not relieve that person from guilt of the offense of "assault" but may be considered as ground for recommendation to clemency. C. M. O. 8, 1911, 7. *See also* ASSAULT, 9.
7. **Business procedure**—Clemency granted because of lack of knowledge of business procedure. C. M. O. 23, 1909.
8. **Character, good or excellent**—Clemency recommended because of excellent character. C. M. O. 96, 1895, 2; 104, 1895; 44, 1915.
9. **Circumstances of the case.** C. M. O. 61, 1893; 80, 1894, 2; 59, 1904, 2; 12, 1911, 5.
10. **Civil life**—In view of certain circumstances developed by the testimony adduced; and in consideration particularly of the fact that the accused was appointed as an

Digitized by Google

officer from civil life, having been in the service, at the time of the occurrence, only about two weeks, favorable action was taken upon the recommendation to clemency, and the sentence was mitigated. This lenient action was taken by the department in the belief that at a time when the accused had enjoyed but little opportunity to become acquainted with the obligations, customs, and traditions of the service, he was betrayed, in a moment of heedlessness, into conduct which his sober judgment would unqualifiedly condemn. C. M. O. 59, 1904, 2. *See also* C. M. O. 31, 1887, 2.

11. **Commendatory letters.** C. M. O. 54, 1892; 69, 1903, 2; 118, 1905. *See also* COMMENDATORY LETTERS, 1; EVIDENCE, 19.
12. **Copy of record**—Given accused should not contain recommendation to clemency. *See* CLEMENCY, 1, 47.
13. **Courts-martial**—The law imposes on courts-martial duty to adjudge adequate sentences in cases of convictions, and where a court-martial adjudges a lenient sentence it encroaches upon the prerogatives of the reviewing authority by exercising clemency, as this power is vested by law, not in courts-martial, but in the reviewing authority. If the members of a court-martial consider that the circumstances in the case justify the exercise of clemency, their duty in the matter is limited by law to signing an appropriate recommendation to the revising power, stating on the record their reasons for so doing (A. G. N. 51). *See* ADEQUATE SENTENCES, 4–19; COURT, 17.
14. **Same**—A recommendation to clemency is not an action by the court as a body, but by the individual members thereof. *See* CLEMENCY, 35.
15. **Denied**—Despite unanimous recommendation of members. C. M. O. 37, 1915, 1, 8–9; 10, 1916; 20, 1916; 1, 1917.

"While it is customary to observe a recommendation of this character, such course is not invariably pursued." File 6465–03, J. A. G., 1903, pp. 11–12.

16. **Department**—Exercised clemency in accordance with recommendation of members of court. C. M. O. 2, 1887; 36, 1888; 38, 1888; 50, 1889; 60, 1889; 66, 1889; 4, 1890; 38, 1890; 52, 1890; 56, 1890; 65, 1890; 25, 1909; 42, 1909; 12, 1911, 5; 19, 1912, 5; 21, 1912, 4; 17, 1915; 23, 1915, 1, 3; 25, 1915, 3; 26, 1915.

In view of the recommendation to clemency signed by *one* member the dishonorable discharge was held in abeyance. C. M. O. 1, 1906, 2.

"In accordance with the recommendation of the Bureau of Navigation, the recommendation to clemency *is disapproved*." C. M. O. 19, 1916, 3.

17. **Dictate or suggest**—A recommendation to clemency should not assume to dictate, or to suggest, to the reviewing authority what mode or measure of clemency will properly be resorted to in the case, such as recommending that the sentence of the accused "be suspended during good behavior until the expiration of said sentence, and that in the meantime the accused be restored to duty." C. M. O. 19, 1912, 5.
18. **Drunkenness, voluntary**—"Voluntary drunkenness does not afford any reasonable or good ground for the exercise of clemency." C. M. O. 8, 1911, 6.
19. **Same**—Incapacity of accused due in part to physical incapacity—Not sufficient basis for exercise of clemency. *See* DRUNKENNESS, 84.
20. **Evidence in extenuation**—The department disapproved the case where the evidence in extenuation was inconsistent with the plea of "guilty" and a recommendation to clemency "in consideration of the evidence adduced in extenuation" was made by the members. C. M. O. 10, 1912, 4–5. *See also* EVIDENCE, 51.
21. **Filipino**—Clemency recommended because accused was a Filipino. *See* CODE OF ETHICS.
22. **Finding**—Recommendations to clemency should not be inconsistent with the findings of the court. C. M. O. 49, 1910, 17; 21, 1910, 4–6; 30, 1910, 5; 5, 1911, 4. *See also* FINDINGS, 53.
23. **Form**—The proper form for a recommendation to clemency is: "In consideration of ..... we recommend * * *."

In one case the members of a general court-martial signed a recommendation to "mercy." G. O. 52, Apr. 15, 1865.

24. **Gravity of offense**—Accused not understanding. C. M. O. 23, 1894, 2; 78, 1894, 2.
25. **Inconsistent**—Recommendation should not be inconsistent with findings or plea of "guilty" of accused. *See* CLEMENCY, 20, 22; FINDINGS, 53; INSANITY, 38.
26. **Indian, American**—Clemency extended because accused was a full-blooded American Indian. C. M. O. 114, 1903, 4. *See also* INDIANS, 2.
27. **Inexperience**—As a grounds for clemency. C. M. O. 67, 1892, 2; 41, 1893; 87, 1893; 94, 1893; 26, 1894; 63, 1894; 28, 1895, 2; 92, 1895; 93, 1895; 102, 1896; 112, 1899; 59, 1904, 2; 23, 1909; 25, 1909; 7, 1911, 13; 33, 1913; 37, 1915, 1, 8–9.

Digitized by Google

28. **Insanity.** *See* FINDINGS, 55; INSANITY, 3–6.
29. **Limited service**—Since graduation from Naval Academy. C. M. O. 41, 1891, 3.
30. **Long service**—As grounds for clemency. C. M. O. 1, 1893, 3; 60, 1893; 32, 1894, 3; 122, 1897, 2. *See also* C. M. O. 20, 1916.
31. **Long time in confinement**—Awaiting trial. C. M. O. 52, 1889; 30, 1892; 85, 1893. *See also* C. M. O. 28, 1916.
32. **Low order of intelligence**—Displayed by accused on witness stand. C. M. O. 224, 1902.
33. **Marital difficulties.** C. M. O. 1, 1916, 1.
34. **Medal of honor**—Grounds for clemency. C. M. O. 2, 1902; 118, 1905. *See also* C. M. O. 34, 1916; File 26251–12117, Sec. Navy, Sept., 1916. *See also* EVIDENCE, 19.
35. **Members**—A recommendation to clemency is not an action by the court as a body, but by the individual members thereof, and it should not be stated in the record that, "the court recommends," but that "We recommend." C. M. O. 21, 1910, 5; 28, 1910, 4; 21, 1912, 4; 21, 1917. *See also* C. M. O. 4, 1913, 53. *But see* C. M. O. 56, 1901; 3, 1908, 2; 23, 1909; 49, 1910, 13; 10, 1916, 2; 11, 1916, 2, which are in error.
Members should not dictate or suggest. *See* CLEMENCY, 17.
36. **Mentally incapacitated**—A finding of "guilty" to fraudulent enlistment, but a light sentence imposed because the accused was "mentally incapacitated" when fraudulently enlisting, was held by the department to be utterly inconsistent, and therefore disapproved the case. C. M. O. 49, 1910, 12–13. *See also* FINDINGS, 52, 55.
With reference to clemency granted because of "doubt as to the sound mental condition of accused," "mental disturbance," "feeble, untrained mind," and "deficient in will power," *see* INSANITY, 3–6.
37. **Ordered to attend a smoker**—In view of the fact "that the accused [officer] was ordered to attend a smoker on shore, a social function, the nature of such functions being recognized as more or less convivial occasions," and for other reasons, the sentence of the accused (officer) was mitigated. C. M. O. 7, 1908, 2. *See also* DRUNKENNESS, 41.
38. **Same**—But in a case where accused (officer) had been convicted of a similar offense previously, and "he made efforts not to go to the function that he had been ordered to go to ashore, feeling that it was to be a convivial occasion, and he was afraid of the result," the sentence of dismissal was carried into effect. C. M. O. 9, 1908.
39. **Pay**—Forfeiture of pay should, in general, be remitted only as an act of clemency to accused. *See* ALLOTMENTS, 6–7; CLEMENCY, 53; PAY, 23.
40. **Personal relations**—Existing between accused and shipmates. C. M. O. 5, 1903.
41. **Physical condition of accused**—It is not within the province of general courts-martial to determine the physical condition of an accused and his ability to serve sentence. These are not matters for it to consider. The law makes it the duty of courts-martial in all cases of conviction to adjudge punishment adequate to the nature of the offense. (Art. 51, A. G. N.) This permits of no allowances being made because of a man's physical disability. C. M. O. 49, 1910, 12. *See also* C. M. O. 3, 1911; COURT, 133.
42. **Same**—Department granted clemency because health of accused was impaired from causes incident to the service. C. M. O. 1, 1893, 3. *See also* C. M. O. 127, 1896; 58, 1898; 97, 1899.
43. **Prior punishment**—Members of a court-martial should not recommend clemency because the accused was punished by his commanding officer for "this offense" for which he is undergoing trial by general court-martial, when he was charged with several offenses. C. M. O. 7, 1914, 4.
44. **Probation**—In certain cases the department in consideration of the recommendation to clemency of the members of courts-martial has placed the accused on probation. C. M. O. 42, 1909, 9; 12, 1911, 5; 19, 1912, 5.
45. **Provocation.** C. M. O. 126, 1897, 2; 54, 1898.
46. **Reasons for**—After the sentence of a court has been decided on, it is competent for any of its members to move that the accused be recommended to the clemency of the revising power. This recommendation is not to be inserted in the body of the sentence, but recorded, with the reason therefor, immediately after the signatures of the court and judge advocate to the sentence, and must be signed by the members concurring in it. *See* C. M. O. 36, 1905, 3.
"The reviewing and revising authorities, in order to properly weigh and determine a recommendation for clemency, should have as a matter of record the information on which the members based this recommendation; and courts should, therefore, see that evidence of previous good character, by oral testimony or by introduction of current enlistment record, is made a matter of record before a recommendation for clemency is made." Let. C. in C. At. Fleet, 636–14 (41), FO–C, May 20, 1914.

Digitized by Google

47. **Record**—A recommendation to clemency should follow immediately after the signatures of court and judge advocate to the sentence. C. M. O. 21, 1910, 9; 23, 1910, 7. *See also* CLEMENCY, 46.

The copy of the record of proceedings furnished the accused should not contain the recommendation to clemency, if there be one. The same may be obtained from the department after final action is taken. File 26504–96, J. A. G., Nov. 19, 1910.

48. **Record of accused**—The previous good character and reputation of the accused (officer) can not for a moment be regarded as a justification of his misconduct. It may be and is considered by the department in judging of his motive, but not in its condemnation of his offense. C. M. O. 107, 1901, 2.

49. **Same**—"Long and particularly excellent record" of accused as a grounds for clemency—"It thus appears from the court's own statement that in arriving at its sentence in this case it was influenced by the 'long and particularly excellent record'" of the accused. "While the previous record of an accused may properly be regarded as a good reason for a recommendation to clemency, it can not be made the basis for an exercise of clemency by the court. This distinction does not always seem to be understood by officers serving as members of general courts-martial. The law requiring courts-martial to adjudge an adequate punishment in all cases of conviction and empowering members of the court to recommend the accused as deserving of clemency would be nullified if courts-martial were allowed to exercise clemency because of the previous good record of the accused when it is obvious that this is peculiarly a matter for the consideration of the convening authority in acting upon the sentence." C. M. O. 28, 1913, 6–7. *See also* C. M. O. 58, 1892.

50. **Same**—Clemency is recommended because of the excellent record of the accused. C. M. O. 23, 1915, 3; 43, 1915; 44, 1915. *See also* EVIDENCE, 19.

51. **Same**—"Long and honorable service, both during the Spanish War and since that time," as a ground for clemency. C. M. O. 15, 1910, 6. *See also* C. M. O. 77, 1906.

52. **Same**—"In view of the limited conversation which sustains the gravamen of the first specification of the first charge, and of the trying circumstances under which this conversation occurred, and in view of the long service and excellent character of the accused," as a ground for clemency. C. M. O. 20, 1912, 4.

53. **Remission of loss of pay**—Imposed by a summary court-martial should be done "only as an act of clemency toward the accused." File 26287-560. *See also* File 26251-7004:2.

The department has held, in considering a question of remitting the loss of pay imposed by a court-martial, that in general it should be done only as an act of clemency toward the accused. (File 26287-560, Sec. Navy, Aug. 3, 1910.) File 26251-7004:2, Sec. Navy, March 31, 1913; C. M. O. 22, 1915, 9. *See also* ALLOTMENTS, 6, 7; CLEMENCY, 39.

54. **Revising authority**—Will not exercise clemency when court adjudges inadequate sentence. C. M. O. 96, 1896, 2; 131, 1901; 67, 1902, 2; 69, 1903, 3; 43, 1906, 3; 101, 1906; 42, 1909, 8; 15, 1910, 6.

55. **Revoking recommendation to clemency**—A court in proceedings in revision revoked its recommendation to clemency. C. M. O. 37, 1909, 7.

56. **Second enlistment**—The court should not be influenced in its findings by the fact that the accused was completing his second enlistment in the naval service with a good record for his current enlistment. Such fact should not be considered by the court in its findings unless properly introduced in evidence, but would be good ground upon which to base a recommendation to clemency. C. M. O. 30, 1910, 10.

57. **Sentence**—Court by adjudging inadequate sentence assumes prerogatives of convening authority by thus exercising clemency. C. M. O. 67, 1902, 2; 69, 1903, 3; 43, 1906, 3; 101, 1906; 42, 1909, 8; 15, 1910, 6; 7, 1912, 3; 8, 1912, 3; 16, 1912, 3; 1, 1913, 7; 9, 1913, 3; 16, 1913, 3; 28, 1913, 6; 43, 1915, 2; 44, 1915, 2.

58. **Same**—A recommendation was based on the grounds that the accused "is now serving a sentence of two and one-half years on a similar charge." C. M. O. 19, 1912, 4.

59. **Short time in service**—C. M. O. 59, 1904, 2. *See also* C. M. O. 31, 1887, 2.

60. **Suspension from duty**—By commanding officer not a basis for clemency. C. M. O. 7, 1914, 13.

61. **Trial, awaiting**—For 45 days. C. M. O. 224, 1902.

62. **U. S. S. "Merrimac"**—Member of crew. C. M. O. 69, 1904, 2; 32, 1905; 20 J. A. G. 289, June 5, 1902. *See also* MERRIMAC, U. S. S.

63. **U. S. S. "Yosemite" at Guam**—Member of crew. C. M. O. 73, 1905, 1.

64. **Unanimous recommendation to clemency**—Made by the full council of Aids to the Secretary of the Navy. C. M. O. 17, 1913, 2.

Digitized by Google

65. **Same**—Clemency granted in view of the unanimous recommendation. C. M. O. 23, 1915; 25, 1915.
66. **Same**—Clemency denied, despite unanimous recommendation of members. C. M. O. 37, 1915, 1, 8–9; 10, 1916; 20, 1916.
67. **War record**—In view of excellent war record of accused, as a volunteer officer, that brought him into the regular service and the excellent manner in which he had commanded his ship, the convening authority exercised clemency. C. M. O. 41, 1892.
68. **Youth**—Clemency recommended because of the youth of accused. C. M. O. 59, 1904, 2; 23, 1909; 21, 1910, 12; 38, 1890; 41, 1891, 3; 58, 1892; 67, 1892, 2; 41, 1893; 61, 1893; 87, 1893; 89, 1893; 94, 1893; 23, 1894, 2; 26, 1894; 80, 1894, 2; 12, 1895, 2; 92, 1895; 93, 1895; 104, 1895; 102, 1896, 2; 58, 1898; 34, 1899; 112, 1899; 25, 1909; 21, 1910, 12; 7, 1911, 14; 12, 1911, 8.
69. **Same**—In consideration of the almost unanimous recommendation to clemency of the court and the youth and inexperience of the accused the department remitted the loss of 10 numbers. C. M. O. 25, 1909.
70. **Same**—The accused was over 20 years of age when he killed a shipmate, was charged with murder and found guilty of manslaughter, and the members of the court recommended him to the clemency of the revising authority, on account of youth and other grounds. C. M. O. 12, 1911, 8.
71. **Same**—The accused was over 24 years of age when he assaulted and wounded another and was drunk on post, yet the members of the court recommended him to clemency because of his youth. C. M. O. 7, 1911, 14.
72. **Same**—The members of the court recommended the accused, in consideration of his youth, to the clemency of the revising authority. C. M. O. 21, 1910, 12.

CLERICAL ERRORS.

1. **Charges and specifications**—Correction of. *See* CHARGES AND SPECIFICATIONS, 33–37.
2. **Record**—Correction of clerical errors on revision. *See* RECORD OF PROCEEDINGS, 26, 27.
3. **Sentence**—Where the word "to" was omitted before the words "be paid," in the sentence of a naval court-martial, being a manifest clerical error, under ordinary circumstances the record would not be required to be returned to the court, but the record, being returned for other reasons, attention was called thereto. File 288–97.

CLERKS.

1. **Leave of absence without pay**—May be granted in some cases. *See* LEAVE OF ABSENCE, 13.

CLERKS, COMMANDANT'S. *See* DEATH GRATUITY, 11.

CLERKS IN OFFICE OF JUDGE ADVOCATE GENERAL.

1. **Copies**—Of officers' records. C. M. O. 29, 1915, 8.

CLERKS OR REPORTERS OF GENERAL COURTS-MARTIAL.

1. **Closed court**—Should not be present during closed court. C. M. O. 19, 1915, 10.
2. **Oath**—Should be sworn by the judge advocate, not by the president of the court. C. M. O. 135, 1897, 2.
3. **Record of proceedings**—Should contain a notation that the clerk entered, and it is not sufficient to merely note that the clerk was sworn. C. M. O. 16, 1912, 3.
4. **Same**—If clerk is only a copyist and does not record the evidence he need not be sworn. C. M. O. 135, 1897, 2. *Note*: Clerks should always be sworn.

CLERKS, PAY. *See* PAY CLERKS AND CHIEF PAY CLERKS.

CLERKS, PAYMASTER'S. *See* PAYMASTER'S CLERKS; PAYMASTER'S CLERKS, MARINE CORPS.

CLERKS, TO ASSISTANT PAYMASTERS, UNITED STATES MARINE CORPS. *See* PAYMASTER'S CLERKS, MARINE CORPS.

"CLIPS."

1. **Records**—Use of "clips" prohibited, in binding naval court-martial records of proceedings. *See* BINDING OF COURT MARTIAL RECORDS, 1.

CLIPPING HAIR OF PRISONERS.

1. **Awaiting trial**—Not looked on with favor by department. *See* PRISONERS, 4.

"CLOSED COURT." *See* COURT, 16, 20–26, 126–128.

Digitized by Google

CLOTHING.

1. **Prisoners' useless clothing—Disposition of—Sold at auction.** File 27222–41, Sec. Navy, July 1, 1916.
2. **Sale of—Liability of civilians for purchase of.** File 26516–49, J. A. G., June 13, 1911.

CLOTHING AND SMALL STORES.

1. **Detentioners, issued to—Chargeable to his accounts.** *See* DETENTIONERS, 2.

CLOTHING OUTFITS.

1. **Right to**—An enlisted man of the Navy who enlisted as landsman July 15, 1901, was honorably discharged on account of expiration of enlistment July 15, 1905, reenlisted as bugler, September 10, 1914, claimed that he was not furnished an outfit of clothing on his first enlistment, and made a claim for same under the provisions of the Naval Appropriation Act of June 30, 1914, which provides that the Secretary of the Navy is authorized to issue a clothing outfit to all enlisted men serving in their second enlistment who failed to receive an outfit of the value authorized by law on their first enlistment, etc.

   The laws in effect at the time of this man's first enlistment were contained in the act of March 1, 1889 (25 Stat. 781), and the Naval Appropriation Act of March 3, 1901. The first of these acts provided for furnishing a clothing outfit to "apprentices," and the latter act contained two paragraphs on the subject, the first making appropriation for outfits for "naval apprentices" and "hospital apprentices" and the second making appropriations for "outfits for 5,000 landsmen under training for seamen, at $45 each." As this man did not enlist originally as an apprentice he is not entitled to the outfit authorized in such cases; neither was he a landsman under training for seaman. He could not be held entitled to an outfit under the act of July 1, 1902 (32 Stat. 664), which enlarged the terms of prior laws on this subject, as it was passed approximately one year after his having enlisted, and the purpose of this law as held by the Attorney General and the Comptroller of the Treasury was to give a bounty "as an *inducement* for the services to be rendered, and not as *compensation* for such services." (11 Comp. Dec. 193, 199.) This man is therefore not entitled to a clothing outfit under the Act of June 30, 1914 (38 Stat. 396). File 26837–5, J. A. G., Dec. 30, 1914; C. M. O. 6, 1915, 8.
2. **Same**—under the provisions of the naval appropriation act of March 3, 1915 (38 Stat. 940). File 26837–7, J. A. G., Jan. 15, 1916.

COAL BARGE.

1. **Capsized—And cargo lost.** C. M. O. 7, 1915.

COAL HEAVER.

1. **General court-martial—Tried by.** C. M. O. 59, 1880; 36, 1886. *See also* C. M. O. 28, 1890, 2.

COALING SHIP.

1. **Enlisted man killed—Struck by bag while coaling ship and killed.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 15.

COAST AND GEODETIC SURVEY. *See also* CHARTS.

1. **Chart**—No. 243. C. M. O. 31, 1916.
2. **Service in—As naval service.** File 26254–550.

COAST GUARD. *See also* REVENUE-CUTTER SERVICE.

1. **Confinement of enlisted men**—There is no legal objection to granting a request of the Treasury Department that enlisted men of the Coast Guard be confined on the receiving ship "pending disposition of charges against them." As stated in a somewhat similar connection concerning the "safekeeping" on board a receiving ship of certain civilian witnesses for the Department of Justice, "the attached papers do not present 'questions involving points of law concerning the personnel,' 'proceedings in the civil courts in * * * cases concerning the personnel as such,' nor any other question under the cognizance of the Judge Advocate General, under the present regulations." (File 26276–60; Bu. Nav. File 2824–295.) File 7018–487, J. A. G., Oct. 7, 1916. *See also* File 1778, May 25, 1905; 7018–487, Sec. Navy, Nov. 13, 1916. Department refused above request. File 7018–487, Sec. Navy, Nov. 13, 1916.
2. **Medals of honor.** *See* MEDALS OF HONOR, 1, 3.
3. **Transfer of naval vessel to.** *See* REVENUE-CUTTER SERVICE, 2.
4. **Witnesses.** *See* COAST GUARD, 1; WITNESSES, 27.

Digitized by Google

COCAINE.

1. **Death of enlisted man**—An enlisted man died under cocaine administered by naval surgeon as a local anaesthetic. C. M. O. 10, 1915, 8. *See also* LINE OF DUTY AND MISCONDUCT CONSTRUED, 68.
2. **General court-martial**—Enlisted man tried by general court-martial for being under the influence of cocaine. C. M. O. 42, 1915, 4.
3. **Unfit for service**—In a case where an enlisted man was convicted of using cocaine and sentenced to confinement and loss of pay, the convening authority was informed that the department does not consider the retention of such a person in the naval service desirable and it was deemed preferable that the sentence should provide for discharge in order to avoid action by the department. File 26287-224.

CODE. *See* ARMY, 1; ARTICLES OF WAR; CRIMINAL CODE.

CODE OF ETHICS.

1. **Clemency**—Among other reasons for recommending clemency it was stated that the accused "is of an alien race [Filipino] and lived for a greater portion of his life under a code of ethics differing from our own." In considering the case the department remarked: "That in order that such a code of ethics may not be introduced into the naval service of the United States it would appear that the finding should have been in accordance with the laws of this country, and that a sentence in some measure commensurate with the offense should have been adjudged. C. M. O. 12, 1911, 5. *See also* CLEMENCY, 21.

COLLATERAL FACTS.

1. **Enlistment record**—As proof of desertion. *See* REPORTS OF DESERTERS RECEIVED ON BOARD, 4.
2. **Evidence**—*See* EVIDENCE, 25; REPORTS OF DESERTERS RECEIVED ON BOARD, 4.
3. **Log**—Extract from log. *See* COLLISION, 8; EVIDENCE, 25.

COLLECTING AGENCY.

1. **Government as.** *See* DEBTS, 1, 16; PAY, 71.

COLLISION.

1. **"Alexander," U. S. N. A.** *See* COLLISION, 10.
2. **Azov**—For papers concerning the collision between the *Chicago* and the *Azov* off Antwerp, *see* File 4290-99; 2068-99.
3. **Board**—The board to inquire into circumstances of a collision should give the captain and crew of the vessel in collision with a United States ship a hearing. File 5376-93, J. A. G., Dec. 30, 1893.
4. **Chicago**—For papers concerning the collision between the *Chicago* and the *Azov* off Antwerp, *see* File 4290-99; 2068-99.
5. **Damages, slight.** *See* COLLISION, 7.
6. **Danger need not be considered**—"Nerve" on the part of commanders of torpedo vessels is a prime requisite and there are times in the handling and maneuvering of these vessels, particularly when acting together and demonstrating the capabilities of their vessels, when the chances of collision should not deter an officer from attempting the full development of the maneuver. C. M. O. 5, 1906. *But see* NAVIGATION, 86, 88.

   Department of Justice—Notwithstanding the fact that the damages suffered by naval vessel, as the result of a collision, is slight, the Department of Justice will take cognizance of the matter, and instruct the United States attorney to bring suit against a private vessel responsible for the loss. File 2337-97; 199-97.

   Evidence to prove—In court-martial proceedings against the commanding officer of a naval vessel for collision with a merchant schooner, testimony was admitted (extract from log of naval vessel) that on the trip immediately succeeding the collision the naval vessel passed in one watch two unknown merchant schooners exhibiting no lights of any kind, or at least not showing the lights required by the rules of the road. *Held:* That this testimony was inadmissible. It is not sufficient to prove a custom and it does not show anything as to the lights actually carried by the merchant schooner with which the naval vessel collided. C. M. O. 38, 1905. *See also* EVIDENCE, 25.
9. **Same**—The record in this case shows that testimony was admitted to the effect "that it was a matter of common report on the *Culgoa* subsequent to the collision with the *Wilson & Hunting*, that the latter was in the habit of having her lights ready but not lit." This testimony should have been excluded as hearsay. C. M. O. 38, 1905, 2.

Digitized by Google

10. **Foreign countries**—In the case of the U. S. N. A. *Alexander*, in which the master was sued by the owners of a Chinese junk, the British Supreme Court at Hong Kong held that the *Alexander* was a public vessel, and forbade the owners of the junk to secure a trial of the merits in the British courts of the colony. File 4729-14, Sept., 1906.
11. **Hearing**—Board investigating collision should give captain and crew of vessel in collision with Government vessel a hearing. *See* COLLISION, 3.
12. **"Inevitable accident"**—Defense of in a collision—"To admit of that defense [inevitable accident] it must appear that the danger was not to be apprehended, or, if it was liable to arise, that a proper watch was kept beforehand, and *seasonable* precaution taken against such a liability, and that reasonable skill was used when danger arose." (The *Columbia*, 48 Fed. Rep., 325.) C. M. O. 4, 1914, 9. *See also* COLLISION, 17; OFFICER OF THE DECK; File 7893-03, J. A. G., Sept. 22, 1903, p. 6; 13 J. A. G. 101.
13. **Merchant ship**—Enlisted man, while on leave of absence, was drowned in collision of merchant vessels. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 29.

Commanding officer and officer of the deck tried in joinder for collision with a merchant ship. *See* JOINDER, TRIAL IN, 5.
14. **Naval Militia**—Where a vessel had been turned over to the Ohio Naval Militia at the navy yard, New York, and while en route to Toledo, Ohio, in charge of officers and men of the Naval Militia, damage was done to the cables of the Western Union Telegraph Company, it was *held* that no liability existed on the part of the Navy Department. File 8100-04, J. A. G.
15. **"Nerve"**—On the part of torpedo-boat commanders. *See* COLLISION, 6.
16. **Ohio Naval Militia.** *See* COLLISION, 14.
17. **Precautions to avoid collision**—Required to be "timely" or seasonable—"Precautions must be *seasonable* in order to be effectual, and if they are not so and a collision ensues in consequence of the delay, it is no defense to allege and prove that nothing could be done *at the moment* to prevent the disaster, or to allege and prove that the necessity for precautionary measures was not perceived until it was too late to render them availing. Inability to avoid a collision usually exists *at the moment* it occurs, but it is generally an easy matter, as in this case, to trace the cause to some antecedent omission of duty on the part of one or both of the colliding vessels." (The *Teutonia*, 23 Wall., 77.) (*See also City of New York*, 147 U. S., 72; *Elizabeth Jones*, 112 U. S., 514, The *Sea Gull*, 23 Wall., 165.)

It is not inevitable accident, as was well remarked by the learned judge in the case of the *Juliet Erskine* (6 Notes of Cases, 634), where a master proceeds carelessly on his voyage, and afterwards circumstances arise, when it is too late for him to do what is fit and proper to be done. He must show that he acted *seasonably*, and that de did everything which an experienced mariner could do, adapting ordinary caution, and that the collision ensued in spite of such exertions. Unless the rule were so, it would follow that the master might neglect the special precautions which are often necessary in a dark night, and when a collision had occurred in consequence of such neglect be might successfully defend himself upon the ground that the disaster had happened from the character of the night and not from any want of exertion on his part to prevent it. (Union Steamship Co. *v.* N. Y. & Va. Steamship Co., 24 How., 307.)

"To admit of that defense [inevitable accident] it must appear that the danger was not to be apprehended, or if it was liable to arise, that a proper watch was kept beforehand, and *seasonable* precaution taken against such a liability, and that reasonable skill was used when danger arose." (The *Columbia*, 48 Fed. Rep., 325.)

"Precautions must be *seasonable* to be effectual; and if not *seasonable*, it is no defense that nothing could be done at the moment to prevent the disaster." (Southern Ry. *v.* U. S., 45 Ct. Cls., 322.) C. M. O. 4, 1914, 8-9.
18. **Same**—From the evidence adduced before the court of inquiry, as well as before the court-martial, the department is satisfied that the *Wilson and Hunting*, the schooner struck by the *Culpoa*, was sailing without her starboard side light burning, in violation of the rules of the road; that if that light had been burning it would have been seen and noted on the *Culpoa*, and that the collision would not have occurred. Concurring to that extent in the finding of the court, the department is assured that the disaster was due to the fault of the schooner.

Nevertheless, it appears from an examination of the testimony given before the general court-martial by the accused officer himself, that, the night in question being dark with a clear atmosphere, a white light was reported at sea bearing "almost exactly two points on the port bow;" that the commanding officer, who was on the bridge at the time, was in doubt as to the distance and course of the vessel carrying this light; that "it was absolutely impossible to tell whether she was four hundred

Digitized by Google

yards away or ten miles," and that notwithstanding this uncertainty the speed of the *Culpoa* was not slackened or arrested, nor was her course changed until too late to avoid collision. C. M. O. 38, 1905.

19. **Same**—In promulgating the proceedings in this case it is deemed proper to emphasize the rule that when a source of possible danger is reported, and pending the determination of its precise character, the officer in command of a naval vessel should, unless precluded from so doing by some paramount consideration, immediately give precautionary orders. In cases of this character doubt should be resolved on the side of safety. C. M. O. 38, 1905, 2.
20. **Same**—The evidence showed that a red light was sighted by the accused about one-half point off his port bow at about eight minutes before the collision occurred. The department stated "While the accused was vigilant and apparently took precautions which he considered safe in regard to passing the light, it is evident that his judgment was at fault with regard to the distance of the light when first sighted and that he failed to take proper precautions to satisfy himself with regard to the light, by taking a bearing on it, or by maneuvering his ship so that a collision would have been impossible. C. M. O. 27, 1908.
21. **Public vessel.** *See* COLLISION, 10.
22. **Rescue**—If a United States ship collides with a merchant vessel, it is the duty of the commanding officer to ascertain the results of such collision, particularly the extent of the injury, if any, sustained by such merchant vessel, and whether she is so injured as to need assistance for her further navigation, or to ensure her safety or the safety of the lives of her officers, crew, and passengers, and to render such assistance, if needed, and for these purposes to remain, if practicable, in the vicinity a sufficient length of time to ascertain the results of such collision and to render such assistance if needed. C. M. O. 43, 1883.
23. **Responsibility of commanding officer.** *See* COLLISION, 19; COMMANDING OFFICERS, 38; NAVIGATION, 14–19, 82.
24. **Torpedo boats.** *See* COLLISION, 6.
25. **U. S. N. A. "Alexander."** *See* COLLISION, 10.

COMITY. *See* CIVIL AUTHORITIES, 8, 16; WORDS AND PHRASES.

COMMAND. *See also* PRECEDENCE.

1. **Boatswains and chief boatswains.** *See* COMMAND, 21.
2. **Carpenters and chief carpenters.** *See* COMMAND, 21.
3. **Engineer officers**—Not restricted by law to engineering duties. *See* COMMAND, 14.
4. **Same**—On board ship. *See* COMMAND, 19.
5. **General court-martial**—Of an assistant engineer which involved a controversy between the line and staff officers of the Navy as to the limitation of authority in matters of command. *See* COMMAND, 19.
6. **Gunners and chief gunners.** *See* COMMAND, 21.
7. **Line officers**—Exercise military command. *See* COMMAND, 18, 19.
8. **Machinists and chief machinists.** *See* COMMAND, 21.
9. **Same**—Before machinists can be held entitled to succession to command, something positive "to that effect should be produced from the personnel act or from the general nature of their duties or elsewhere." File 17789–15, J. A. G., Dec. 13, 1909, p. 3.
10. **Same**—It is not at all evident that because chief machinists and machinists are *assistants to line officers*, such fact qualifies them to exercise or succeed to command outside of the engineer department. File 3980-629 J. A. G., July 13, 1911, p. 3.
11. **Same**—With reference to the exercise of military command by chief machinists and machinists, it was held that nothing sufficiently positive has been produced from the personnel act or from the general nature of their duties or elsewhere, to warrant the suggested cancellation of the recent changes made in Navy Regulations, 1909, R–28 (3). [*See* Navy Regulations, 1913, R–1013, (3)] by "Changes in Navy Regulations No. 15," and that the presumption against the exercise of the right to command has not been overcome, and that the above-mentioned change in the regulations is not illegal. File 3980–629, J. A. G., July 13, 1911. *See also* COMMAND, 21.
12. **Marines**—When afloat in battalion or separate organization. *See* JURISDICTION, 75, 76.
13. **Medical officers**—Over pay officer on a hospital ship. *See* HOSPITAL SHIPS, 1, 3.
14. **Navy yards**—Succession to, in temporary absence of commandant—In a navy yard, the captain of the yard held a commission as captain on the active list dated March 3, 1911; the engineer officer of the yard was a retired officer holding a commission appointing him a captain on the retired list to date from June 30, 1910 (not restricted by law to engineering duty). *Held*, That during the temporary absence of the commandant of said navy yard, the retired officer should succeed to command, rather than

Digitized by Google

the captain of the yard. File 26806-73, J. A. G., Sept. 20, 1911. *See also* File 13559-17, J. A. G., Dec. 15, 1915; C. M. O. 49, 1915, 22; File 13559-17:1, Sec. Navy, June 19, 1916; 3809-6402, J. A. G., June 12, 1916; 26253-4601:1, J. A. G., May 13, 1916; Navy Regulations, 1913, R-3904.

15. **Same**—In the absence of the commandant the line officer next in rank, not restricted by law to the performance of engineering duties, shall become the acting commandant and shall exercise, for the time being, the authority of the commandant, both ashore and in respect to ships in commission at the yard, as prescribed in article R-3910. (R-3904.) *See* File 3311-04. *See also* COMMANDANTS OF NAVY YARDS AND NAVAL STATIONS, 2.
16. **Pharmacists and chief pharmacists.** *See* COMMAND, 21.
17. **Sailmakers and chief sailmakers.** *See* COMMAND, 21.
18. **Staff**—The staff is subordinate to line in matters of command. G. O. 87, Sept. 7, 1868.
19. **Same**—In a case where an officer was tried by general court-martial for offenses which involved a controversy between the line and the staff, the department stated in part: In view of the position assumed by the defense, in certain interrogatories proposed to be put to the members of the court, implying a controversy between the line and staff officers of the Navy as to the limitation of authority in matters of command, it is deemed proper to state that the evidence adduced upon the trial shows that the offense, committed, "disobedience of the lawful order of his superior officer," was clearly a violation of the express regulation requiring engineers on duty to conform to the orders of the officer of the deck, who, as the representative of the commanding officer of the vessel, is entitled to obedience from all officers of whatever rank, whether of line or staff. C. M. O. 67, 1892, 1-2.
20. **Succession to.** *See* COMMAND, 9, 10, 11, 14, 19, 21.
21. **Warrant officers**—Chief boatswains, chief gunners, chief machinists, boatswains, gunners, and machinists are classed as line officers of the Navy; chief carpenters, chief sailmakers, chief pharmacists [chief pay clerks], carpenters, sailmakers [pay clerks], and pharmacists, as staff officers. So far as succession to command or succession to duties aboard ship outside the engineer department are concerned, chief machinists and machinists are restricted to the performance of engineering duty only. (R-1013(3)). *See* COMMAND, 11.

COMMANDANTS OF NAVY YARDS AND NAVAL STATIONS.

1. **Acting commandant**—An officer duly appointed to act as commandant and governor of an insular possession of the United States is, and while so serving, entitled to all the honors due to that position. File 4451, March 27, 1906.
2. **Death of commandant**—Where, upon the death of the commandant of a naval station, who was also governor, a naval officer, junior to a marine officer present, succeeds in command [Navy Regulations, 1905, R-1682 (Navy Regulations, 1913, R-3904)], he should also succeed as acting governor. File 3311-04.
3. **Law**—Commandants responsible that law is observed. C. M. O. 31, 1915, 16.
4. **Senior officer present**—The commandant of a navy yard or naval station, or the officer acting in his absence, is the senior officer present for all purposes within the sphere of the command, with full authority as such, including review of summary courts-martial. File 2969-04, J. A. G. *But see* Act of August 29, 1916 (39 Stat. 586), which modifies this; SUMMARY COURTS-MARTIAL, 21, 22.
5. **Succession to command**—In temporary absence of commandant. *See* COMMAND, 14.

COMMANDANT, NAVY YARD, PHILADELPHIA, PA.

1. **Responsible**—That persons under his command observe law. C. M. O. 31, 1915, 16. *See also* SUNDAY LAWS, 1.

COMMANDANT, NAVY YARD, WASHINGTON, D. C.

1. **Government Hospital for the Insane**—Allowances for prisoners and patients at. C. M. O. 22, 1915, 8. *See also* GOVERNMENT HOSPITAL FOR THE INSANE, 2.

COMMANDANT, U. S. MARINE CORPS. *See* MARINE CORPS, 47-50.

COMMANDANT'S CLERKS.

1. **Death gratuity.** *See* DEATH GRATUITY, 11.

COMMANDER IN CHIEF OF FLEET.

1. **Court-martial orders**—Publishing of. *See* COURT-MARTIAL ORDERS, 12, 13.
2. **Examining boards**—Power to change. *See* NAVAL EXAMINING BOARDS, 4.
3. **General courts-martial**—May convene. *See* CONVENING AUTHORITY, 27.
4. **Summary courts-martial**—Power to direct reconvening of. *See* RECONVENING, 16.

Digitized by Google

COMMANDER OF CRUISER SQUADRON, AND COMMANDER IN CHIEF, DETACHED SQUADRON, UNITED STATES ATLANTIC FLEET.

1. **Courts of inquiry**—Convening of. C. M. O. 6, 1915, 9. *See also* CONVENING AUTHORITY, 28.
2. **General courts-martial**—Convening of. C. M. O. 6, 1915, 9. *See also* C. M. O. 14, 1910, 17; 17, 1915; 40, 1915; 46, 1915; 48, 1915; CONVENING AUTHORITY, 28.

COMMANDING OFFICERS. *See also* OFFICERS.

1. **Absence from station and duty without leave**—Commanding officers charged with. C. M. O. 34, 1899; 19, 1915.
2. **Arrested by civil authorities**—Where a commanding officer, arrested by the civil authorities, fails to make any report whatever of his whereabouts, either to his immediate superior or to the Secretary of the Navy, he must be held responsible for his resulting unauthorized absence and neglect of duty, notwithstanding the fact that, as in the present case, he may be acquitted by the civil courts when tried. C. M. O. 19, 1915, 9.
3. **Articles for the Government of the Navy**—The commanding officer shall cause the Articles for the Government of the Navy to be hung up in some public part of the ship and read once a month. A commanding officer was tried by general court-martial for neglecting to observe this provision of the law. C. M. O. 29, 1890, 8.
4. **Same**—Commanding officer tried by general court-martial for violating various provisions of. C. M. O. 29, 1890.
5. **Authority and precedence of.** *See* G. O. 194, Aug. 2, 1875.
6. **Authority of.** *See* COMMANDING OFFICERS, 31, 32, 33.
7. **Battle**—General rule to observe. *See* BATTLE, 2.
8. **Carrying gold.** *See* GOLD, 1.
9. **Civil authorities**—Arrested by. *See* COMMANDING OFFICERS, 2.
10. **Same**—Delivery of enlisted men to. *See* CIVIL AUTHORITIES; GENERAL ORDER NO. 121, September 17, 1914.
11. **Collisions.** *See* COLLISION.
12. **Confessions to.** *See* CONFESSIONS, 9.
13. **Consular officers**—Orders to commanding officers by diplomatic and consular officers. *See* DIPLOMATIC OFFICERS, 2.
14. **Court-martial, not a**—The commanding officer of a naval vessel, in imposing punishments, is not a court-martial. C. M. O. 7, 1914, 8; 6, 1915, 8–9. *See also* COMMANDING OFFICERS, 31; JEOPARDY, FORMER, 3; G. C. M. REC. 13370.
15. **Crew**—Cruel and unusual treatment. Commanding officer tried by general court-martial for. C. M. O. 29, 1890, 2–3.
16. **Criticism of**—A commanding officer was censured by the department for failing and neglecting to notify the pay officer that an enlisted man had been declared a deserter. File 26254–2038:1, Sec. Navy, July 20, 1916. *See also* COMMANDING OFFICERS, 27, 39.
17. **Cruelty to crew**—Tried by general court-martial. C. M. O. 29, 1890.
18. **Deck courts**—Commanding officer as deck court officer. *See* DECK COURTS, 7, 10, 14. Convening of. *See* DECK COURTS, 7, 10; SUMMARY COURTS-MARTIAL, 22.
19. **Discipline**—Commanding officer is charged with the discipline of his command. File 25675–9–10–11, Sec. Navy, Oct. 28, 1915. *See also* CRITICISM OF COURTS-MARTIAL, 36. Laxness of discipline. C. M. O. 4, 1911, 2, 5.
20. **Drunk**—While on shore in a foreign port—Tried by general court-martial. C. M. O. 18, 1916. *See also* DRUNKENNESS, 14.
21. **Drunk on duty.** C. M. O. 33, 1889, 3; 19, 1913. *See also* DRUNKENNESS, 14.
22. **General courts-martial**—The commanding officer of a naval vessel is not empowered to convene a court-martial for the trial of an officer under his command. C. M. O. 7, 1914, 10.
23. **Gold**—Transportation of, on a naval vessel. *See* GOLD, 1.
24. **Insubordinate.** C. M. O. 4, 1911, 2, 58.
25. **Intoxicated.** C. M. O. 33, 1889, 3; 18, 1916. *See also* DRUNKENNESS, 14.
26. **"Nerve"**—On part of commanding officers of torpedo vessels. *See* COLLISION, 6
27. **Offenses**—Commanding officer criticised for not punishing accused himself instead of recommending trial by general court-martial. The inadequate sentence was caused by the negligence of the commanding officer in not taking proper disciplinary action at time offense was committed. C. M. O. 46, 1910, 1. *See also* COMMANDING OFFICERS, 39.
28. **Power of.** *See* COMMANDING OFFICERS, 33.
29. **Precautionary orders**—When possible source of danger is reported. C. M. O. 38, 1905, 2. *See also* COLLISION, 19.

Digitized by Google

30. **Precedence**—Over all under their command. G. O. 194, August 2, 1875.

Commanding officers of vessels of war and of naval stations shall take precedence over all officers placed under their command. File 3980-1075, J. A. G., April 9, 1915.

31. **Punishments by**—Status of commanding officers in imposing punishments—The department has fully considered the status of a commanding officer in imposing punishments, and held that he does not act as a court-martial, that his investigation of an offense is in no sense a trial, that his finding is not a conviction or acquittal, and that the punishment which he imposes is not a sentence. (C. M. O. 7, 1914; 31, 1914.) File 26251-6297:9, Sec. Navy, Dec. 28, 1914; C. M. O. 6, 1915, 8-9. *See also* COMMANDING OFFICERS, 14; JEOPARDY, FORMER, 3.

The commanding officer of a naval vessel in punishing enlisted men occupies a "quasi judical" and not a "purely judicial" position. C. M. O. 7, 1914, 8.

32. **Same**—Too many punishments by commanding officer—The department has noticed with regret, the frequency of punishments inflicted upon the enlisted men on board some of the ships now in commission—no one punishment, perhaps, exceeding the law, but some commanding officers, taking advantage of the law, inflict punishment for slight offenses so frequently as to harass the men and create discontent, without adding to the efficiency of their ships or to the maintenance of discipline.

The department, without taking more decided action at present, would suggest to commanding officers to try the experiment of forbearance and consideration for the feelings of the men, and endeavor to induce cheerful obedience by granting indulgences, instead of coercing reluctant obedience through fear of punishment.

If these means fail then they can resort to punishment, for the department does not desire nor intend that the efficiency of the Navy shall be impaired by any undue leniency, nor will it sanction any willful disregard of law or disrespect to authority. G. O. 204, Feb. 9, 1876.

33. **Same**—The power of commanding officers of naval vessels is not *confirmed by statutes*, but on the contrary is an inherent power, the exercise of which had been *restricted by statutes;* and such commanding officer possesses no greater powers in this respect than those possessed and exercised by the commander in chief of a fleet. Thus in a decision of the Secretary of the Navy, January 14, 1907 (file 6489), it was said:

"Article 24 of the Articles for the Government of the Navy is not a statute conferring powers of punishment upon officers in command of naval vessels, but is, on the contrary, a provision of law restrictive in its character, prescribing the limits within which the disciplinary powers inherent in such command may be exercised. This statute does not, under any possible construction, impose greater restrictions upon the powers of the commanding officer of a division, squadron, fleet, or naval station than it imposes upon the commander of a single vessel."

The power of the commanding officer of a naval vessel to maintain discipline and punish offenses is similar to that possessed by commanding officers of merchant vessels under general principles of maritime law, which power, in the latter case, has repeatedly been likened by the United States courts to the power of a parent over his child, or of a master over his apprentice, or of a school teacher over his scholar, in all of which cases the power is inherent and not expressly conferred by statute. (Opinion of Mr. Justice Story in U. S. *v.* Hunt, 26 Fed. Cas. No. 15423.) Similar power has been regarded as existing and in practice has been exercised by commanding officers in the Army. A commanding officer of a naval vessel obviously can not be conceded any larger powers because of a statute *limiting* his authority, than he would have possessed in the absence of such a statute. C. M. O. 7, 1914, 7.

34. **Rescue**—If a naval vessel collides with a merchant vessel the commanding officer should do all in his power to rescue the officers, crew, and passengers of the merchant vessel. C. M. O. 43, 1883. *See also* COLLISION, 22.

35. **Responsibility of**—Collision. *See* COLLISION, 6, 17, 19, 22.

36. **Same**—Grounding ship, etc. *See* NAVIGATION, 17, 18, 31, 43, 57, 71, 82, 88.

37. **Same**—Handling his vessel. *See* COLLISION, 6.

38. **Same**—For ship—"As no officer would be justified in refusing *in time of danger*, to execute an order involving unreserved exposure of life, so none are authorized, at any time, to interpose their judgment between the exigencies of the service and the responsibility of the commanding officer. He is intrusted with the purposes and orders of the Government; to his care and command are committed, under strict accountability, the ship and her company, and he is responsible for the accomplishment of the purposes for which she is commissioned, her safety in danger, and efficiency in presence of an enemy." G. O. 140, September 17, 1869.

Digitized by Google

39. **Sentence—Inadequacy of an officer's sentence by general court-martial caused by the failure of justice usually incident to such delays of the law as was caused by the negligence of the commanding officer at the time of the occurrence of the offense in not taking proper disciplinary action.** C. M. O. 46, 1910, 1. *See also* COMMANDING OFFICERS, 27.
40. **Status—Of commanding officers in imposing punishments.** *See* COMMANDING OFFICERS, 14, 31; JEOPARDY, FORMER, 3.
41. **Stranding vessel—Tried by general court-martial.** C. M. O. 2, 1915.
42. **Summary courts-martial—The commanding officer of a naval vessel can convene only summary courts-martial and deck courts for trial of enlisted men under his command.** C. M. O. 7, 1914, 10. *See also* SUMMARY COURTS-MARTIAL, 12.
43. **Torpedo vessels—"Nerve" in handling.** *See* COLLISION, 6.
44. **Uniform disarranged and drunk—While on shore in a foreign port—Tried by general court-martial.** C. M. O. 18, 1916.

COMMENDATORY LETTERS.

1. **Clemency—Commendatory letters, particularly when setting forth long and faithful service, are entitled to consideration where the offense is what may be termed a military one, or in case of a lapse of the character as drunkenness, for example, but such letters do not have much weight in a case where the evidence established beyond the shadow of a doubt transactions tainted with fraud and extending over the full period of time that the court's inquiries may cover without going beyond the bar of the statute of limitations.** C. M. O. 69, 1903, 2. *See also* C. M. O. 54, 1892; 118, 1905; CLEMENCY, 11.
2. **Secretary of the Navy—It is within the province of the Secretary of the Navy to express his approval or disapproval of the acts or omissions of any officer, enlisted man, or civil employee under the department. His action may be in accordance with, or even contrary to, the findings of a board of investigation or any other source of information, or recommendation.** File 26283-522, J. A. G., Feb. 12, 1913. *See also* PUBLIC REPRIMAND, 18; REPRIMAND, 10; SECRETARY OF THE NAVY, 63.

COMMERCIAL ATTACHÉ.

1. **Eligibility—Of a retired naval officer.** File 27231-67, J. A. G., Aug. 20, 1915, Sec. Navy, Aug. 23, 1915.

COMMISSARY STEWARD.

1. **Charges and specifications—Important allegations to be specified when accused is to be charged with irregularities in commissary department.** File 26251-12309, J. A. G., October, 1916.
2. **Duty—Irregularities in commissary departments, U. S. Atlantic Fleet.** File 14625-183: 31, Sec. Navy, May 9, 1913.

COMMISSIONS. *See also* APPOINTMENTS; PROMOTION.

1. **Ad interim.** *See* File 22724-18, p. 5. *See also* COMMISSIONS, 23, 29.
2. **Additional numbers in grade—Date of.** *See* ADDITIONAL NUMBERS.
3. **Antedating—The practice of antedating the commissions for purposes of rank is an old one, and has been repeatedly recognized and sustained by the Attorney General and the courts.** (*See* U. S. *v.* Vinton, 2 Sumn. 299, 28 Fed. Cas. 352; 4 Op. Atty. Gen. 123, 318, 603, 608; 5 Op. Atty. Gen. 132; 9 Op. Atty. Gen. 137; 17 Op. Atty. Gen. 97; 14 Op. Atty. Gen. 191; Collins *v.* U. S., 15 Ct. Cls. 22; Kilburn *v.* U. S., 15 Ct. Cls. 41, 47; 23 Op. Atty. Gen. 30, 40; Burchard *v.* U. S., 19 Ct. Cls. 137, 143; Young *v.* U. S., 19 Ct. Cls. 145; Bennett *v.* U. S., 19 Ct. Cls. 379, 386, 387; Laws *v.* U. S., 27 Ct. Cls. 59.) File 26280-68, J. A. G., Apr. 12, 1916.
4. **Same—In cases where appointing power did not fill a vacancy at the time it was created, or the person at the time was ineligible for appointment and the department acted promptly, it is not deemed advisable to antedate the commission.** File 9466-03. *See also* File 22724-18, J. A. G., Dec. 4, 1911, p. 3; 5460-72:1, J. A. G. June 8, 1915.
5. **Bond—Failing to execute and file bond when ordered—Tried by general court-martial.** C. M. O. 29, 1881.
6. **Canceling.** *See* File 26260-132: f, J. A. G., June 2, 1909.
7. **Change of date.** *See* COMMISSIONS, 14-17.
8. **Chiefs of bureaus.** *See* BUREAU CHIEFS, 8, 13.
9. **Date of—Officer advanced in rank but not in grade—An assistant paymaster advanced in rank from ensign to lieutenant (junior grade), without receiving an advancement in grade, need not be commissioned, as this is merely an advancement in rank,**

Digitized by Google

without change in office, which remains, as before, that of assistant paymaster. File 28254-542. *See also* 19 Op. Atty. Gen. 169, 173; 20 Op. Atty. Gen. 358. *But see* File 1282-01, Mar. 19, 1901, in which the Secretary of the Navy decided that staff officers advanced in rank without advancement in grade or change of office should be nominated and, after confirmation by the Senate, commissioned with the higher rank, thereby expressly changing the "long-established custom of the department to advise officers of the staff corps of the Navy of the attainment of a higher rank in their grade by a letter of notification only." File 1282-01, Sec. Navy, Mar. 19, 1901. *See also* PROMOTION, 73.

10. **Same**—Where an officer is transferred from the retired list to the active list by a special act of Congress, without stating the position he is to take on the active list, the only appropriate date which can be fixed for his restoration is the date of the act itself. File 2871-7, Oct. 11, 1907.

11. **Same**—Commission should not be dated prior to qualification of candidate—Where new offices are created by law, and it is provided therein that no person shall be appointed until he has been found qualified by examination, the commission issued should not bear a prior date to that when the candidate qualified by examination. File 5460-72:1, May 19, 1915.

12. **Same**—While there is no statute prescribing the form of commission to be issued to officers of the Navy, the established custom of inserting therein the date from which it becomes effective has repeatedly been recognized both by law and authorative legal opinions and may therefore now be regarded as having the force and effect of law. To issue commissions without a date stated therein would result in much confusion and avoidable correspondence, as each officer in the service affected would request a decision of the department, etc. File 5460-76, J. A. G., July 12, 1915.

13. **Same**—For chief pay clerks. File 5460-76, J. A. G., July 12, 1915.

14. **Same**—The action taken at the time an officer's commission was issued should be regarded as conclusive upon the present administration and his case should not be reopened during a subsequent administration. If any wrong has been done the officer, his recourse lies in an appeal to Congress. File 11130-6, J. A. G., Dec. 28, 1909. *See also* 2 Op. Atty. Gen., 8; 13 Op. Atty. Gen. 33, 35; 16 Op. Atty. Gen. 583; 17 Op. Atty. Gen. 611; Day *v.* U. S., 21 Ct. Cls., 264; File 14818-4, J. A. G., Aug. 16, 1908.

15. **Same**—The statutes and regulations governing precedence having once been determined in any particular case, considerations of repose intervene, and become important. Disturbance of the Navy lists is prejudicial to the service, and should not be sanctioned where doubt exists respecting the appropriate action, and where a considerable length of time has elapsed. File 8171-03; 9019-04; 13 Op. J. A. G., 127. *See also* File 5460-72:1, J. A. G., June 8, 1915; 11, 130-22, J. A. G., Nov. 17, 1913.

The statutes themselves are by no means simple and free from difficulty in their application to existing conditions. Having been once interpreted and applied by the department, considerations of repose intervene and become important. If the lists are to be disturbed whenever, by ingenious analysis, it can be shown that some minor provision of a complicated statute has perhaps been erroneously dealt with, a condition of uncertainty and instability would ensue more prejudicial to the service than the occasional examples of questionable individual hardship that might thereby be corrected. File 8171-03, J. A. G., Oct. 30, 1903, p. 4.

16. **Same**—The action taken at the time an officer's commission was issued should be regarded as conclusive by subsequent administrations, and his case should not therefore be reopened. Opinions regarding the doctrine of *res judicata* in administrative action considered and applied. File 11130-6, Dec. 28, 1909. *See also* File 2346-1, Aug. 23, 1905.

17. **Same**—An officer of the Marine Corps was retired with the rank of the next higher grade when it was the practice of the department to date a retired officer's commission of the actual date of retirement and not from the date of the vacancy to which he would have been promoted if qualified. Therefore he requested that a new commission be issued him as of the latter date, citing Court-Martial Order No. 29, 1915, page 9, as a reason for such request. *Held*, That the officer's date of rank on retirement was correctly fixed in accordance with the existing and long continued practice, and should not be disturbed because of a subsequent decision of the department which prescribed a different rule to be applied in future cases. The same principle is observed in cases where the department has adopted a rule less liberal in its operation than the previous practice without disturbing the status of officers who had theretofore been retired. File 26260-2076:5, J. A. G., Oct 21, 1915; Nav. File, 4489-51, Sec. Navy, Oct 25, 1915; C. M. O. 35, 1915, 11. *See also* File 27231-70; 14818-4, J. A. G., Aug. 16, 1909.

Digitized by Google

18. **Same**—While an officer might have been promoted to the grade of captain in the Marine Corps when a vacancy in that grade occurred, such action was discretionary with the appointing power; and since such action was not taken, but the officer was promoted and commissioned as of a later date, there is no law or regulation entitling him to have his commission date from the occurrence of the vacancy. File 2518-04. *See also* File 5460-72:1, J. A. G., June 8, 1915; 7151-03, J. A. G., 1903.
19. **Same**—Where the filling of vacancies is discretionary with the President, the commissions need not be made to date from the occurrence of the vacancy unless the appointing power so decides. File 7151-03. *See also* File 3089-04; 5460-72:1, J. A. G., June 8, 1915. *See also* PROMOTION, 50.
20. **Erroneously issued is null and void**—A commission issued to an officer who had not qualified for promotion, but was nominated and confirmed through error, is null and void. File 26260-1193, Jan. 11, 1912. *See also* File 26260-110:1, June 21, 1909; 26260-132; 26254-645; 26254-482; 26254-654; 26254-655; 5172-93, Apr. 6, 1907; 26254-286½a, May 27, 1909.
21. **General court-martial**—The President is not required to issue a commission to an officer who had been recommended for trial by general court-martial for shortages in his accounts and indebtedness, and who thereafter presented his resignation, which was accepted "for the good of the service," in the meantime having been nominated by the President for promotion, which nomination was confirmed by the Senate, but whose commission had not been signed by the President. File 26251-2833, J. A. G., Mar. 31, 1910. *See also* 12 Op. Atty. Gen. 304.
22. **Same**—But if the commission be signed and sealed, and the office be of a character not removable by the President, in that case the President's right over the office no longer exists, according to the Supreme Court (Marbury *v.* Madison, 1 Cranch 50) for the right is vested and irrevocable. File 26251-2833, J. A. G., Mar. 31, 1910.
23. **"Gunboat" commissions.** File 1282-01. *See also* COMMISSIONS, 1, 29.
24. **Marine officers.** *See* COMMISSIONS, 17, 18.
25. **Naval operations, chief of.** *See* File 22724-33, J. A. G., Aug. 22, 1916. *See also* NAVAL OPERATIONS, CHIEF OF, 1.
26. **Numbering of commissions**—When commissions bear the same date "the numbering of the commissions is not an act of the President and Senate, but is * * * an act of the Secretary of the Navy alone, in order to prevent questions of rank from arising among the officers from the circumstances of the identity of date in the commissions. Hence, the question * * * is obviously not one of law, but of practice merely in the Navy Department." (1 Op. Atty. Gen., 325.) File 28026-1209:4, J. A. G., Oct. 25, 1915; C. M. O. 35, 1915, 9.
27. **Paymaster General**—Issuance of a commission to a retired Paymaster General. *See* PAYMASTER GENERAL OF THE NAVY, 4.
28. **Precedence where commissions bear same date**—Where naval officers are commissioned on same date, the numbers of the commissions, to determine the relative rank of the officers, is, in the absence of statutes, a matter of practice in the Navy Department, and not governed by law. (1 Op. Atty. Gen., 325.) *See* File 28026-1209:4, Oct. 25, 1915; 11130-27, Aug. 26, 1915. *See also* PRECEDENCE, 13-17.
29. **Recess appointments**—The President shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session. (Con. Art. II, sec. 2, cl. 3.) File 22724-16:1, J. A. G., Apr. 24, 1911, p. 9.

    A temporary appointment during a recess of the Senate need not be made in any prescribed form. It has even been held that a communication from the Secretary of the Army informing the recipient that he has been appointed an officer of the Army by the President is sufficient and answers the purpose of a commission. (O'Shea *v.* U. S., 28 Ct. Cls. 392.) File 26521-152, J. A. G., Sept. 22, 1915.

    A recess appointment which was not accepted, and was therefore never of any practical effect, should not be accepted after the appointment has been confirmed by the Senate, but should be disregarded and a permanent commission issued in the usual manner. File 8622-2, Feb. 10, 1908. *See also* 2 Op. Atty. Gen. 336; U. S. *v.* Kirkpatrick, 9 Wheat 721; File 6288-2, J. A. G., Mar. 29, 1907; 1518-4; 4389, Nov. 18, 1907; COMMISSIONS, 1, 23.
30. **Retired officers**—For Civil War Service. *See* CIVIL WAR SERVICE, 5, 6.
31. **Same**—The advice and consent of the Senate is not required for the issuance of commissions to those retired officers of the Army, Navy, and Marine Corps "whose rank has been or shall hereafter be advanced by operation of or in accordance with law." (Act Mar. 4, 1911, 36 Stat. 1354.) File 22724-18, J. A. G., Jan. 3, 1912.

Digitized by Google

32. **Revocation**—After signed and sealed, impossible. *See* COMMISSIONS, 22.
33. **Same.** *See* File 4389; 26260–132: f, J. A. G., June 2, 1909.
34. **Sale of**—Officer tried by general court-martial on request of House of Representatives. *See* CONGRESS, 11.
35. **Secretary of the Navy**—May sign commissions. *See* SECRETARY OF THE NAVY, 14.
36. **Senate ratifies**—The appointment takes place when the President has issued the officer's commission, which can only be done after the action of the Senate. (Pomeroy, 3d ed., sec. 646.) The President is to nominate, and thereby has the sole power to select for office; but his nomination can not confer office unless approved by a majority of the Senate. (2 Story, 5th ed., sec. 1554.) File 22724–16: 1, J. A. G., Apr. 24, 1911, p. 9.
37. **Sentimental reasons**—A commission should not be issued for sentimental reasons where no services are to be rendered under it, the appointment having been declined after confirmation by the Senate. The department can not properly request the President to commission as a naval officer a person who has never rendered any service and who formally declined on the day on which he was confirmed, to accept the appointment. Such course would be wholly without precedent, and would not be warranted by the circumstances of the case. To ask the President to issue a commission with the distinct and explicit understanding that it is not to be accepted, and is not to go into effect, would be an entirely anomalous proceeding, and one of doubtful propriety. (4 Op. J. A. G., 443, Oct. 19, 1893; *quoted*, file 26251–2833, Mar. 31, 1910, p. 3.) *See also* File 8622–2, Feb. 10, 1908.
38. **Signed and sealed**—President's right over no longer exists. *See* COMMISSIONS, 22.
39. **Staff**—Officer advanced in rank but not in grade. *See* COMMISSIONS, 9.
40. **Suspended**—An ensign who failed on examination for promotion, was suspended, and after six months qualified and was promoted, should not be given in his commission the same date as that on which he would have been promoted had he been found qualified upon his first examination, as this would entitle him to pay for a period of six months during which he was not performing the duties of the higher grade and had demonstrated his incompetency therefor. File 26266–475, May, 1915.
41. **Withholding by President**—Even after confirmation by the Senate, the President may in his discretion withhold a commission from the applicant. And until a commission, signifying that the purposes of the President has not been changed, the appointment is not fully consummated. *See* File 4996, June 1, 1906; 26251–2833, Mar. 31, 1910. *See also* 4. Op. Atty. Gen. 218; APPOINTMENTS, 9; COMMISSIONS, 21.
42. **Same**—Until commission signed by President may be withheld and promotion not complete—Although a lieutenant commander has been examined and found qualified for promotion to the grade of commander and the board's finding approved by the President, he may, nevertheless, be retired under section 9 of the personnel act of March 3, 1899 (30 Stat. 1004), his commission not having been signed by the President. File 26297–7: 3, 4, 5. *See* File 26297–14, June 7, 1913, for a similar case where an officer was found qualified by an examining board, but finding of board not acted upon by the President. *See also* File 26297–13, June 7, 1913.
43. **Same**—President may withhold commission, or the delivery of the commission to an officer after he has been nominated and confirmed by the Senate, notwithstanding a *locus penitentiae*. File 26251–2833, J. A. G., Mar. 31, 1910. *See also* 12 Op. Atty. Gen. 304; Op. J. A. G., June 1, 1906, 34 Br. and Op. Book, 150; 14 Op. J. A. G., 353.

COMMISSIONS ILLEGALLY RECEIVED FROM GOVERNMENT CONTRACTORS. *See* C. M. O. 69, 1903, 2.

COMMISSIONED OFFICERS. *See* OFFICERS.

COMMISSIONER OF PENSIONS.
1. **Jurisdiction**—For granting pensions. *See* PENSIONS, 3, 4.

COMMITTEES.
1. **Government Hospital for the Insane**—Committees appointed for patients at. *See* GOVERNMENT HOSPITAL FOR THE INSANE, 2.

COMMON LAW. *See also* WORDS AND PHRASES.
1. **Charges and specifications**—All technicalities applied to common law indictments are not required. *See* CHARGES AND SPECIFICATIONS, 99.
2. **Embezzlement**—Unknown to common law. *See* EMBEZZLEMENT, 7.
3. **"Feloniously"**—Use of at common law. *See* FELONIOUSLY, 2.
4. **Jeopardy, former**—Principle of Constitution is derived from common law. *See* JEOPARDY, FORMER, 4.

Digitized by Google

5. **Name, change of**—At common law. *See* NAME, CHANGE OF, 6.
6. **Offenses**—Punishment of common law offenses. C. M. O. 21, 1910, 17. *See also* C. M. O. 2, 1912, 8.
7. **Presumption of death**—Generally conceded that an absence of seven years raises a presumption of death. C. M. O. 10, 1915, 9.
8. **Rules of evidence.** C. M. O. 21, 1920, 14.
9. **Rules of statutory construction**—Where a statute is intended to be declaratory of the common law the rule of construction applies that statutes are to be construed with reference to the principles of common law and in harmony therewith, unless a different intention on the part of the legislature is manifested. C. M. O. 29, 1914, 10, 12.
10. **Sodomy**—Punishment for sodomy at common law was death. *See* SODOMY, 15.
11. **Specific intent**—Where by common law or statute a specific intent is essential to a crime, it must be proved. *See* DESERTION, 77.
12. **Subtle technicalities of**—Of the English common law should not be introduced into naval courts-martial procedure without observing the limitation by which their application is defined, and they should not be so used as to confuse procedure and defeat the administration of justice. C. M. O. 94, 1905, 1.
13. **Wife**—Common law wife. (File 26254-1936, J. A. G., Jan. 29, 1916.) *See* DEATH GRATUITY, 12.
14. **Same**—Witness—Competency of. *See* WIFE, 5.

COMMUTING SENTENCES.

1. **Convening authority may not commute sentences**—Every officer who is authorized to convene a general court-martial shall have power, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which he is authorized to approve and confirm. (This article, as set forth above in the form given in sec. 1624, R. S., is modified by sec. 9 of the act of Feb. 16, 1909 (35 Stat. 621).) *See* A. G. N. 33; A. G. N. 54; C. M. O. 51, 1893; 89, 1899, 1; 150, 1897, 3; 17, 1910, 8.
2. **Same**—The officer ordering a summary court-martial shall have power to remit, in part or altogether, but not to commute, the sentence of the court. (A. G. N. 33.) *See* COMMUTING SENTENCES, 1.
3. **Same**—A naval cadet was sentenced to dismissal from the naval service, and the revising authority mitigated this sentence to loss of numbers. The department held that A. G. N. 54 confers upon every officer authorized to convene a general court-martial "power on revision of its proceedings to remit or mitigate, *but not to commute* the sentence." The action of the revising authority in changing the punishment awarded by the court from dismissal to loss of numbers amounted to a commutation of the sentence, which is expressly forbidden by the statutory provision quoted. The sentence was accordingly set aside. C. M. O. 89, 1899, 1. *See also* C. M. O. 150, 1897, 3; 17, 1910, 8; G. C. M. Rec. 28521. *But see* COMMUTING SENTENCES, 1; DISMISSAL, 19.
4. **President**—An officer was sentenced to dismissal from the naval service. The President placed the following action on the record: The sentence "is hereby approved, but it is *commuted* to the loss of fifteen numbers in his grade." C. M. O. 38, 1907, 1-2. *See also* CONVENING AUTHORITY, 50. The President in the exercise of his power to pardon may commute a sentence.

COMPANY FUND. *See* C. M. O. 49, 1915, 4.

COMPENSATION.

1. **Counsel**—Naval officers before naval courts-martial. *See* COUNSEL, 17.
2. **Retired officers**—Whether considered as "pay" or "pension." *See* RETIRED OFFICERS, 16.

COMPETENCY OF WITNESSES. *See* DECK COURTS, 5 (p. 159); EVIDENCE, 79. *See also* WITNESSES, 29, 52.

COMPLAINING WITNESSES. *See* C. M. O. 53, 1910, 2; 54, 1910, 2.

COMPLEMENTS OF SHIPS. *See* File 13352-407, J. A. G., Mar. 16, 1912.

COMPOUNDING A FELONY. File 5208-1, J. A. G., July 2, 1906.

Digitized by Google

COMPTROLLER OF THE TREASURY.

1. **Abstract questions**—The comptroller will not render decisions upon abstract questions. File 26254-345:1.
2. **Administrative matters**—Policy of the department—The policy of the Navy Department has been to disapprove the submission to the Comptroller of the Treasury of specific questions involving administrative matters under its own jurisdiction, and the department has not been inclined to invite controversy by specifically requesting his decision upon questions which the law places under the cognizance of the Secretary of the Navy. File 11112-476, J. A. G., Feb. 20, 1915; C. M. O. 10, 1915, 8. *See also* SECRETARY OF THE NAVY, 18.
3. **Death gratuity.** *See* DEATH GRATUITY.
4. **Department**—Policy of Navy Department with reference to administrative matters. *See* COMPTROLLER OF THE TREASURY, 2.
5. **Form of requests for decisions.** *See* COMPTROLLER OF THE TREASURY, 12.
6. **Jurisdiction**—No jurisdiction—When item from which appealed is not disallowed but only suspended. File 26254-316:a.

   For jurisdiction of Comptroller in general, *see* COMPTROLLER OF THE TREASURY, 18.
7. **Navy Regulations**—Validity of. (File 26254-1451:11, J. A. G., Apr. 12, 1915; 30 Op. Atty. Gen.—.) *See* REGULATIONS, NAVY, 10.
8. **Orders**—Comptroller can not relieve officers of duty to obey orders. File 26254-58, June 27, 1908.
9. **Pending questions**—The department will not request decision of comptroller upon a matter which is pending before the auditor. File 26254-324.
10. **Questions of law**—The comptroller's decision upon a question of law involved in the settlement of accounts under his cognizance, is not binding upon the department in taking action upon matters under its cognizance, even though the identical question of law may be involved. File 26254-1451:11, J. A. G., Apr. 12, 1915. *See also* BILLINGS *v.* U. S., 23 Ct. Cls. 180.
11. **Reconsideration of decision**—It is not the policy of the department to request the Comptroller of the Treasury to reconsider his decisions in individual cases unless such decisions tend to disturb the practice of the service, based on naval regulations or instructions issued pursuant to law. File 26254-1947, Sec. Navy, Jan. 19, 1916; C. M. O. 3, 1916, 8.
12. **Requests for decisions of**—Form of—Requests for decisions of the Comptroller of the Treasury should contain a concise statement of facts, with all comments and arguments not necessary to a decision of the case by the comptroller eliminated.

    The rule formulated by the Attorney General, and which the department applies equally to requests for decisions submitted to it for transmittal to the comptroller, is as follows:

    "When an opinion is requested of the Department of Justice on behalf of the head of another executive department the facts must be definitely formulated and clearly stated by the person asking the opinion. The Attorney General can not be required to extract a finding of facts from correspondence or reports." (22 Op. Atty. Gen. 342.)

    "The unvarying practice of the Attorney General from the foundation of the Government, has been to require a succinct statement of the facts and of the question of law arising thereupon upon which an opinion is desired." (20 Op. Atty. Gen. 493.)

    File 26254-1263, Sec. Navy, Aug. 19, 1913; C. M. O. 10, 1915, 7. *See also* File 26254-1661, Sec. Navy, Nov. 5, 1914.
13. **Same**—Administrative questions not under comptroller's jurisdiction. *See* COMPTROLLER OF THE TREASURY, 2.
14. **Same**—Naval Instructions 1913, I-2205 (2), reads as follows. "Applications to the Comptroller of the Treasury, under the act approved July 31, 1894 [28 Stat. 206], for his decision upon any question involving a prospective payment, shall be forwarded through the usual official channels to the Navy Department for transmission to that officer."

    In view of the above the action of an officer who submitted a request direct to the comptroller for a decision as to legality of payments to court-martial prisoners was in violation of the foregoing naval instructions.

    In this connection it should be understood that the department will gladly forward to the comptroller any request of a pay officer in which a question of a payment, past or prospective, is at issue, but I-2205 (2) was promulgated in order not only to discourage questions of a trivial nature being sent the comptroller, or those previously decided

Digitized by Google

by him, but also to afford the department an opportunity to decide questions which are administrative. (*See* C. M. O. 10, 1915, p. 8.) File 26254-1922, Sec. Navy, Dec. 10, 1915; C. M. O., 49, 1915, 22. *See also* File 26254-1964, Sec. Navy, Feb. 12, 1916.

15. **Same**—Vexatious—While the right to appeal to the Comptroller of the Treasury from a disallowance by the auditor, can not be denied, yet when the question presented was plainly covered by previous decisions, the department returned letter to claimant approving the Paymaster General's indorsement that "it is regarded merely in the nature of a vexatious demand upon the comptroller's time to submit this claim." File 26254-360. *See also* COMPTROLLER OF THE TREASURY, 14.
16. **Retired officers**—Jurisdiction of Comptroller over pay and rank. *See* RETIRED OFFICERS, 17.
17. **Ships' stores.** *See* SHIPS' STORE, 1.
18. **Status**—Prior to the act of July 31, 1894 (28 Stat. 208) the Comptroller of the Treasury had no legal status as an adviser on questions of law. He was an accounting officer holding great power, but his function was to take action, not to advise others how to act. (20 Op. Atty. Gen. 654.) The practice, however, developed of asking the Comptroller's opinion upon questions of law involving payments, and this practice was given legal sanction by the act of July 31, 1894, section 8 (28 Stat. 208), which required the Comptroller of the Treasury to render a decision upon the request of heads of executive departments upon any question involving a payment to be made by or under them, "which decision when rendered shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement." This statute plainly limits the Comptroller of the Treasury's jurisdiction to decisions upon proposed payments in specific cases, for it speaks of "a payment to be made," and "the account containing said disbursement." (1 Comp. Dec. 34; 2 Comp. Dec. 58; 5 Comp. Dec. 562.) File 26254-1451:11, J. A. G., April 12, 1915, p. 19.

COMPULSORY PROCESS.

1. **Constitutional right**—Of accused to have compulsory process for obtaining witnesses in his favor should never be denied. C. M. O. 17, 1910, 9. *See also* CONSTITUTIONAL RIGHTS OF ACCUSED, 17.

CONCLUSIONS OF LAW.

1. **Court of Claims.** *See* C. M. O. 10, 1915, 13.
2. **"Culpable"**—States a mere conclusion of law and is not necessarily essential to the validity of the charge of "Culpable inefficiency in the performance of duty" if improperly excepted by the court in its finding. C. M. O. 4, 1914, 1, 7.
3. **"Desertion"**—The word "desertion" as used in specifications under a charge of "Desertion."
4. **Finding**—A court-martial found proved all the substantial allegations of fact contained in a specification but did not find proved the conclusions of law as set forth in the same specification. C. M. O. 4, 1913, 9.
5. **Offense**—An offense is charged by the statement of the material facts which constitute it, and not by the statement of a mere conclusion of law. C. M. O. 4, 1914, 1, 7. *See also* CHARGES AND SPECIFICATIONS, 49; CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN, 7.
6. **"Unlawful."** *See* "UNLAWFUL PURPOSE."

CONDITIONAL DISCHARGE. *See* DISCHARGE OBTAINED BY FRAUD.

CONDITIONAL SALE. C. M. O. 6, 1915, 9. *See also* DESERTERS, 11.

CONDITIONAL PARDON. *See* PARDONS, 4, 5.

CONDONE.

1. **Drunkenness on duty**—Department does not desire to condone such offenses as "drunkenness on duty." C. M. O. 5, 1915, 2.
2. **Sentence remitted**—Department remitted sentence of an officer, without condoning accused's offense in order to avoid a miscarriage of justice. C. M. O. 37, 1915, 9.
3. **Unofficerlike conduct**—The department does not desire to condone such offenses as unofficerlike conduct. C. M. O. 28, 1894, 4.

CONDUCT RECORD OF THE ACCUSED. C. M. O. 96, 1898. *See also* EVIDENCE, 14; SERVICE RECORDS; REPORTS ON FITNESS; SUMMARY COURTS-MARTIAL, 13.

CONDUCT REPORTS. C. M. O. 15, 1910, 4–5. *See also* PROBATION, 17.

Digitized by Google

CONDUCT SUBVERSIVE OF GOOD ORDER AND THE DISCIPLINE OF THE SERVICE.

1. **Officer charged with.** G. C. M. Rec. 6230.

CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE.

1. **Absence unauthorized**—With manifest intention of evading transfer to another ship is chargeable both under "Conduct to the prejudice of good order and discipline," and a charge specifying unauthorized absence. C. M. O. 27, 1915, 2. *See also* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 12.
2. **Same**—Not properly chargeable under. *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 12.
3. **Attempt to smuggle liquor**—Into navy yard. G. C. M. Rec. 31142.
4. **Attempted unauthorized absence.** G. C. M. Rec. 31333.
5. **Avoiding**—Expeditionary duty. G. C. M. Rec. 32136.
6. **Breaking arrest**—Not properly chargeable under. *See* BREAKING ARREST, 2.
7. **Same**—Enlisted man broke arrest after expiration of enlistment but before discharge. *See* BREAKING ARREST, 3.
8. **Discharge obtained by fraud.** *See* DISCHARGE OBTAINED BY FRAUD.
9. **Disrespectful**—Letter to Major General Commandant, Marine Corps. G. C. M. Rec. 31679.
10. **Leaving ship**—While under suspension from duty and missing ship. G. M. C. Rec. 31925.
11. **Midshipmen**—Charged with. C. M. O. 10, 1909; 41, 1909; 8, 1912; G. C. M. Rec. 25104.
12. **Missing ship**—Chargeable under. C. M. O. 42, 1915, 1; 49, 1915, 1, 2; G. C. M. Rec. 31298.
13. **Same**—And avoiding expeditionary duty. G. C. M. Rec. 32136.
14. **Same**—Officer. C. M. O. 14, 1916.
15. **Money transactions**—It is doubtful if money transactions of a culpable character between enlisted men, in their private capacity and not directly affecting the naval service or impairing discipline, can be charged under "Conduct to the prejudice of good order and discipline." File 26287-1041, J. A. G., Jan. 13, 1912. *See also* SCANDALOUS CONDUCT TENDING TO THE DESTRUCTION OF GOOD MORALS, 6, 9.
16. **Not halting**—When challenged by patrol. G. C. M. Rec. 29071.
17. **Officers**—Charged with. C. M. O. 8, 1909; 11, 1909; 15, 1909; 39, 1909; 40, 1909; 45, 1909; 46, 1910; 51, 1910; 16, 1910; 18, 1910; 24, 1910; 4, 1911; 13, 1911; 15, 1911; 9, 1912; 15, 1912, 5; 22, 1912; 23, 1913; 31, 1913; 7, 1914; 11, 1914; 17, 1914; 19, 1914; 27, 1914; 43, 1914; 14, 1916; 18, 1916; 40, 1916; 41, 1916; 1, 1917; 2, 1917; 5, 1917; 6, 1917; 9, 1917.
18. **Warrant officers**—Charged with. C. M. O. 12, 1912, 3; 17, 1912; 18, 1912; 10, 1914; 38, 1914; 11, 1916; 20, 1916.
19. **Warrant officers (commissioned)**—Charged with. C. M. O. 46, 1915; 38, 1916.
20. **What constitutes.** *See* CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN, 12.

CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN.

1. **Army**—Sentence of dismissal mandatory for officers found guilty of. C. M. O. 49, 1915, 23. *See also* CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN, 6.
2. **Debts**—Nonpayment of, charged under. *See* DEBTS, 2, 12.
3. **Midshipmen**—Charged with. C. M. O. 9, 1909; 7, 1912; 8, 1912.
4. **Newspaper**—Officer writing letters to. C. M. O. 22, 1890.
5. **Officers**—Charged with. C. M. O. 5, 1909; 16, 1909; 48, 1910; 53, 1910; 54, 1910; 15, 1911; 32, 1911; 13, 1912; 36, 1913; 40, 1913; 20, 1914; 26, 1914; 27, 1914; 30, 1914; 43, 1914; 1, 1916; 12, 1916; 15, 1916; 5, 1917; 10, 1917; 20, 1917.
6. **Sentence should include dismissal**—Congress by law has provided that any officer of the Army convicted of "Conduct unbecoming an officer and a gentleman" "shall be dismissed from the service" (sec. 1342, art. 61, Rev. Stat.) thus making a sentence of dismissal mandatory upon conviction of the offense named in Army cases.

   While there is no similar statutory enactment with reference to the Navy, the foregoing is sufficient evidence of how seriously this particular offense has been regarded by Congress.

   A court-martial composed of naval officers should not refuse to accept for the service of which they are members the standard fixed by law to which officers of the Army must conform in order to retain their commissions. File 26251-11181, Sec. Navy, Dec. 17, 1915; G. C. M., Rec. 31436; C. M. O. 49, 1915, 23. *See also* File 13673-3728, J. A. G., Mar. 17, 1916; C, M. O. 12, 1916, 1-2; COURT, 169.

Digitized by Google

7. **Specification under charge of**—An addition to specification under a charge of "Conduct unbecoming an officer," etc., of the words "all of which was an abuse of his trust, a violation of his public duty, and was conduct unbecoming an officer and a gentleman" does not affect the specification, whether or not such words are found proved. File 26251-3252, J. A. G., Apr. 26, 1910, p. 5.
8. **Warrant officers**—Charged with. C. M. O. 5, 1913; 13, 1913; 29, 1913; 11, 1915; 20, 1916.
9. **Warrant officer, retired**—Charged with. C. M. O. 34, 1916.
10. **Warrant officers (commissioned)**—Charged with. C. M. O. 21, 1915; 2, 1916.
11. **Warrant officers (commissioned), retired**—Charged with. C. M. O. 15, 1915; 20, 1916.
12. **What constitutes**—"What is conduct unbecoming an officer and a gentleman, or what is conduct to the prejudice of good order and military discipline, is beyond the bounds of exact formula and must depend more or less upon the circumstances and peculiarities in each case. * * * The cases which involve conduct to the prejudice of good order and military discipline are still further beyond the bounds of ordinary judicial judgment, for they are not measurable by our innate sense of right and wrong, of honor and dishonor, but must be gauged by an actual knowledge and experience of military life, its usages and duties." "In the recent case of Fletcher (26 Ct. Cls. 541, 562), where the court was obliged to pass upon the legality of a sentence for conduct unbecoming an officer and a gentleman, resting upon a series of acts which neither civil or criminal jurisprudence would have stigmatized as fraudulent, it was said * * * 'In military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army [and Navy] shall come down to the requirements of a criminal code.'" (Swaim v. U. S., 28 Ct. Cls. 173.) File 26260-1392, 26260-697, J. A. G., June 29, 1911, p. 10. *See also* HONOR; JURISDICTION, 26.

CONDUCT UNBECOMING AN OFFICER OF THE NAVY.

1. **Midshipman**—Charged with. C. M. O. 3, 1909.

CONFESSIONS.

1. **Admissibility and nature of**—The commanding officer of the accused called his attention to a newspaper account of certain occurrences in which the accused participated while on shore "and asked him if he had any statement to make concerning it." The accused thereupon made a verbal statement concerning the newspaper report "without threat, inducement, or promise of reward." The commanding officer then "asked him if he would make a written statement" and the accused complied without "any threat or reward or promise." The department held that both the verbal and written statements were admissible as confessions. C. M. O. 7, 1914, 13-14.
2. **Same**—It is generally agreed that voluntary and deliberate confessions of guilt are among the most effectual proofs in the law, on the presumption that a rational being will not make admissions prejudicial to his interest and safety, unless urged by the promptings of truth and conscience. (2 Moore on Facts, sec. 1181, and authorities cited.) The real question to be considered in determining whether or not the confession was voluntary is, *"was there any threat or promise of such a nature as would be likely to cause the accused to tell an untruth from fear of the threat or hope of profit from the promise."* (C. M. O. 26, 1910.)

   The rule is well stated that "whether a confession is voluntary depends largely upon the facts of the particular case. If it is obtained by reason of oral threats of harm, by promise of benefit, or by actions of those in control of the prisoner which are equivalent to such threats or promises, it is involuntary and incompetent, and in determining whether it was obtained by such means the *sex, age, disposition, education, and previous training of the prisoner, his mental qualities, his physical health, and his surroundings are elements to be considered.*" (12 Cyc., 464.) C. M. O. 7, 1914, 14. *See also* C. M. O. 224, 1902.
3. **Same**—The prosecution introduced in evidence an alleged confession of the accused. The accused testified that he was under the impression that his commanding officer "was going to get him out of this trouble."

   From the testimony adduced there does not appear to have been any promise made by his commanding officer to relieve the accused from prosecution nor any such promise or representation as could reasonably have induced the accused to state things that were not true, even though the court gave full faith and credit to the testimony of the accused as to the statements made to him by his commanding officer.

   The question as to whether or not the accused was influenced to make this confession through expectations that he would not be prosecuted does not rest upon his

Digitized by Google

testimony that such were the facts, but upon whether the court, taking into consideration all the testimony in connection therewith, considered that the accused was justified in believing that he would not be court-martialed if he made a confession. C. M. O. 26, 1910, 9.

4. **Same**—In Pierce *v.* United States (160 U. S., 355), the admission in evidence of certain statements made by the defendant while under arrest and handcuffed was objected to. As to this matter the Supreme Court said:

"No exception was taken to the admission of this testimony, and the court properly held that the mere presence of officers is not an influence. Confessions are not rendered inadmissible by the fact that the parties are in custody, provided that such confessions are not extorted by inducements or threats. (Hopt *v.* Utah, 110 U. S., 574, 583; Sparf *v.* United States, 156 U. S., 51, 55.)"

In Sparf and Hansen *v.* United States (156 U. S., 51), it was held that a voluntary confession may be made while a defendant is confined and in irons under an accusation of having committed a capital offense.

"A confession is admissible even if elicited by questions, whether put to the prisoner by a magistrate, officer, or private person." (Greenleaf, 15th ed., 229.)

And also, if the statement of the accused be not regarded as a full confession of guilt then *a fortiori:*

"Mere incriminating statements of facts not amounting to confessions of guilt are not subject to the restrictions that obtain in the case of confessions.

It was also held in the case of United States *v.* Graff (26 Fed. Cas. No. 15244) that—

"A written statement made freely, without the influence of a threat or promise, by a person acknowledging his connection with another in smuggling goods, may be admitted in evidence against the former, where it appears that he was not under arrest, though he had been told that he was charged with being connected with smuggling."

And indeed an accused person may be actually made drunk, and if a confession is made while thus intoxicated it will nevertheless be admissible. C. M. O. 31, 1911, 5–6.

5. **Same**—The corpus delicti having been proved, a confession by the accused may be admitted in evidence, providing it was a voluntary confession. A letter claimed to have been written by the accused in which he acknowledged having drawn transportation illegally against the Government was introduced by the judge advocate for the purpose of proving the charge made against the accused (misappropriating to his own use the transportation in question). *Held*, That in order that such letter be admissible as a confession, it must be proved, (1) that the transportation was actually drawn, (2) that the confession contained in the letter was voluntarily written by the accused, and (3) that it was actually written and signed by the accused. C. M. O. 17, 1910, 3–4. *See also* C. M. O. 42, 1909, 6; 26, 1910, 9–10; 31, 1911, 5; G. C. M. Rec. 21166, 21176, 21203, 21205, 21243, 21244, 22393, 23490, 23491, 23492, 24221, 24258.

6. **Same**—Forms of Procedure, 1910, page 138, states that "it must be clearly shown that the confession was voluntary, and anything that will tend to show that a confession was extorted by threats or promises, or by use of force, especially by one in authority, will destroy its value as evidence." (*See also* C. M. O. 224, 1902; 32, 1908, 2; 47, 1910, 6; 17, 1910, 4; 26, 1910, 9; 31, 1911, 5–6; 5, 1913, 9; 10, 1915, 5; Index-Digest, 1914, 10.) C. M. O. 3, 1916, 6. *See also* File 26251–12159, Sec. Navy, Dec. 9, 1916, p. 10.

7. **Same**—Against third parties—In sodomy. G. C. M. Rec. 23491. *See also* G. C. M. Rec. 23490, 23492; CONFESSIONS, 23.

8. **Board of investigation**—The statement made by an accused before a board of investigation, when such statement takes the complexion of an admission against interest or a confession, is admissible before naval courts-martial. G. C. M. Rec. 11279.

9. **Commanding officer**—The fact that an accused confessed to his commanding officer, who was investigating this case, does not of itself throw doubt upon the truthfulness of his confession and thus render it inadmissible. (C. M. O. 7, 1914, 13–15; Index-Digest, 1914, 10.) C. M. O. 3, 1916, 7. *See also* C. M. O. 212, 1902.

In a case where the accused made a confession to his commanding officer the department remarked as follows: As stated by the judge advocate in his closing argument upon the trial of the accused "the accused in this case is not a boy, nor is he drawing a boy's salary. He graduated from the Naval Academy five years ago, and *is 26 years of age*. He holds a commission in the United States Navy, with the honor and trust it is presumed to carry with it." It can not be presumed that a commissioned officer of the Navy would regard a simple question put to him by his commanding officer as to whether "*he had any statement to make*," as compelling or inducing him to make an involuntary statement of such character that it could not

Digitized by Google

reasonably be accepted as true, particularly when, as in this case, the accused had himself voluntarily sought an interview with his commanding officer in connection with the matter. On the contrary, a commissioned officer of the age, education, and experience of the accused must be presumed to know—and is in fact required to know—the provisions of the Navy Regulations, 1913, contained in chapter 13, entitled "Naval Administration and Discipline," one paragraph of which chapter (Art. R. 1404 (2)) reads as follows: "He [commanding officer] shall also call upon the accused for such counter statement or explanation as he may wish to make, and for a list of the persons he desires to have questioned in his behalf. *If the accused does not desire to submit a statement he shall set forth that fact in writing.*" Accordingly, the accused and the members of the general court-martial by which he was tried are chargeable with knowledge of the fact that the commanding officer, even had he desired or undertaken to do so, could not legally compel any subordinate under his command to make a statement relative to accusations against such subordinate. Furthermore, as the members of the court-martial in this case were required to know, it is not necessary that the accused should be warned that any statement he might make would be used against him as evidence. (*See* C. M. O. 31, 1911, and decisions of the Supreme Court and other authorities quoted therein.) C. M. O. 7, 1914, 14-15.

A statement of an accused, charged with "desertion," made by him before his commanding officer when his offense is being investigated at the mast, is uniformly admitted in evidence when he is tried for the offense. C. M. O. 43, 1906, 2.

10. **Coroner's inquest**—Repeated efforts were made by the judge advocate to introduce in evidence the testimony given by the accused before the coroner's inquest which inquired into the death of his deceased wife. A copy of the record was produced by a witness, who testified that he was deputy county clerk and the legal custodian of the record; that the original thereof was filed by him in the office of the county clerk; that the copy produced was a duplicate made at the same time as the original and by the same process; and that the duplicate had been certified by him the same as the one on file. The judge advocate specified the portions of the record containing the testimony of the accused which he desired to introduce, but the introduction thereof was objected to by counsel for the accused, and objection sustained by the court on the ground that such testimony was irrelevant and not voluntary. Subsequently, the judge advocate endeavored to introduce a portion of such testimony by oral examination of the coroner, who was present at the inquest. This, however, was also refused by the court. In People *v.* Molineaux (168 N. Y., 331; 61 N. E., 308; 62 L. R. A., 193) it was stated by the court that the rule "is now firmly established in this State [New York] that when a person testifies at an inquest as an accused or arrested party, his testimony can not be used against him upon a subsequent trial of an indictment growing out of the inquest unless his testimony has been voluntarily given after he has been fully advised of all his rights and has been given an opportunity to avail himself of them." (*See also* State *v.* Finch, Supreme Court of Kansas, 81 Pac., 494.)

In the case of State *v.* Wescott (104 N. W., 341, 343) it was held by the Supreme Court of Iowa, with reference to the admission in evidence of a confession made by the defendant before a coroner's inquest, that "there was no error here of which defendant may justly complain. While the defendant may have been under unlawful arrest, this did not of itself make the confession involuntary. There were no threats or duress sufficient to destroy the voluntary character of the confession. * * * Before making the statement on the morning of December 13, the defendant was fully advised as to his rights, and there were no threats or promises made at that time. Apparently what he said or did was entirely voluntary." In the case of Green *v.* State (52 S. E., 431), decided by the Supreme Court of Georgia November 20, 1905, it was held, quoting syllabus:

"It is competent to prove on a subsequent trial the statement of the prisoner at a coroner's inquest by the testimony of witnesses who profess to remember the substance of such statement; and it is not error for the court to overrule an objection to such testimony, urged on the ground that 'the law requires the evidence before the coroner's jury to be in writing, and the writing would be better evidence of what the witness said. * * *.'"

"An objection to the admission of the same evidence, on the ground that 'the defendant was in the custody of the officers, under arrest, and while thus situated was compelled to give testimony against herself, and it was unlawful to require her to make any statement tending to incriminate herself; and therefore such statement would be inadmissible,' is equally without merit where the record does not disclose any evidence, either of compulsion or that the statement proved by such testimony was not

Digitized by Google

freely and voluntarily made." (*See also* 14 Cent. Dig. Crim. Laws, secs, 1185–1188; 6 Dec. Dig. Crim. Law, sec. 521.)

In the present case the court was plainly in error in ruling that the testimony of the accused before the coroner's inquest was inadmissible, there being nothing whatever to show that such testimony was given by the accused under compulsion, and the only ground for the court's ruling appearing to be statements made by counsel for the accused in urging, without any evidence to support his remarks, "that the accused was there under process; he was compelled to testify. He was compelled to give testimony perhaps prejudicial to himself." C. M. O. 5, 1913, 9, 10.

11. **Corpus delicti.** *See* CORPUS DELICTI.
12. **Court of inquiry**—The department held that a court was in error when it held that a statement made before a *court of inquiry* in the nature of a confession is inadmissible in a later trial because proper and timely warning was not given the accused when his testimony was taken before the court of inquiry. C. M. O. 12, 1904, 4; File 26251–12895.
13. **Custody of officers.** *See* CONFESSIONS, 4, 10, 22.
14. **Entire confession should be admitted**—Confessions should be admitted in their entirety. Introducing excepts is irregular. C. M. O. 41, 1904, 2.
15. **Examining board**—Statements made before an examining board. *See* Section 1500 R. S.; C. M. O. 43, 1906; 101, 1903, 10; 88, 1895; G. C. M. Rec. 11279; 7913; 24258.
16. **Hope that charge would be withdrawn**—If an officer admits to his superior officer in a written statement that he committed a military offense and promised not to repeat the offense again, under the well-grounded hope that a charge which had been preferred against him would be withdrawn, the admission thus made, in case he were actually brought to trial upon such charge, would not properly be received in evidence over an objection. C. M. O. 32, 1908. *See also* CONFESSIONS, 18.
17. **Order**—A confession made by the accused after *orders* to do so from an officer in authority over him can not be considered as voluntary. It was so *held* under the wording of a statement by the accused, as follows: "*Having been called upon for a statement* * * * I make this statement freely of my own accord." Such practice was held to be contrary to the spirit of the law and a conviction depending upon such evidence (confession) would be illegal. C. M. O. 47, 1910, 6.
18. **Same**—An example of a confession held to have been involuntary is given in General Court-Martial Order No. 47, 1910, page 6, in which the executive officer addressed the following order to the officer of the day: "*Make* these two men *write full statements* as to what they did with their uniforms." C. M. O. 7, 1914. 14. *See also* C. M. O. 32, 1908, where accused was *ordered* to submit a statement and the case was disapproved.
19. **Preliminary examination**—"The court is allowed to take testimony to ascertain the absolute conditions under which a confession was made in order to decide whether it was a voluntary act of the accused." (Forms of Procedure, 1910, p. 138. *See also* C. M. O. 5, 1913, p. 9.) That is, it is proper for the court to allow a preliminary examination of witnesses, before the contents of the confession are divulged to decide whether or not the confession was voluntary and thus admissible. (C. M. O. 10, 1915, p. 4.) Where the facts shown by this preliminary examination are conflicting the question as to whether the confession was voluntary is to be determined by the court whose decision in general will not be disturbed. (C. M. O. 10, 1915, p. 5; Index-Digest, 1914, p. 10.) C. M. O. 3, 1916, 6–7.

In a case where a general court-martial refused to permit the defense to cross-examine a witness who was on the stand for the purpose of introducing a confession to show that it was involuntary, the department stated: "Before a confession or statement in the nature of a confession may be introduced in evidence it is necessary to show the circumstances under which such confession or statement was made in order that the court may determine whether or not it was voluntary. To this end the judge advocate, when introducing such a statement, should conduct a preliminary examination of the witnesses in order to show the surrounding circumstances. Counsel for the accused is then entitled to cross-examine the witness on the same point, and it is error to refuse to permit him to do so." (C. M. O. 5, 1913, 9; *see also* 12 Cyc. 481.) It follows that unless a confession is shown to be voluntary it is incompetent and inadmissible as evidence. (C. M. O. 32, 1908, 2; 17, 1910, 4; 26, 1910, 9; 5, 1913, 9; 7, 1914, 14.)

In a recent case the judge advocate offered in evidence an alleged confession signed by the accused, after examining a witness for the prosecution, before whom such confession was made concerning circumstances bearing on its voluntary character. Counsel for the accused asked permission, which was properly granted by the court, to cross-examine the witness in question *before the alleged confession was received in evidence* "only on that one point of determining whether any confession that may

Digitized by Google

be testified to was voluntarily made by the accused." Counsel for the accused then stated that before the confession should be admitted "the accused would like to testify and will himself ask for the privilege and will volunteer to testify at this time on the single issue of what was said to him as leading up to statements which he subsequently made" on the occasion of the alleged confession. Thereupon, the desired permission having been granted by the court, the accused was at his own request duly sworn as a witness in his own behalf, and testified on the subject. As a result of this testimony there was a conflict in the evidence as to the circumstances under which the confession was made. The defense objected to the admission of the confession in evidence, and the court permitted it to be introduced over such objection. The department held that where facts shown by preliminary examination are conflicting the question as to whether the confession was voluntary is to be determined by the court whose decision will not be disturbed. (G. C. M. Rec. No. 29422; File 26251–9280, Sec. Navy, Nov. 24, 1914.) C. M. O. 10, 1915, 5.

20. **Same**—In a case where there was a conflict in the evidence given by the witnesses for the prosecution and that given by the defense as to the circumstances under which a confession was made, the department stated: "Under these circumstances it was for the court to decide which of the witnesses it would believe, and what were the actual facts of the case. The department has repeatedly held that when the facts are in dispute, and there is such a conflict in the evidence that reasonable men might differ as to the conclusions to be drawn therefrom, the decision of the court on the subject should not be disturbed." (C. M. O. 4, 1913, 57; 24, 1914, 7; 29, 1914. 9; G. C. M. Rec. No. 29422; File 26251-9280.) Therefore, where the facts shown by the preliminary examination are conflicting the question whether the confession was voluntary is to be determined by the court whose decision will not in general be disturbed. G. C. M. Rec. No. 29422; File 26251-9280; C. M. O. 51, 1914, 3.

21. **Reason behind the rule of admissibility**—It is a rule of evidence that in order for a confession to be admissible it must have been voluntary. The phrase "voluntary" is so "indefinite that it is of little service in itself." (1 Greenleaf, p. 355, sec. 219.)

The reason behind the doctrine "and the controlling inquiry is, whether the inducement held out to the prisoner was calculated to make his confession an *untrue one*." (1 Greenleaf, p. 354, sec. 219.)

Rice on Evidence, vol. 3, page 489, states that the "confessions of the prisoner are receivable in evidence, upon the presumption that a person will not make an *untrue* statement against his own interest."

The underlying principle is that the confession "shall not be induced by improper threats or promises, because under such circumstances that the party may have been influenced to say that which is *not true*, and the supposed confession can not be safely acted on." (1 Greenleaf, p. 354, sec. 219.)

"The reason for excluding the confession is, to repeat, not that the law affirmatively presumes it to be *untrue*, but that its *truthfulness* is so uncertain as to render it unsafe for the jury. Therefore, as often said, the real reason in every case is, whether or not the confessing mind was influenced in a way to create doubt of the *truth* of the confession. (2 Bishop's New Crim. Proc., p. 1049.)

"The doctrine in its essence and divested of its technicalities is that a defendant's confession is admissible in evidence against him if made freely and without hope of benefit to his cause; otherwise it is rejected, since its purpose may have been to secure such benefit rather than to disclose the *truth*." (2 Bishop's New Crim. Proc., p. 1043.) C. M. O. 3, 1916, 7.

22. **Silence as a confession**—"Where, on being accused of crime, with full liberty to speak one remains silent, his failure to reply or to deny is relevant as tending to show his guilt. His silence alone, however, raises no legal presumption of guilt. Its effect is for the jury, and from it, in connection with other facts and circumstances, they may infer that he is guilty." (12 Cyc. 421.)

A confession may in some cases be collected or inferred from the conduct and demeanor of a prisoner on hearing a statement affecting himself. "As such statements frequently contain much hearsay and other objectionable evidence, and as the demeanor of a person upon hearing a criminal charge against himself is liable to great misconstruction, evidence of this description ought to be regarded with much caution." (Ph. & Arn. 405, 10th ed., quoted in Roscoe's Criminal Evidence, pp. 53, 54.)

In any event, in order that silence may be received in evidence against an accused as tantamount to an admission of charges against him, it must be shown (*a*) "either that the accused did in fact hear what was said, or was in a position to hear"; (*b*) that "the statements were such as to call for a reply by him"; and (*c*) "it must also

Digitized by Google

appear affirmatively that he had an opportunity or right under the circumstances of the case to deny the truthfulness of the charges made against him." (12 Cyc., 421 422.)

According to many authorities "the fact that one is under arrest and in the custody of an officer when he is silent under accusation prevents his silence or the statements themselves from being admissible against him, on the ground that under such circumstances *he is not called upon to speak*." (12 Cyc., 422.) C. M. O. 7, 1911, 7–8.

23. **Sodomy.** *See* File 26251–7121:3. *See also* CONFESSIONS, 7.
24. **Statement of accused**—When offense is being investigated, a statement of an accused enlisted man, charged with desertion, made by him before his commanding officer when his offense is being investigated at the mast, is uniformly admitted in evidence when he is tried for the offense. C. M. O. 43, 1906, 2. *See also* BOARDS OF INVESTIGATION, 7; DESERTION, 123, 125.
25. **Voluntary**—A confession must be voluntary to be admissible. *See* CONFESSIONS, 2, 5, 6, 21.
26. **Warning**—It is not necessary to the admissibility of any confession to whomsoever it may have been made that it would appear that the accused was warned that what he said would be used against him. On the contrary, if the confession was voluntary, it is sufficient, though it should appear that he was not so warned. C. M. O. 31, 1911, 5; 7, 1914, 15; 3, 1916, 7. *See also* C. M. O. 12, 1904, 4; 14, 1910, 11–12; G. C. M. Rec. 21336; 21996; 24224.
27. **Same**—With respect to whether a warning is necessary in the case of an accused person, the Supreme Court, in Wilson *v.* The United States (162 U. S., 613, 623), said:

"And it is laid down that it is not essential to the admissibility of a confession that it should appear that the person was warned that what he said would be used against him, but, on the contrary, if the confession was voluntary, it is sufficient though it appear that he was not so warned. (Joy on Confessions, 45, 48, and cases cited.)"

Likewise, Greenleaf, in his work on Evidence (15th ed., v. 1, sec. 229), says:

"Neither is it necessary to the admissibility of any confession to whomsoever it may have been made that it should appear that the prisoner was warned that what he said would be used against him. On the contrary, if the confession was voluntary, it is sufficient, though it should appear that he was not so warned."

It is also stated in the Cyclopedia of Law and Procedure (vol. 12, p. 463) that—

"The fact that a voluntary confession is made without the accused having been cautioned or warned that it might be used against him *does not render it incompetent* unless a statute invalidates a confession made where the accused is not first cautioned."

As there is no statute which is applicable to this matter before naval courts-martial, the italicized words indicate the rule governing the case.

With respect to the first point, therefore, it is evident that the statement or confession of the accused was admissible in evidence against him, even though he had not been warned that such statements might be used against him. And it may be regarded, in addition, that there is nothing to show that it was obtained by any inducement or threat; also, that its admission was not objected to by the accused. C. M. O. 31, 1911, 5, 6.

CONFIDENTIAL. *See* CONFIDENTIAL PUBLICATIONS; MEDICAL RECORDS, 1, 3, 4, 5; OATHS 20, 47.

CONFIDENTIAL PUBLICATIONS.

1. **Battle signal book**—Officers tried by general court-martial for loss of. C. M. O. 7, 1916; 8, 1916.
2. **Document**—Officer tried by general court-martial for loss of. C. M. O. 20, 1909.
3. **Tactical signal book**—Officer tried by general court-martial for loss of. C. M. O. 12, 1910.

CONFINEMENT.

1. **Antedating**—The department held that the action of a convening authority was in error when it approved a sentence involving confinement to take effect from a prior date. This was improper; for, whereas it is within the province of the convening authority to mitigate sentences of general courts-martial convened by him, and he could in this case, by express terms, have reduced the period of confinement adjudged had he so desired, his action in making this confinement date from a previous day was irregular and contrary to the provisions of Navy Regulations, 1909, R–1784 (2) [Navy Regulations, 1913, R–818 (2)]. C. M. O. 49, 1910, 15; 21, 1914, 4. *See also* ANTE-

Digitized by Google

DATING, 3; CONFINEMENT, 9; C. M. O. 96, 1902. *But see* C. M. O. 13, 1910, where a fleet convening authority antedated an officer's sentence involving restriction.

2. **Bad-conduct discharge**—And solitary confinement should not be both adjudged in the same summary court-martial sentence. File 26287-3483, Sec. Navy, July 17, 1916.
3. **Begins.** *See* ANTEDATING, 3; CONFINEMENT, 1, 9.
4. **Bread and water.** *See* BREAD AND WATER.
5. **Certificate of medical officer**—Whenever any person is sentenced for a period exceeding 10 days to confinement on diminished rations, or on bread and water, there must appear on the record of the proceedings the certificate of the senior medical officer under the immediate jurisdiction of the convening authority, to the effect that such sentence will not be seriously injurious to the health of the prisoner. (A. G. N. 33; R-33.) G. O. 196, Dec. 15, 1875; U. S. Navy Reg. Cir. No. 19, June 4, 1879; C. M. O. 33, 1909, 2; 49, 1910, 15; G. C. M. Rec. 24595.
6. **Civil courts**—A man who has been sentenced by a Cuban civil court to confinement for four months can not be confined on board a naval vessel for such length of time as punishment for the offense for which he was sentenced, since the authority of the commanding officer of a naval vessel to confine a man under sentence not imposed in pursuance of any statute or regulation is questionable. File 5128-04.
7. **Same**—Pay—An enlisted man of the Navy imprisoned by civil authorities for an offense, convicted and withdrawn from the service of the United States, is not entitled to pay during the term of confinement (2 Comp. Dec. 584; 19 comp. Dec. 226). But *contra* if found "not guilty." Arrest and confinement by civil authorities of a man for manslaughter, no bar to receipt of pay, if acquitted by the civil court. File 2433-96. *See also* C. M. O. 5, 1912, 4-14; 14, 1914, 4-6; 29, 1914, 10; File 3811-04; 609-04. *See in this connection* Carrington *v.* U. S. (46 Ct. Cls., 279).
8. **Convening authority**—If the convening authority, after reviewing the proceedings of a summary court-martial, deem that the ends of justice will be subserved by so doing, he is authorized to mitigate a sentence of "confinement not exceeding two months" to "confinement to the limits of the garrison," but no such power is given to the court itself, which must strictly adhere to the statutory form of sentence. C. M. O. 2, 1912, 11. *See also* CONFINEMENT, 41; RESTRICTION, 1, 4.
9. **Date**—The term of confinement shall take effect from the date of approval of the sentence. Should an unusual time elapse between the date of confinement of the accused for trial and the date of approval of the sentence, this period may be considered by the convening authority in acting upon the case. Should the sentence be to solitary confinement, or to confinement on reduced rations, the time of such conditioned confinement must be fulfilled unless such provision of the sentence be remitted or mitigated by the convening or higher authority. *See* ANTEDATING, 3; CONFINEMENT, 1.
10. **Deck courts**—Are not authorized to adjudge confinement or loss of pay in excess of 20 days. C. M. O. 24, 1909, 3; 1, 1914, 5. *See also* DECK COURTS, 8.
11. **Same**—It is illegal for a deck court to adjudge a sentence which includes *both* solitary confinement on bread and water, and reduction in rating. Where this was done the department set aside that part of the sentence relating to reduction in rating in view of the fact that when the record of proceedings was received in the department the solitary confinement had in all probability been carried into execution. C. M. O. 33, 1914, 5-6. *See also* DECK COURTS, 49.
12. **Definition**—"Confinement," as prescribed by A. G. N. 30, should be in the nature of an imprisonment.

    A restraint which includes the placing of a prisoner by himself where he can communicate with no unauthorized persons and not with fellow prisoners, is solitary confinement, and is not properly simple confinement.

    Mere restriction to the limits of a ship is not regarded as being a form of confinement within the meaning of A. G. N. 30.

    As facilities on board ships at shore stations, etc., vary for the execution of sentences, no precise rule as to how "confinement" shall be executed can be prescribed.

    A. G. N. 30 provides for three kinds of physical restraint: (1) solitary confinement, (2) confinement, (3) deprivation of liberty on shore on foreign station. File 26806-79, J. A. G., Feb. 6, 1912; C. M. O. 23, 1912, 5. *See also* SUMMARY COURTS-MARTIAL, 92.
13. **Deprivation of liberty on shore on foreign station**—May not be added to confinement. C. M. O. 33, 1914, 5.
14. **Discharge, without**—Sentences involving confinement at hard labor with corresponding forfeiture of pay, *without discharge*, should adjudge forfeiture of only "pay that may become due him *during said confinement.*" C. M. O. 21, 1912, 4.

Digitized by Google

15. **Garrison**—Confinement to limits of garrison. *See* CONFINEMENT, 8, 19, 41.
16. **Hard labor**—Sentences of general courts-martial including *confinement* shall contain a provision requiring that the person sentenced shall perform hard labor while so confined. C. M. O. 23, 1912, 4; 46, 1902, 1; 47, 1910, 4. *See also* G. C. M. Rec. 21161; 22745; HARD LABOR, 1; R-900 (8).
17. **Same**—All sentences of general courts-martial involving confinement shall be at *hard labor*, instead of involving the performance of extra police duties. C. M. O. 6, 1909, 2; 42, 1909, 6; 47, 1910, 4. *See also* HARD LABOR, 2.
18. **Same**—Officers confined at hard labor. C. M. O. 173, 1902; 50, 1914. *See also* HARD LABOR, 5.
19. **Limits of garrison**—A summary court-martial has no power to adjudge a sentence which confines a man to the limits of the garrison. C. M. O. 2, 1912, 11. *See also* CONFINEMENT, 8, 41; RESTRICTION, 1, 3.
20. **Limits of ship, post, or station**—Where restriction to the limits of the ship, post, or station is contemplated by a general court-martial rather than close confinement, the word "restricted" rather than "confined" should be used in the sentence and the proper form is "to be restricted to the limits of the post, station, or ship," etc. (C. M. O. 23, 1912, 4.) C. M. O. 6, 1882; 6, 1883, 2; 2, 1909; 17, 1912, 1; 23, 1912, 4; 16, 1914, contain the wrong phraseology, and C. M. O. 95, 1893, 3 and 21, 1914, contain the correct wording. *See* G. O. 44, Dec. 7, 1864, where an officer was sentenced to be confined in a place "other than a prison," and a navy yard was designated. *See also* C. M. O. 12, 1899, 3; 118, 1905.
21. **Limits of the marine barracks**—Officer's sentence. C. M. O. 38, 1886.
22. **Limits of the U. S. S. "Richmond"**—Sailmaker. C. M. O. 53, 1888.
23. **Medical officer's certificate**—Confinement over 10 days on diminished rations, etc. *See* CONFINEMENT, 5.
24. **Midshipman**—For "brutal or cruel" hazing. *See* HAZING, 6.
25. **Officers**—Sentences which adjudge confinement for officers in addition to dismissal, C. M. O. 27, 1887, 16; 34, 1909; 35, 1909; 17, 1911; 29, 1911; 33, 1911; 29, 1913; 31, 1913; 35, 1913; 50, 1914.
26. **Same**—Confined at hard labor. *See* CONFINEMENT, 18.
27. **Pay**—Sentences involving confinement at hard labor not desirable without forfeiture of pay. C. M. O. 1, 1913, 3; 5, 1914, 6. *See also* C. M. O. 100, 1894, 2.
28. **Same**—Arrest and acquittal by civil authorities. *See* CONFINEMENT, 7.
29. **Same**—Forfeiture of pay should agree with period of confinement. *See* CONFINEMENT, 14, 32, 34.
30. **Same**—It has been noticed that in a number of cases tried by general court-martial, in which the men were sentenced to confinement without discharge, the sentences failed to include the usual words excepting from forfeiture any amount that may be due the Government; and consequently, if a man is in debt, or if afterwards develops that he is in debt, to the Government, this indebtedness can not be wiped out until after he has completed his term of imprisonment and is restored to duty. *See* CONFINEMENT, 31.
31. **Same**—It is therefore considered by the department desirable that all sentences which include forfeiture of pay contain the provision that "after his accrued pay (and allowances—in the case of marines) shall have discharged his indebtedness to the United States at the date of approval of this sentence, to forfeit all pay, etc." C. M. O. 42, 1909, 11; 31, 1910, 4; 19, 1911, 4; 1, 1913, 5.
32. **Period of**—Forfeiture of pay should agree with. C. M. O. 42, 1909, 3; 49, 1910, 11; 14, 1910, 7; 26, 1910, 8; 7, 1911, 4; 21, 1912, 4; 1, 1913, 3. *See also* CONFINEMENT, 14, 34.
33. **Post**—Confinement to limits of. *See* CONFINEMENT, 20.
34. **Reduced by convening authority**—Where the convening authority, after approving the proceedings, findings, and sentence, reduces the period of confinement, he should make a corresponding reduction in the forfeiture of pay and allowances adjudged, for if he does not do so the accused will forfeit all pay and allowances during confinement, except $3 per month for necessary prison expenses, and all pay and allowances *throughout the balance of his enlistment.* The department took this action. C. M. O. 49, 1910, 11. *See also* ALLOWANCES, 1.
35. **Reduction in rating**—May not be added to confinement. *See* CONFINEMENT, 11.
36. **Restriction.** *See* CONFINEMENT, 8, 20; RESTRICTION, 1, 3.
37. **Ship**—Confinement to limits of ship. *See* CONFINEMENT, 20, 22.
38. **Solitary.** *See* CONFINEMENT, 9, 12; SOLITARY CONFINEMENT.
39. **Starts**—Date of approval of sentence. *See* ANTEDATING, 3; CONFINEMENT, 1, 9.
40. **Summary courts-martial**—Authorized to sentence an accused to "confinement not exceeding two months." C. M. O. 33, 1914, 5. *See also* SUMMARY COURTS-MARTIAL, 86.

Digitized by Google

41. **Same**—No authority exists to make any departure in the sentence from the express terms of the statute, either as to form or extent of punishment. A sentence "to be confined to the limits of the garrison for two (2) months" adjudged by a summary court-martial is one for which there is no authority of law, and differs from "confinement not exceeding two months" authorized by Article 30, A. G. N. File 26287-1020, J. A. G., Dec. 27, 1911. *See also* CONFINEMENT, 8.
42. **"Sweat boxes"**—Confinement in. *See* SWEAT BOXES, 1.
43. **Term of**—Shall take effect from the date of approval of sentence. C. M. O. 49, 1910, 15; 21, 1912, 4. *See also* ANTEDATING, 3; CONFINEMENT, 1, 9.
44. **Torpedo boat**—Confinement in fireroom of a torpedo boat. C. M. O. 92, 1905, 3.
45. **Unusual.** C. M. O. 10, 1891.

CONFLICTING ORDERS. C. M. O. 23, 1912, 5–6. *See also* ORDERS, 3.

CONGRESS.

1. **Appeals to**—Death gratuity in case of mother who had not been "previously designated" by deceased. *See* APPEALS, 2.
2. **Same**—Where officer believes his date of commission is erroneous and matter is *res judicata*. *See* COMMISSIONS, 14.
3. **Appointments to office**—Congress can not make. *See* APPOINTMENTS, 8.
4. **Naval Academy**—Policy of Congress to leave the internal administration and discipline largely in hands of the officials at the Naval Academy. *See* HAZING, 6.
5. **Regulations**—Congress annuling. *See* REGULATIONS, NAVY, 3, 4, 20.
6. **Same**—Approval of regulations by Congress. *See* REGULATIONS, NAVY, 5–9.
7. **Retired naval officer**—As Member of Congress. *See* RETIRED OFFICERS, 18, 72.
8. **Thanks of Congress**—A resolution tendering the thanks of Congress to Vice Admiral David G. Farragut, and to the officers, petty officers, seamen, and marines under his command, for their gallantry and good conduct in the action of Mobile Bay on August 5, 1864. G. O. 73, Feb. 17, 1866.
9. **Same**—Effect of vote of thanks by Congress to officers of the Navy. (R. S. 1446, 1465, 1508, 1509.) *See* File 27231-10, J. A. G.
10. **Same**—Officers of the Navy and other persons who have received a vote of thanks by Congress since 1878:
    Henry M. Stanley (explorer), Feb. 7, 1878. (20 Stat. 247).
    Khedive of Egypt, Jan. 12, 1882. (22 Stat. 377.)
    John F. Slater (for work in uplifting emancipated slaves), Feb. 5, 1883. (22 Stat. 636.)
    Commodore George Dewey, May 10, 1898. (30 Stat. 742.)
    Hon. John Hay (address on McKinley), June 3, 1902. (33 Stat. 1171.)
    Gen. Horace Porter (for recovering body of John Paul Jones), May 9, 1906. (34 Stat. 820.) File 27231-10, J. A. G., 1910.
11. **Trial of a naval officer**—Recommended by Congress—Part of the department's action in a general court-martial case of an officer read as follows—This is a case of extraordinary and unprecedented character. The facts set forth in the charge and specifications were first discovered and disclosed by a congressional investigation. The investigation and discovery of similar transactions between other parties led to the expulsion of one Member of Congress, the resignation of others, and the passage of a resolution by the House of Representatives requesting the Secretary of the Navy to convene a court-martial for the trial of the accused for "conduct unbecoming an officer." In compliance with that request this court was convened, and the accused has been tried." The case is, therefore, quite unexampled in its origin. It is equally so in the character of the accusation preferred. The purchase and sale of appointments and commissions are familiar transactions in the army and navy of other countries, but are unknown to our military and naval service. Here every military or naval nomination, appointment, or commission should be made and conferred as a reward of merit, or as a means of advancing the public interests by opening an honorable career to pure and honorable men.
    The Navy Department would not represent faithfully the tone and spirit of the Navy, were it less prompt than the House of Representatives to inquire into every charge of venality and corruption, or less certain, when discovered, to inflict the prescribed punishment upon the offender.
    The Secretary of the Navy, therefore, as requested by the House of Representatives, convened a court for the trial of the accused officer; a court composed of intelligent and distinguished officers, all of whom were senior in rank to the accused

Digitized by Google

and, having produced before that court all procurable proof in support of the charge and specifications, it is now called upon to revise its proceedings, finding, and sentence. This officer was found guilty and sentenced to public reprimand. G. O. 156, May 24, 1870. *See also* NAVAL ACADEMY, 12.

12. **Witness**—Under the act of February 16, 1909, sections 11 and 12 (35 Stat. 621, 622), a court of inquiry is empowered to subpoena a Representative attending a session of Congress, but if he refused to appear, he could not be compelled to do so owing to the fact that under Article I, section 6, clause 1 of the Constitution he would be privileged from arrest for the misdemeanor so committed. In this case the witness stated he would appear voluntarily without a subpoena. Accordingly the court decided to withdraw the subpoena, and the Representative thereupon voluntarily appeared and testified. Ct. Inq. Rec. 5203, pp. 1281–1286, 1293–1294, 1339–1343, 1363–1365, 1422.

CONSCIENCE FUND.

1. **Effect and status of**—Congress has never authorized the "conscience fund" which has been created by the Treasury Department, and any funds contributed thereto probably would be returnable to the person (or his heirs) contributing thereto, although it is possible that the courts would give legal effect to the custom of receiving funds, such custom having continued many years, not being in conflict with any express provision of law on the subject. File 13673-1442: 1, J. A. G., Jan. 13, 1912.
2. **Pay**—Officer returning pay to Treasury. *See* LEAVE OF ABSENCE, 6.

CONSCRIPTION OR DRAFT.

1. **Exemption from**—Of former enlisted men. File 13673-3141:2 July 14, 1916.

CONSTITUTION OF THE UNITED STATES.

1. **Amendments**—Fifth amendment. C. M. O. 7, 1914, 6; 29, 1914, 10, 15.
2. **Same**—Sixth amendment. C. M. O. 49, 1910, 4; 55, 1910, 8; 15, 1910, 9; 17, 1910, 10; 10, 1915, 6.
3. **Article I, Sec. 9, clause 8.** C. M. O. 35, 1915, 11.

CONSTITUTIONAL LAW. *See also* JEOPARDY, FORMER, 5.

1. **Accused**—Privileges and immunities of. *See* CONSTITUTIONAL RIGHTS OF ACCUSED.
2. **Civil authorities**—Jurisdiction of. *See* CIVIL AUTHORITIES; GENERAL ORDER No. 121, Sept. 17, 1914.
3. **"Due Process."** *See* DEBTS, 18; DUE PROCESS OF LAW; NAVAL EXAMINING BOARDS, 10; PROMOTION, 64.
4. **Power to provide a Navy**—The power to formulate Articles for the Government of the Navy and punish individual officers for violation thereof is conferred upon Congress by Article I, section 8, clause 14; the power to provide what persons may be appointed or enlisted in the naval service, the qualifications they must possess, and the total number of the entire force is conferred by the clause authorizing Congress "to provide and maintain a Navy." Statutes passed under the first clause mentioned are penal and are to be enforced by courts-martial; those passed under the second clause are enacted in the interest of the Navy at large and are to be administered by the President, either alone or with the aid of examining boards or such other instrumentalities as may be determined upon by Congress. Persons excluded from appointment, for lack of any required qualification—health, age, nationality, height, temperament, or any other condition that Congress might see fit to impose—are not being punished under penal laws for their failure to measure up to the necessary requirements, but are merely incidentally affected by the Government's policy, as defined by Congress in the exercise of its undoubted right to say who shall and who shall not be appointed to the naval service. File 26260-1392, June 29, 1911, pp. 24–25.

   "The discretion of the President as commander in chief of the Navy, to make such dispositions of the personnel and material of the naval service as to him may seem advisable, is, of course, subject to legislative restrictions by Congress enacted under its constitutional authority to 'provide and maintain a navy.'" File 4670-47, J. A. G., Nov. 23, 1910, p. 5.
5. **State interference**—The principle that no State has the right to interfere with the instrumentalities of the Federal Government has been recognized from the earliest days of our Government. File 6769-21, J. A. G., July 19, 1911; 26524-54, Feb. 12, 1914. *See also* JURISDICTION, 118.
6. **Same**—Inspection of battleships. *See* File 6118-3, Nov. 22, 1907.
7. **Same**—Quarantine charges. *See* File 3983, Mar. 5, 1906; 6118-2, Dec. 29, 1906; 25 Op. Atty. Gen. 234. *But see* 13 Comp. Dec. 672.
8. **Same**—Exemption of civil employees from jury duty. *See* File 21090-3, Sept. 3, 1908; 20 Op. Atty. Gen. 618 *See also* JURY, 1.

Digitized by Google

CONSTITUTIONAL RIGHTS OF ACCUSED.

1. **Counsel**—Article VI of the amendments to the Constitution provides that "in all criminal prosecutions" the accused shall "have the assistance of counsel for his defense." Though the reference here is to prosecutions before criminal courts of the United States, naval courts, though not bound by the letter, are within the spirit of the provision.

   Therefore, where an accused goes on record as being desirous of having the assistance of counsel in conducting his defense, and is denied that right, except where it is impracticable to obtain counsel, such denial constitutes a fatal irregularity, and the improper procedure of designating the judge advocate to act in that capacity does not offset this irregularity nor fulfill the requirements of the law. C. M. O. 49, 1910, 14; 55, 1910, 8.
2. **Crimination.** *See* SELF INCRIMINATION.
3. **Cross-examination**—Of witnesses against him. *See* CONSTITUTIONAL RIGHTS OF ACCUSED, 16.
4. **Cruel and unusual punishment**—"Sentences must be neither cruel or unusual, and must be in accordance with the common law of the land and customs of war in like cases." (R-815.) "Offenses not provided for herein [Limitation of Punishment] remain punishable as authorized by the Articles for the Government of the Navy, as amended by the acts of May 13, 1908; February 16, 1909;" Aug. 29, 1916. (R-900 (2).)
5. **Double jeopardy.** *See* JEOPARDY, FORMER.
6. **Due process of law.** *See* DEBTS, 18; DUE PROCESS OF LAW; PROMOTION, 64.
7. **Jeopardy.** *See* JEOPARDY, FORMER.
8. **Jury trial**—Not required. *See* JURY, 6.
9. **Offenses defined, etc.**—In short, the whole proceeding would be repugnant to the constitutional safeguards, the spirit of which is that offenses and their punishment should be defined and fixed *in advance* of the doing of the wrongful act. C. M. O. 21, 1910, 9.
10. **Presence during trial.** *See* ACCUSED, 1-9.
11. **Presentment and indictment by grand jury.** *See* CONSTITUTIONAL RIGHTS OF ACCUSED, 13.
12. **Public trial.** *See* COURT, 127; PUBLIC TRIAL.
13. **Safeguards**—The contention that the constitutional safeguards and limitations apply to officers and enlisted men of the Navy with the single exception of presentment and indictment by grand jury is fully refuted in Ex parte Milligun (4 Wall. 2, 137.) File 26260-1392, 697, J. A. G., June 29, 1911, p. 29.
14. **Self-incrimination.** *See* SELF INCRIMINATION.
15. **Speedy trial.** *See* COURT, 127; SPEEDY TRIALS.
16. **Witnesses**—Confrontation and cross-examination—It is the right of an accused to be confronted by witnesses against him, and afforded an opportunity to cross-examine them upon the evidence they may give in the case. C. M. O. 47, 1910, 9; 49, 1910, 9, 10; 15, 1910, 9; 17, 1910, 12; 21, 1910, 16. *See also* C. M. O. 224, 1902; 37, 1909, 8, 9; 47, 1910, 65, 1916, 5; FALSE SWEARING, 5; DEPOSITIONS, 9.
17. **Same**—Compulsory process of obtaining—Article 6 of the amendments to the Constitution of the United States provides that an accused, in all criminal prosecutions, shall enjoy the right to have compulsory process for obtaining witnesses in his favor. The propriety of this provision is clearly manifest and is beyond question. (Story on the Constitution, 5th ed., vol. 2, 572, 573.)

   Although the reference in the sixth amendment is to criminal courts of the United States only, military courts, though not bound by the letter, are within the spirit of the provision. Therefore, when an accused goes on record as desiring the attendance of certain witnesses and requests a postponement of the trial to permit him to secure them, unless it be shown to have been impracticable to accede to that request and secure the desired witnesses, the noncompliance with this provision would constitute a grave error. C. M. O. 17, 1910, 9. *See also* C. M. O. 47, 1910, 5-6; 49, 1910, 10.

   The act of Congress approved February 16, 1909 (35 Stat. 621, 622), provides that a naval court-martial or court of inquiry shall have power to issue like process to compel witnesses to appear and testify which United States courts of criminal jurisdiction within the State, Territory, or district where such naval court shall be ordered to sit may lawfully issue.

CONSTRUCTION OF STATUTES. *See* STATUTORY CONSTRUCTION AND INTERPRETATION.

CONSTRUCTIVE PARDON. *See* DESERTION, 41; PARDONS, 44.

Digitized by Google

CONSTRUCTIVE SERVICE.

1. **Officers**—Six years constructive service for the purposes of precedence was allowed staff officers of the Navy by section 1486, Revised Statutes. Five years constructive service for longevity pay was allowed officers of the Navy appointed from civil life by the Navy personnel act of March 3, 1899. (30 Stat. 1004.) The naval appropriation act of March 4, 1913 (37 Stat. 899), provided that the above provisions of section 1486, Revised Statutes, and act, March 3, 1899, should not apply to any person entering the Navy "after the passage of this act." File 11130-30:1, J. A. G., May 4, 1916. *See also* File 26255-95; 1, J. A. G., Apr. 6, 1910; 11130-9, J. A. G., July 18, 1910.

CONSULAR OFFICERS.

1. **Orders to**—Offices of the naval service. *See* DIPLOMATIC OFFICERS, 2.
2. **Retired naval officers**—Appointment as. *See* DIPLOMATIC OFFICERS, 1, 3; RETIRED OFFICERS, 18, 26.

CONTEMPT OF COURT.

1. **Deck courts**—In cases of contempt the court shall report the facts to the convening authority for such disciplinary action as may be appropriate.
2. **General court-martial**—During the progress of a general court-martial trial the accused was adjudged guilty of contempt, on account of refusing to answer a certain question propounded by the court, and he was thereupon sentenced "to be imprisoned in such place as the Secretary of the Navy may designate for a period of two months." In view, however, of the fact that there was a doubt owing to the conflict of authorities on the subject, as to whether the accused in the case was properly found guilty of contempt, particularly as the proceedings subsequent to those in contempt seem to show that the accused misunderstood the import of the question above referred to, the department directed that the sentence imposed for contempt be merged in that awarded for the offense of which the accused was convicted under the charge preferred against him. C. M. O. 234, 1902. *See also* G. C. M. Rec. 29475, p. 16; Navy Regulations, 1913, R-42; R-724.
3. **Same**—"Indecorous and disrespectful conduct of the accused toward the court while on trial." G. O. 157, May 24, 1870.
4. **Officer arrested by civil authorities**—An officer at home awaiting orders was served with subpœna requiring him to appear in a civil court, and disregarded it. He was publicly arrested for contempt of court. C. M. O. 24, 1886.
5. **Summary courts-martial**—Are without power to punish for contempt of court. Where a summary court-martial punished the recorder for contempt, the department set its action aside. File 4549-02, June 25, 1902; 22400, 1897. *See also* File 1020-05, Mar. 8, 1905. *See* JEOPARDY, FORMER, 3 (p. 297, line 3), FOR CONTEMPT OF COURT OF INQUIRY.
6. **Same**—In cases of contempt the court shall report the facts to the convening authority for such disciplinary action as may be appropriate.
7. **Witnesses**—If the witness refuses to answer a question, the judge advocate may request the court to require the witness to answer on the ground that the answer would not tend to criminate him, or would not tend to degrade him, or, admitting that the answer would degrade him, that the question which the witness declined to answer was as to a subject which is material to the issue on trial and must be answered. If the court sustains the judge advocate, the witness must answer or be in contempt. C. M. O. 29, 1914, 13.

CONTINUANCES.

1. **Accused requests**—Court should grant a continuance if grounds for request are reasonable and it is practicable to do so. C. M. O. 17, 1910, 10; G. C. M. Rec. 22012. *See also* ARMY, 13; CONSTITUTIONAL RIGHTS OF ACCUSED, 17; COUNSEL, 20; COURT, 134; POSTPONEMENT; TRIALS, 7.

CONTINUING OFFENSES.

1. **Desertion**—Is a continuing offense. C. M. O. 31, 1910, 5; File 5256-04. *See also* DESERTION, 35.
2. **Fraudulent enlistment**—Is not a continuing offense. C. M. O. 31, 1910, 5; File 5256-04; 1551-04. *See also* FRAUDULENT ENLISTMENT, 20; C. M. O. 17, 1916, 6, line 36.

CONTINUOUS-SERVICE CERTIFICATE. C. M. O. 42, 1915, 2; FRAUDULENT ENLISTMENT, 36.

CONTRIBUTORY NEGLIGENCE. *See* MANSLAUGHTER, 11, 12.

Digitized by Google

CONVENING AUTHORITY.

1. **Accused**—Right of accused to a copy of action of. *See* RECORD OF PROCEEDINGS, 32.
2. **Action of**—Importance of—Where a convening authority of a summary court-martial who was also the senior officer present did not, in subscribing his action upon the record, add to his title the words, "Senior Officer Present" as required by Article 32 of the Articles for the Government of the Navy, and Navy Regulations, 1913, R-620 (4), the department stated in part:

"The approval of the senior officer present is necessary before the sentence can have any legal effect, and it must be shown affirmatively. It is not sufficient that his approval be shown inferentially or argumentatively.

"The importance of the action of a reviewing officer is shown by the following words of the Attorney General, quoted with approval by the United States Supreme Court: 'And the act of the officer who reviews the proceedings of the court, whether he be commander of the fleet or the President, *and without whose approval the sentence can not be executed*, is as much a part of this judgment, according to law, as is the trial or sentence.' (Runkle *v.* U. S., 122 U. S. 558; 11 Op. Atty. Gen. 21.)" File 26287-2584, Sec. Navy, Jan. 27, 1915; C. M. O. 6, 1915, 5.

An enlisted man was tried by summary court-martial and sentenced to forfeiture of pay and bad-conduct discharge. The record disclosed that the convening authority was also the senior officer present and took separate actions thereon; that is, he acted on the case as convening authority and also took separate action thereon as senior officer present. Navy Regulations, 1913, R-620(4) provides: "If the convening authority approves the whole or any part of the sentence adjudged, he shall transmit the record to the commander in chief, or in his absence to the senior officer present. Should no officer senior to himself be present, he shall, in subscribing his action upon the record, add to his title the words 'Senior Officer Present.'" This one action is thus made to serve a double purpose in such cases. (*See* C. M. O. 6, 1915, p. 5.) C. M. O. 6, 1915, 5. *See also* SUMMARY COURTS-MARTIAL, 38.

For action in revision *see* REVISION, 10.

A conviction, upon trial by court-martial, is not complete until the findings and sentence have been approved by the proper reviewing authority. File 26251-1963:1, 5. A. G., Aug. 17, 1910, p. 1. *See also* REVIEWING AUTHORITY, 11, 19.

That the approval of the convening authority is necessary to the validity of the proceedings of a court-martial is, it is true, too well settled to admit of doubt. (20 A. E. Ency., 2d ed., 656; In re Esmond, 5 Mackey (D. C.) 64; 19 Op. Atty. Gen. 107.) File 26251-1963:1, J. A. G., Aug. 17, 1910, p. 9.

The convening authority is the reviewing authority, except where the sentence is death or the dismissal of a commissioned or warrant officer. (A. G. N. 53.) *See* CRITICISM OF COURTS-MARTIAL, 35.

3. **Approval that accused might not entirely escape punishment.** *See* APPROVAL ONLY THAT ACCUSED MIGHT NOT ENTIRELY ESCAPE PUNISHMENT.
4. **Arrest**—Where it is the proper action the convening authority should release the accused from arrest and restore him to duty, and where such does not appear from the record the department will so direct in the following words: "As it deos not appear on the record of the general court-martial in the foregoing case of Lieutenant (junior grade) * * * U. S. Navy, that he has been ordered to be released from arrest, such action will be taken to restore him to duty as may be necessary." C.M. O. 13, 1914; 40, 1915; 14, 1916. *See also* C. M. O. 32, 1915, which is in error.
5. **Binding of court-martial records**—Convening authority responsible. *See* BINDING OF COURT-MARTIAL RECORDS.
6. **Changing action of**—*Held*, That as a reviewing authority (Senior Officer Present) can not change his action upon a summary court-martial after such action has been promulgated and the accused duly notified, it would be improper for the successor in office of such Senior Officer Present to do what the original reviewing authority could not do.

But if the proceedings have not been published nor accused notified, it would be proper for such successor in office to take any further action upon a case as might seem to him necessary. File 26287-1121. J. A. G., Feb. 24, 1912.

7. **Charges and specifications**—Convening authority should follow prescribed forms. *See* CHARGES AND SPECIFICATIONS, 15, 43, 44, 47, 48, 53.
8. **Same**—Time and place of signing by convening authority should be stated C. M. O. 159, 1897, 2; 160, 1897, 2.

Digitized by Google

9. **Same**—Convening authority, members and judge advocate or recorder, responsible for correctness of charges and specifications. *See* CHARGES AND SPECIFICATIONS, 33, 34.
10. **"Commander Cruiser Squadron and Commander in Chief Detached Squadron"**—As convening authority of general courts-martial and courts of inquiry. C. M. O. 6, 1915, 9. *See also* C. M. O. 17, 1915; 40, 1915; 46, 1915; 48, 1915. *See also* CONVENING AUTHORITY, 28.
11. **"Commanding officer, Fourth Division Atlantic Fleet Battalion, U. S. Marine Corps"**—Can not convene summary courts-martial. C. M. O. 12, 1915, 6. *See also* SUMMARY COURTS-MARTIAL, 23.
12. **Commuting sentences.** *See* COMMUTING SENTENCES.
13. **Confinement reduced.** *See* CONFINEMENT, 34.
14. **Counsel for judge advocate**—Appointed by convening authority. *See* JUDGE ADVOCATE, 45.
15. **Courts of inquiry.** *See* CONVENING AUTHORITY, 27; COURTS OF INQUIRY, 10.
16. **Date of action.** *See* ANTEDATING, 3; CONFINEMENT, 1, 9.
17. **Deck courts.** *See* DECK COURTS, 4, 10, 13, 14, 58.
18. **Delegation of powers**—The powers of the convening authority as reviewing officer can not be delegated. *See* CRITICISM OF COURTS-MARTIAL, 35.
19. **Depositions**—Necessity of approval by convening authority. *See* DEPOSITIONS, 3.
20. **Desertion**—Convening authority remitted dishonorable discharge in a case of desertion. *See* DISHONORABLE DISCHARGE, 11, 12.
21. **Disapproval**—Of the entire proceedings of a naval court-martial leaves nothing to support an approval of the sentence. If the entire proceedings are devitalized by a disapproval, they retain no force to sustain the finding and sentence predicated thereon. 16 J. A. G., 79. *See also* C. M. O. 31, 1911, 3–4; REVIEWING AUTHORITY, 20.
22. **Dishonorable discharge**—If dishonorable discharge in the case of marine is remitted the forfeiture of allowances should also be remitted. *See* ALLOWANCES, 4.
23. **Evidence, unobjected to**—Convening authority should not notice. *See* EVIDENCE, 82, 83, 84, 125; REVIEWING AUTHORITY, 9.
24. **Exemptions in sentences.** *See* EXEMPTIONS IN SENTENCES.
25. **Exercise of accused**—Convening authority (fleet) approved the proceedings, findings, and sentence and directed that the accused "will be confined as a prisoner on board ship, with one hour's exercise on deck, under charge of a sentry, every day," etc. C. M. O. 57, 1895, 2; 58, 1895, 2. NOTE.—A convening authority should use the authorized forms of action.
26. **Forms of action**—Under G. O. 110 and I–4893. *See* GENERAL ORDER No. 110, July 27, 1914, 3–5, 7.
27. **General courts-martial**—General courts-martial may be convened by the President, by the Secretary of the Navy, by the commander in chief of a fleet, or squadron, and by the commanding officer of any naval station beyond the continental limits of the United States. (Art. 38, A. G. N., R–38: act of Feb. 16, 1909, sec. 10, 35 Stat., 621; "Forms of Procedure, 1910," pp. 51 and 54.) *See* C. M. O. 14, 1910, 17.

    The above provision of law was amended by the following provision of the act of August 29, 1916 (39 Stat., 586):

    When empowered by the Secretary of the Navy general courts-martial may be convened by the commanding officer of a squadron, of a division, of a flotilla, or of a larger naval force afloat, and of a brigade or larger force of the naval service on shore beyond the continental limits of the United States: *Provided*, That in time of war, if then so empowered by the Secretary of the Navy, general courts-martial may be convened by the commandant of any navy yard or naval station and by the commanding officer of a brigade or larger force of the Navy or Marine Corps on shore not attached to a navy yard or naval station.
28. **Same**—An officer commanding a cruiser squadron, U. S. Atlantic Fleet, on detached duty, under proper orders, and while actually in command of that squadron for the duty assigned, is authorized, for the purpose of convening general courts-martial and courts of inquiry and issuing such orders as necessary in relation thereto, and in reviewing records thereof, to sign in the above-mentioned cases as follows: "Commander of Cruiser Squadron, and Commander in Chief, Detached Squadron, U. S. Atlantic Fleet." File 26504–43; 5, Sec. Navy, Dec. 21, 1914; C. M. O. 6, 1915, 9. *See also* C. M. O. 17, 1915; 40, 1915; 46, 1915; 48, 1915.
29. **Same**—Convening of, on foreign territory. *See* JURISDICTION, 53, 54.

Digitized by Google

30. **Same**—From the records of proceedings in a number of general court-martial cases received in the department, it was noticed that the commander of one of the squadrons of the Navy signed the precept convening the court, and also his action as reviewing authority in each case, as "Commander, —— —— Squadron."

After careful inquiry into the status of the squadron commander above referred to the department is of opinion that he is *de facto* commander in chief of said squadron; and, as such, authorized by law to convene general courts-martial. The fact that he signed the precept convening the court and his action as reviewing authority in each case, as commander rather than commander in chief, though irregular and not sanctioned, was held by the department not to invalidate the proceedings.

This officer was subsequently directed to sign as commander in chief all documents pertaining to general courts-martial. C. M. O. 14, 1910, 17.

A convening authority who was in fact a commander in chief, signed himself as "Commanding the U. S. Naval Forces on the South Atlantic." The department held that while the method of signing as "commander in chief" is by far preferable, it is not a fatal defect for an officer who is in fact a commander in chief to sign as above. C. M. O. 18, 1897, 2-3. *But see* CHARGES AND SPECIFICATIONS, 91.

Held: That an officer may convene general courts-martial and courts of inquiry, signing as "commander in chief, U. S. Naval Force in San Domingan waters." Similarly for other commanders of squadrons when separated from the commander in chief, as "commander in chief, U. S. Naval Force in Venezuelan waters," or "Mediterranean Sea"—wherever he may happen to be. 13 J. A. G., 451, May 1, 1905.

31. **Same**—Where the Navy Regulations provided that rear admirals and commodores may command fleets and squadrons but not captains, and a captain was ordered as "Commander in chief" of a squadron, the fact that he was a captain did not make illegal general courts-martial convened by him, since the Navy Regulations in this respect were held to be directory in character rather than mandatory. C. M. O. 18, 1897, 3.

32. **Same**—The convening authority alone is empowered to make changes in the constitution of general courts-martial and orders given by any other authority appointing or relieving members or judge advocates are without authority of law. C. M. O. 68, 1898; 125, 1900, 1-2; 34, 1901; 49, 1910, 11. *See also* COURT, 35, 37-49.

33. **General Order No. 110.** *See* GENERAL ORDER NO. 110, July 27, 1914, 3-5, 7.

34. **I-4893.** *See* GENERAL ORDER NO. 110, July 27, 1914, 3-5, 7.

35. **Joining charges.**—*See* JOINDER, TRIAL IN.

36. **Judge Advocate**—Responsible to convening authority for proper discharge of his duties. *See* JUDGE ADVOCATE, 60.

37. **Same**—Counsel for judge advocate should be appointed by convening authority. *See* JUDGE ADVOCATE, 45.

38. **Members of court**—Convening authority should not detail himself as a member of a court. *See* COURT, 36.

39. **Mitigating sentence**—Form for—In several cases received from the fleets and foreign stations, it has been observed that the convening authority in mitigating the adjudged punishment failed expressly to provide for a corresponding reduction in hard labor and forfeiture of pay (and allowances), necessitating such action by the department. The following phraseology is suggested for use in such cases:

"The proceedings, findings, and sentence of the general court-martial in the foregoing case of ..... are approved, but, in view of ..... the period of confinement, with corresponding hard labor and forfeiture of pay (and allowances) is reduced to ....." C. M. O. 21, 1912, 5.

40. **Nature and effect of action.** *See* CONVENING AUTHORITY, 2.

41. **Numbers, loss of**—Action on general court-martial, where it is desired to place officer at foot of list and there lose numbers. *See* NUMBERS, LOSS OF, 10.

42. **Oath**—Summary court-martial—Official inquiry by convening authority will authorize members to disclose vote or opinion of members. *See* OATHS, 47.

43. **Plea in bar**—Convening authority may not compel a court to reverse its judgment. *See* REVIEWING AUTHORITY, 15, 16.

44. **Precept**—Original precept should be forwarded to convening authority when court is dissolved. *See* PRECEPTS, 23.

45. **Prejudice of convening authority is immaterial**—The question of prejudice, real or supposed, on the part of the convening authority may be eliminated. The accused is tried, not by the convening authority, but by the court. 13 J. A. G. 324, June 11, 1904.

46. **Probation**—Action regarding probation. C. M. O. 15, 1910, 4-5; 17, 1910, 5-6; 21, 1910, 11-12; 1, 1912, 4. *See also* GENERAL ORDER NO. 110, July 27, 1914; NAVAL INSTRUCTIONS, 1913, I-4893; PROBATION.

Digitized by Google

47. **Same**—Reports of probationers. *See* PROBATION, 17.
48. **Qualified approval**—Inasmuch as unqualified approval by the department would be equivalent to an assertion by it that officers of the naval service may use Government coal for private purposes without violating law, regulation, or propriety, the claim being based upon an ingenious construction of recent appropriation acts, it is deemed most important that the department should qualify its approval by stating that the construction placed upon the appropriation act by counsel for the accused, and apparently accepted by the court, is not tenable. C. M. O. 88, 1895, 15.
49. **Same**—The proceedings and the finding upon the first charge and its specification are approved; the finding upon the second charge and the specification thereunder is disapproved; and the sentence, though manifestly inadequate as a punishment for the offense committed, and by no means such as will exercise a wholesome influence upon the discipline of the naval service, is approved only in view of the fact that the exigencies of the service render it impracticable to reassemble the court. C. M. O. 3, 1898, 1.
50. **Rank, reduction in**—In some cases where the accused (officer) was sentenced to dismissal, the Secretary of the Navy, in submitting the case to the President for his action, recommended that the accused be "reduced in rank," meaning reduction in rank by loss of numbers, and the President took such action. C. M. O. 35, 1892, 11 *See also* C. M. O. 18, 1897, 5; COMMUTING SENTENCES, 4.
51. **Reconvening court**—Convening authority desired to reconvene court because of inadequacy of sentence, but did not do so owing to the fact that the ship was about to sail, etc. C. M. O. 11, 1912, 2. *See also* CONVENING AUTHORITY, 49; COURT, 146.
52. **Same**—Reconvening dissolved court. C. M. O. 4, 1914. *See also* COURT, 69, 71.
53. **Record of proceedings.** *See* REVISION, 9.
54. **Reprimand of court**—Authority to. *See* CRITICISM OF COURTS-MARTIAL, 35.
55. **Restoration to duty on probation**—After approving the case. C. M. O. 17, 1910, 5-6; 1, 1912, 4. *See also* PROBATION, 15.
56. **Revision**—Action on proceedings in revision. *See* REVISION, 10.
57. **Secretary of the Navy**—Action of, as convening authority. *See* CONVENING AUTHORITY, 2; SECRETARY OF THE NAVY, 24, 27, 32, 33, 54.
58. **Senior officer present**—Form of action where convening authority and senior officer present is the same officer. C. M. O. 6, 1915, 5; 12, 1915, 5. *See also* CONVENING AUTHORITY, 2; SENIOR OFFICER PRESENT, 6.
59. **Same**—Supplying members for summary courts-martial. *See* SUMMARY COURTS-MARTIAL, 48.
60. **Sentence**—Excessive—The approval of a sentence in which the period of confinement adjudged by the courts-martial exceeds the limitation to punishment applies only to so much of the sentence as is within the prescribed limitation and is void *ab initio* as to the excess. G. C. M. Rec. 23271. *See also* EXCESSIVE SENTENCES, 2, 3, 5.

    The convening authority can not dictate to the court what sentence to adjudge. *See* CRITICISM OF COURTS-MARTIAL, 36.
61. **Same**—Commuting sentences. *See* COMMUTING SENTENCES.
62. **Same**—Remission or mitigation after final action on—A convening authority is not authorized to remit or mitigate the sentence after having once acted thereupon. (*See* 19 Op. Atty. Gen. 106.) Accordingly where such was done, *held*, this action is "illegal and ineffectual to remit either the confinement or the loss of pay imposed by the court in this case." File 26262-1246:1, Sec. Navy, Dec. 29, 1911. *See also* C. M. O. 1, 1912, 3, 4; SECRETARY OF THE NAVY, 56.
63. **Signature of**—Must show authority to convene. C. M. O. 14, 1910, 17. *See also* CHARGES AND SPECIFICATIONS, 91; CONVENING AUTHORITY, 28-31.
64. **Summary courts-martial.** *See* RECONVENING, 16; SUMMARY COURT-MARTIAL, 18, 21-23.
65. **Threat of undesirable discharge**—The convening authority, in his remarks upon the proceedings, recommended that execution of the sentence be suspended for six months with a view to an entire remission thereof at the expiration of the probationary period, provided the conduct of the accused so warrants; otherwise, that the sentence be executed and that upon its completion the accused be discharged as "undesirable" for the naval service.

    So much of the convening authority's action as refers to an "undesirable" discharge is without authority, and, were his recommendation in connection therewith approved, a punishment in excess of that provided for by the court's judgment would be held over the accused during the probationary period.

Digitized by Google

66. **Unobjected to evidence**—Convening authority should not notice. *See* EVIDENCE, &c, 83, 84; REVIEWING AUTHORITY, 9.
67. **Warrant officers**—May convene summary courts-martial if actually in command of a naval vessel. *See* COURT, 196; SUMMARY COURTS-MARTIAL, 105.
68. **Same**—May convene deck courts if actually in command of a naval vessel. *See* DECK COURTS, 4.

CONVENING OFFICER. *See* CONVENING AUTHORITY.

CONVENING ORDER. *See* DECK COURTS, 15; PRECEPTS.

CONVICTS.
1. **Discharged as undesirable**—And turned over to civil authorities. *See* CIVIL AUTHORITIES, 12.
2. **Enlistment in naval service**—It is a long established policy of the Navy not to enlist men who have been convicted by civil courts. For similar reasons the department invariably refuses to retain in the naval service enlisted men who are convicted by civil courts of offenses which render them unfit for the service. (*See* C. M. O. 42, 1915, p. 6; 35, 1915, p. 8.) File 26524-222; 3, Sec. Navy, Feb. 9, 1916; C. M. O. 5, 1916, 7. *See also* File 26524-215, Sec. Navy, Dec. 8, 1915.
   "No person who has been convicted of crime or is of known bad character shall be enlisted." (R-3686.) File 7657-396, Sec. Navy, Sept. 15, 1916.
3. **"Escaped convict"**—Should not be enlisted. File 26524-215, Sec. Navy, Dec. 8, 1915. *See also* CIVIL AUTHORITIES, 12; FUGITIVE FROM JUSTICE, 2.

CONVICT LABOR.
1. **Laws**—Relating to. *See* File 12404-81.

COPIES, CERTIFIED. *See* CERTIFIED COPIES; EVIDENCE, DOCUMENTARY.

COPIES OF RECORDS. *See* CERTIFIED COPIES; CIVIL COURTS, 2; COURTS OF INQUIRY, 12; GENERAL ORDER NO. 121, September 17, 1914, 23; MEDICAL RECORDS; RECORDS OF OFFICERS; REPORTS ON FITNESS; RECORDS OF THE DEPARTMENT.

CORONERS.
1. **Inquests**—Jurisdiction of coroners to hold inquests on naval territory. *See* JURISDICTION, 22-24.

CORONER'S INQUEST.
1. **Confession**—Statements of accused before coroner's inquest. *See* CONFESSIONS, 10.

CORPORATIONS.
1. **Retired officers**—Employment by. *See* RETIRED OFFICERS, 28, 31.

CORPSE, DISPOSITION OF. *See* DISPOSITION OF BODIES.

CORPUS DELICTI.
1. **Application of doctrine**—This doctrine applies particularly to such offenses as homicide, and the strictness of the rule is relaxed in minor offenses.
   "The rule with regard to proof of the corpus delicti, apart from the mere confession of the accused, proceeds upon the reason that the general fact without which there could be no guilt, either in the accused or in anyone else, must be established before anyone could be convicted of the perpetration of the alleged criminal act which caused it, as in cases of homicide the death must be shown, in larceny it must be proved that the goods were lost by the owner, and in arson that the house had been burned; for otherwise the accused might be convicted of murder when the person alleged to be murdered was alive, or of larceny when the owner had not lost the goods, or of arson when the house was not burned. But where the general fact is proved the foundation is laid and it is competent to show by any legal and sufficient evidence how and by whom the act was committed, and that it was done criminally." (Sam *v.* State, 33 Mass. 347.) C. M. O. 26, 1910, 10. *See also* File 26251-7121:3, December, 1912.
2. **Fraudulent enlistment**—The prosecution put in evidence a confession by the accused regarding his age, which was ordered stricken out by the court as not admissible unti the corpus delicti had been proved by other evidence. This ruling was erroneous. The doctrine that the corpus delicti must be established before conviction—that is, that the prosecution must show "the substantial fact that a crime has been committed by some one" before the person accused can be convicted—grew out of the

Digitized by Google

dealings of the courts with such offenses as homicide, arson, burglary, theft, and the like, as is found by a mere reference to the authorities and adjudicated cases; and it appears that the civil courts have recognized the fact that the strictness of the rule is relaxed in the cases of minor offenses where from the nature of things it is impracticable otherwise than by presumption to show that an offense has been committed. (Bouvier's Law Dictionary, 1897, vol. 1, p. 446.) The subtle technicalities of the English common law should not be introduced into the procedure of general courts-martial without carefully observing the limitation by which their application is defined, and they should never be so used as to confuse procedure and defeat administration of justice. The main facts of the present case were established by oral testimony and by the enlistment record of the accused, and it remained only for the members of the court, acting in their capacity as jurors, to find upon the question whether or not the accused was under age at the time of enlistment. The proper rule in such cases is laid down in the American and English Encyclopædia of Law, 1888, volume 4, page 309, under the title "Corpus delicti," as follows:

"It is sufficient that there be such extrinsic corroborative circumstances as will, taken in connection with the confession, produce conviction of the defendant's guilt in the minds of the jury." C. M. O. 94, 1905, 1.

3. **Proof of**—Must be proved *in proper case* before a confession is admissible. C. M. O. 94, 1905, 1; 42, 1909, 6; 17, 1910, 4; 26, 1910, 10. *See also* File 26251-7121:3; CONFESSIONS, 5.
4. **Sodomy.** *See* File 26251-7121:3.

CORRECTIONS. *See also* ALTERATIONS; AMENDMENTS.

1. **Charges and specifications.** *See* CHARGES AND SPECIFICATIONS, 33, 34.
2. **Clerical errors**—On revision. *See* RECORD OF PROCEEDINGS, 26, 27.
3. **Names.** C. M. O. 12, 1915, 10; 16, 1915, 6; 20, 1915, 7. *See also* NAME, CHANGE OF.
4. **Record**—No corrections should be made in *original* record in proceedings in revision. C. M. O. 47, 1910, 5; 17, 1910, 5; 5, 1911, 5; 5, 1912, 14; 5, 1914, 9. *See also* ACCUSED, 8; RECORD OF PROCEEDINGS, 26.
5. **Same**—Where record of proceedings correctly reports the proceedings which actually occurred, it can not properly be "corrected" so as to record a different state of facts. C. M. O. 51, 1914, 9. *See also* C. M. O. 14, 1910, 10.
6. **Records of the department.** *See* RECORDS OF THE DEPARTMENT.

CORRESPONDENCE. *See also* DESIGNATIONS.

1. **Official**—Official correspondence between officers of the naval service and officials of the public service must be courteous in tone and free from any expressions of a personal nature. File 24482-34, J. A. G., May 1, 1911, p. 3. *See also* OFFICERS, 69.
2. **Same**—Irregular interpolation of personal opinion and information is not only contrary to the United States Navy Regulations, but tends to create dissension militating against the efficiency of the naval service. File 6833, Mar. 1, 1907; 875-6, Mar. 28, 1907.
3. **Titles.** *See* DESIGNATIONS.

CORROBORATIVE TESTIMONY. *See* EVIDENCE, 33-35.

COUNSEL.

1. **"Able counsel"**—Accused represented at his trial by. C. M. O. 6, 1915, 6.
2. **Absence of**—If the counsel for the accused is absent at any time during the proceedings, the record should show affirmatively that the accused waived his privilege of having his counsel present during that time. C. M. O. 42, 1909, 6. *See also* G. C. M. Rec. 30684, p. 301.
3. **Accused**—Unreasonable demand for civilian counsel. *See* COUNSEL, 20.
4. **Accused advised of right to**—When the accused has no legal adviser, the commandant of the navy yard or station, the commander in chief, or the senior officer present within whose jurisdiction the court sits, shall, if the accused so requests, detail a suitable officer to act as his counsel. If there be no such officer available, the fact shall be reported to the convening authority for action. An officer so detailed shall perform such duties as usually devolve upon counsel for defendant before civil courts in criminal cases. As such counsel he should guard the interests of the accused by all honorable means known to the law, so far as they are not inconsistent with military relations. Enlisted men to be tried shall be particularly advised of their rights in the premises, and counsel detailed for them, if practicable, unless they explicitly state that they do not desire such assistance. C. M. O. 75, 1898; 78, 1905, 1; 55, 1910, 8.

Digitized by Google

5. **Accused bound by attitude of counsel during trial**—Where the judge advocate challenges a member and counsel for accused objects, the accused is estopped to complain of the court's ruling which did not sustain the challenge. C. M. O. 128, 1905, 4. *See also* CHALLENGES, 9.
6. **Accused entitled to**—The accused is entitled to counsel as a right, and the court can not properly deny him the assistance of a professional or other adviser. C. M. O. 78, 1905; 6, 1909, 3.
7. **Accused without counsel**—Judge advocate's duty. *See* JUDGE ADVOCATE, 28–44.
8. **Additional civilian counsel for prosecution**—A general court-martial can not assign additional counsel for the prosecution so as to permit such additional counsel to have any official standing before the court. File 26504–140, J. A. G. May 6, 1912.
   A civilian lawyer appointed "as counsel to the judge advocate." File 26251–10398:6, Sec. Navy, Apr. 26, 1915.
   The Secretary of the Navy requested the Department of Justice to furnish legal assistance to a judge advocate in the general court-martial trial of an enlisted man on the charge of "Manslaughter." The request was granted and a United States district attorney was directed to assist the judge advocate. G. C. M. Rec. 16098, Exhibit "B"; File 6674–30; File of Dept. Justice, E. T. S. 99858, March 28, 1907.
9. **Appeals by counsel of the accused.** *See* APPEALS, 4, 12, 13.
10. **Argument, closing**—General courts-martial. *See* ARGUMENTS.
11. **Boards of investigation.** *See* BOARDS OF INVESTIGATION, 4.
12. **Briefs**—Submitted to department by counsel for accused. *See* BRIEFS, 1, 2, 3.
13. **Same**—Oral argument as to admissibility of evidence and upon interlocutory proceedings. *See* ARGUMENTS, 4; BRIEFS, 1.
14. **Choice of**—Accused in a naval court-martial case in which counsel is appointed for him by the Government has no choice in the matter and his wishes even are not to be consulted as to the individual who shall be designated to defend him. File 26251–6020:11, July 7, 1913.
15. **Civilian counsel**—Praises the witnesses of a general court-martial—"I also desire to express, as an outsider and a civilian, my admiration for the appearance and conduct of the naval officers who have appeared here as witnesses. It was quite a revelation to me to see the evident spirit of fairness and the desire to stick closely to the absolute truth. That is something we do not see so uniformly in civil courts. Often a witness becomes an intense partisan for the side which calls him; but the attitude and conduct of the young officers particularly left an impression upon me that I shall never forget." File 26251–9280; G. C. M. Rec. 29422, p. 505.
16. **Same**—Accused represented by. C. M. O. 128, 1905; 20, 1915, 6; 35, 1915, 6.
17. **Compensation**—Naval officers prohibited from receiving compensation—A retired naval officer is an officer in the employ of the Government within the meaning of the act of March 4, 1909 (35 Stat., 1109), and can not legally accept any compensation whatever, directly or indirectly, for any services rendered or to be rendered to any person as counsel before courts-martial of the United States. (29 Op. Atty. Gen. 397.) File 27231–60, Sec. Navy, Feb. 26, 1915; C. M. O. 10, 1915, 13. *See also* G. C. M. Rec. 30485, exhibit 6, 21; File 27231–60.
18. **Complemented**—By the department. C. M. O. 86, 1898, 1.
19. **Constitutional rights**—Of accused to be represented by counsel—Though the reference in Article VI of the Amendments to the Constitution of the United States, that "in all criminal prosecutions" the accused shall "have the assistance of counsel for his defense" is to prosecutions before criminal courts of the United States, naval courts-martial, though not bound by the letter, are within the spirit of the provision. C. M. O. 49, 1910, 14; 55, 1910, 8. *See also* CONSTITUTIONAL RIGHTS OF ACCUSED, 1.
20. **Continuance requested**—When an enlisted man, while a prisoner at large awaiting trial by summary court-martial, was afforded ample time in which to secure civilian counsel, but at his trial requested a postponement, for such time as he would be permitted, to go in person to some city in the State for the purpose of engaging counsel, the court properly decided that this request was unreasonable. This action of the court did not deny the accused the right to be represented by civilian counsel, but decided in effect that, as he had had ample time and opportunity to secure counsel and had failed to do so, his demand that he be set at liberty for this purpose was unreasonable. The accused refused to allow any naval officer on duty at place of trial to act as his counsel, whereupon the court properly decided that the accused "had denied himself the benefit of counsel," and proceeded with the trial. File 26287–15:37. Sec. Navy, Apr. 7, 1913; S. C. M. Rec. 5131, 1913.

Digitized by Google

21. **Court**—Duty of to provide counsel for accused. *See* COUNSEL, 4.
22. **Same**—Where accused stated that they had been unable to obtain counsel, and it did not appear from the record that they did not desire counsel, it was held by the department that it was the duty of the court to make some effort to provide counsel. C. M. O. 78, 1905.
23. **Court of inquiry**—Requests assistance of district attorney—Procedure to secure. File 9608-443, Sec. Navy, Mar. 21, 1914.

Department requested the department of Justice to furnish legal assistance to the judge advocate of a court of inquiry which was convened to investigate a case of homicide which might possibly be tried subsequently in a Federal court. File 26250-842:3, Sec. Navy, Sept. 26, 1916.

Until a party clearly becomes a defendant he is not entitled to counsel. In one case the court informed a party who requested permission to be represented by counsel: "You are advised that the court does not at this time regard you as a party in the case now before it, and therefore is unable to comply with your request." Ct. Inq. Rec. 4952, p. 292.

24. **Criminating questions**—Counsel for accused not permitted to object to questions being asked accused, who is testifying at own request, on ground that the answers would criminate. *See* SELF INCRIMINATION, 16.
25. **Same**—Counsel for accused not permitted to object to a witness answering a question the answer to which might criminate the witness. *See* SELF-INCRIMINATION, 16.
26. **Criticised by the department**—A naval officer in his capacity of counsel for accused, having misstated facts in his closing argument, was criticized for so doing by the department. C. M. O. 9, 1908, 3; G. C. M. Rec. 21478.
27. **Detailed by senior officer present**—Counsel in a summary court-martial case was detailed by senior officer present at request of accused. File 26287-3475, Sec. Navy, July 5, 1916.
28. **Division officer**—It is considered advisable, when practicable, that the accused be represented by counsel, preferably his division officer or some other officer who consents to act. C. M. O. 6, 1909, 3.
29. **Duties and powers of**—An officer acting as counsel for accused should not institute habeas corpus proceedings or a suit for damages against members. File 8464-03. *See also* COUNSEL, 36; HABEAS CORPUS, 17.
30. **Exception or protest**—Improper to enter on record. *See* EXCEPTIONS, 2, 3.
31. **Failure to provide**—Where an accused goes on record as being desirous of having counsel, and is denied that right, except where it is impracticable to obtain counsel, such denial constitutes a fatal irregularity, and the improper procedure of designating the judge advocate to act in that capacity does not offset this irregularity nor fulfill the requirements. C. M. O. 49, 1910, 14.
32. **Same**—Where accused desired counsel but later stated in open court that he would proceed without counsel and that he was ready for trial, the department held that this did not constitute a denial of the right to have counsel. C. M. O. 55, 1910, 7. *See also* C. M. O. 53, 1901, 1-2.
33. **Foreign country**—While as the law stands at the present time it is doubtless within the province of the Attorney General only to employ counsel in foreign countries to defend the United States against suit for collision by a naval vessel, the Attorney General has neither facilities for communicating with the naval officers abroad nor has he any method of ascertaining who would be the most desirable attorneys to employ or by what particular method such employment should be made. The Attorney General, therefore, requested that the Secretary of the Navy act in his stead in arranging for the employment of counsel to defend a suit brought in the Supreme Court of Hongkong by owners of a Chinese junk, *Tung on Tai*, against the master of the U. S. N. A. *Alexander*. File 4720-1, Apr. 24, 1906. *See also* COLLISION, 1.
34. **Same**—Counsel employed in foreign country to defend master of a United States auxiliary in suit for collision not required to take oath of office. File 4729-18.
35. **Same**—A naval officer was detailed by commander in chief of Asiatic Fleet as counsel for an enlisted man in proceedings before United States court for the consular district of Hankow upon charge of manslaughter. *See* File 12671-35.
36. **Habeas corpus**—Officer acting as counsel for accused should not institute habeas corpus proceedings or a suit for damages against members. *See* COUNSEL, 29 HABEAS CORPUS, 17.

Digitized by Google

37. **Incompetent**—When it is contended by civilian counsel employed by the accused after completion of the trial that the accused was not properly represented by counsel, the commissioned officer appointed to defend him being incompetent, and at the same time it is asserted that the accused should have been acquitted upon the evidence before the court, the contention is considered "as being wholly without merit." File 26251-6020:11, July 7, 1913.
38. **Judge advocate**—As counsel for accused. *See* JUDGE ADVOCATE, 28–44.
Counsel for judge advocate. *See* COUNSEL, 39; JUDGE ADVOCATE, 45–48.
39. **Law clerk**—The law clerk in the Office of Judge Advocate General was assigned by the Secretary of the Navy as counsel to the judge advocate in the trial of a commissioned officer by general court-martial. File 26251-10398:6, Sec. Navy, Apr. 26, 1915; G. C. M. Rec. 30485, exhibit 4.
40. **Negligence of**—Effect of. File 26251-6020:11, Sec. Navy, July 7, 1913.
41. **Oath**—Special counsel. *See* COUNSEL, 34, 50.
42. **Officers**—Compensation for acting as counsel prohibited. *See* COUNSEL, 17.
Detailed to defend an enlisted man in a civil court. *See* COUNSEL, 35.
As counsel for the United States in the Supreme Court. *See* COUNSEL, 52.
43. **Privilege.** *See* PRIVILEGE.
44. **Procedure**—Of securing counsel for accused. *See* COUNSEL, 4.
45. **Prosecuting witness**—A general court-martial can not assign additional counsel for the prosecution (employed and paid by prosecuting witness) so as to permit such additional counsel to have any official standing before the court. File 26504-140, J. A. G., May 6, 1912.
46. **Protests or exceptions**—Not permitted on record. *See* BILLS OF EXCEPTIONS, 1; COUNSEL, 30; EXCEPTIONS, 2, 3; PROTESTS, 1.
47. **Record of proceedings**—It should be shown on record whether or not the accused desired counsel and, if so, that the request was granted and counsel entered. C. M. O. 12, 1911, 3.
Record of proceedings should note absence of counsel. *See* COUNSEL, 2.
48. **Retired officers**—Acting as counsel for accused. *See* COUNSEL, 17.
49. **Solicitor**—The solicitor in the Office of the Judge Advocate General was assigned by the Secretary of the Navy as associate and assistant to a judge advocate of a court of inquiry. Ct. Inq. Rec. 4952.
He has also represented the United States in the Supreme Court. (U. S. *v.* Smith, 197 U. S. 386; File 469-1904.
50. **Special**—Special counsel employed in foreign countries to defend the master of a United States auxiliary in a suit for collision not required to take the oath of office required by R. S. 366. (*See* act Aug. 24, 1912, 37 Stat. 465; 18 Op. Atty. Gen. 135.) File 4729-18.
51. **Statements of counsel**—Court should not give weight to statements of counsel for the accused by accepting them as evidence. C. M. O. 5, 1913, 10.
52. **Supreme Court**—A commissioned officer of the Marine Corps appeared in behalf of the United States "by special leave of the court." (Johnson *v.* Sayre, 158 U. S. 113.) *See* File 5728-1894. *See also* U. S. *v.* Freeman (3 How. 560), in which the defendant, an officer of the Marine Corps, submitted printed argument for himself and was not represented by counsel.
Solicitor has also represented the United States in the Supreme Court. *See* COUNSEL, 49.
53. **Unreasonable request**—Of accused for civilian counsel. *See* COUNSEL, 20.
54. **Witness**—If counsel is a witness he is not to be warned or shown as withdrawing. C. M. O. 15, 1910, 5.
55. **Same**—Counsel is not permitted to object to a witness answering a question which might criminate the witness. *See* SELF INCRIMINATION, 16.
56. **Same**—Counsel should not improperly assist witness on stand. C. M. O. 49, 1915, 10, 11.

COUNSEL FEES.

1. **Collision**—Between *Chicago* and *Azov*. *See* File 4290-99; 2068-99. *See also* 21 Op. Atty. Gen. 195; COLLISIONS, 2.
2. **Same**—*Saturn* and *Newchwang*. File 4573-02.
3. **Officers**—Acting as counsel for accused in naval court-martial cases. *See* COUNSEL, 17.

Digitized by Google

COUNTERSIGN.

1. **Officer should respect**—An officer should not display ignorance of the duties of a sentinel, should respect the sacred character of a countersign, and should treat inferiors charged with responsible duties, such as sentinels, with respect. Where an officer did not so act he was tried by general court-martial. C. M. O. 95, 1893, 2–3. *See also* ORDERS, 34; SENTINELS, 18.

COURT.

1. **Absence of members.** *See* MEMBERS OF COURTS-MARTIAL, 1–6.
2. **Accused**—Courts-martial in the conduction of trials should guard against anything which might indicate that the accused was not fully protected in his rights, and thus prevent any question from arising as to the fairness of his trial. File 26251–10287, Sec. Navy, Feb. 20, 1915.
3. **Same**—Should be present during trial. *See* ACCUSED, 1–9.
4. **Adjournment.** *See* ADJOURNMENT OF COURTS-MARTIAL.
5. **Authentication**—Of record of proceedings. *See* RECORD OF PROCEEDINGS, 10–16.
6. **Same**—Omission of signature of one of members. *See* MEMBERS OF COURTS-MARTIAL, 12, 24. *See also* AUTHENTICATION OF SENTENCES.
7. **Boatswains**—May not act as deck court officers. *See* DECK COURTS, 62.
8. **Same**—May convene deck courts if actually in command of a naval vessel. *See* DECK COURTS, 4.
9. **Same**—If commanding a naval vessel a boatswain may convene a summary court-martial. *See* BOATSWAINS, 10; SUMMARY COURTS-MARTIAL, 21.
10. **Carelessness, gross**—Of court and judge advocate. C. M. O. 78, 1905, 1; 14, 1913, 5.
11. **Censured by department.** *See* CRITICISM OF COURTS-MARTIAL, 6, 16, 35, 36.
12. **Challenges.** *See* CHALLENGES.
13. **Changes**—In court. *See* CONVENING AUTHORITY, 32; COURT, 35, 37–48.
14. **Charges and specifications**—Court errs if it pronounces faulty charges and specifications in "due form and technically correct." C. M. O. 35, 1915, 6–7. *See also* COURT, 73.
15. **Same**—Errors in. *See* CHARGES AND SPECIFICATIONS, 33, 34.
16. **"Cleared court"**—Purpose must be shown in record. C. M. O. 28, 1910, 6. *See also* COURT, 20.
17. **Clemency**—The power of exercising clemency is vested in the reviewing authority, not in the court-martial or the members. C. M. O. 67, 1902; 1, 1914, 8. *See also* ADEQUATE SENTENCES, 4–19; CLEMENCY, 13.
18. **Same**—Revising authority will not exercise clemency when court adjudges an inadequate sentence. *See* ADEQUATE SENTENCES; CLEMENCY, 13.
19. **Same**—Recommendations to clemency should be made by members, not court. *See* CLEMENCY, 35.
20. **"Closed court"**—An incident of sufficient importance to be mentioned in the record should be recorded therein with such clearness as to render its intelligent review practicable. Therefore, where the court is cleared "for the examination of a question suggested by a member," and subsequently "that the question suggested was withdrawn," the question suggested should be included in the record so that the reviewing authority may form an intelligent judgment as to the propriety of this action. C. M. O. 10, 1897, 3–4. *See also* COURT, 16; REVIEWING AUTHORITY, 17.
21. **Same**—Record should show purpose for which cleared. *See* COURT, 16, 20.
22. **Same**—The accused submitted a plea in bar of trial. "The court sustained this plea and dismissed the said specification. They did this upon evidence produced in secret session, and when the court was cleared for deliberation, and in the absence of the accused. That evidence should have been produced only in open court by the accused, as part of his case, and in suppport of his plea. Thus, while the conclusion arrived at upon the proof was correct, and is approved by the Secretary of the Navy, the mode of introducing that proof was wholly irregular, and is disapproved." G. O. 152, Mar. 29, 1870.
23. **Same**—Judge advocate should not be present. *See* ACCUSED, 3; JUDGE ADVOCATE, 105.
24. **Same**—Closing court after arriving at a finding. C. M. O. 26, 1910, 8.
25. **Same**—When court opens it should announce its decision. C. M. O. 49, 1915, 10.
26. **"Closed doors."** *See* COURT, 16, 20–25.
27. **Commanding officer**—Of a naval vessel in imposing punishments is not a court-martial. *See* COMMANDING OFFICERS, 14, 31; JEOPARDY, FORMER, 3.
28. **Same**—Can not convene a general court-martial. *See* COMMANDING OFFICERS, 22.
29. **Same**—Can convene only summary courts-martial and deck courts for trial of enlisted men under their command. *See* COMMANDING OFFICERS, 42.

Digitized by Google

30. **Common law**—Subtle technicalities of. *See* COMMON LAW, 12.
31. **Composition**—Of naval courts-martial. *See* COURT, 33–51.
32. **Conjectures**—The court, whose finding is controlled by oath and rendered with all the solemnity incident thereupon, is not required to indulge in conjectures for the purpose of supplying omissions in the testimony which it was the duty of the accused to offer if he desired and was able to do so (C. M. O. 39, 1913, 13); but on the contrary the court's duty is to render its findings upon the evidence before it. C. M. O. 24, 1914, 6. *See also* COURT, 95; EMBEZZLEMENT, 25 (lines 35–37).
33. **Constitution of**—General court-martial—A general court-martial shall consist of not more than 13 nor less than 5 commissioned officers as members; and as many officers, not exceeding 13, as can be convened without injury to the service, shall be summoned on every such court. But in no case, where it can be avoided without injury to the service, shall more than one-half, exclusive of the president, be junior to the officer to be tried. The senior officer shall always preside, and the others shall take place according to their rank. (A. G. N. 39.) C. M. O. 68, 1898, 3; 125, 1900, 1; 7, 1914, 10.
34. **Same**—In detailing officers for a general court-martial for the trial of a medical, pay, or marine officer it is deemed proper, if the exigencies of the service permit, that at least one-third of the court be composed of officers of the same corps as the person to be tried. No officer should be named in the precept as a member against whom either the judge advocate or the accused can reasonably object when called upon to exercise the privilege of challenge. C. M. O. 1, 1914, 7. *See also* EVIDENCE, 12 (p. 219).
35. **Same**—There should be no change in the constitution of a general court-martial, as stated in the precept, without authority therefor appearing on the record. C. M. O. 1, 1912, 5.

    See G. C. M. Rec. 32043, where court refused to permit an officer to sit as a member because he did not have "specific orders."
36. **Same**—Convening authority should not detail himself as a member—It is decidedly improper though not illegal for a convening authority to detail himself as a member of a summary court-martial and then subsequently to act upon the case in the capacity as convening authority. Case was disapproved where this was done. File 26287-389; 26287-963. *But see* File 26287-1185, where department did not disapprove.
37. **Same**—Proceedings, findings, and sentence disapproved on account of the irregular manner in which one of the members of a general court-martial was appointed. The fatal irregularity consisted of an officer, whose presence was necessary to make a legal quorum, sitting as a member on orders from the Bureau of Navigation and without authority of the convening authority. C. M. O. 63, 1898.

    Where an officer who sat as president of the general court-martial was informed of the appointment thereof and of the date and place of its convening, but was not specifically designated in the precepts as a member; he was not empowered to sit, and his participation in the proceedings invalidated them. File 10200-03; 1007-04.
38. **Same**—Where an officer sat as a member of a general court-martial and signed the record despite the fact that no order appointing him as such had been issued by the convening authority, although he had orders signed by the Chief of the Bureau of Navigation, the department disapproved the case, stating that the court was illegally constituted, and the conviction of the accused was illegal. C. M. O. 49, 1910, 6.
39. **Same**—In a case where a member sat as a member of a general court-martial although no orders had been issued by the convening authority (the department), the department disapproved the proceedings, findings, and sentence, since the tribunal that tried the accused was not a lawfully constituted court-martial. C. M. O. 21, 1905, 3. *See also* C. M. O. 114, 1901; G. C. M. Rec. 32043.
40. **Same**—Two officers received orders from the Bureau of Navigation to report to a president of a general court-martial as members. They sat as members without any authority from the convening authority and signed the sentence, etc. The presence of these officers was not necessary to form a legal quorum. The department held that the general court-martial was illegally constituted. The statutory authority, that general courts-martial may be convened by certain persons, can not be extended beyond its terms, and the court-martial in this case not having been constituted in accordance with statutory requirements, the entire proceedings must, therefore, be regarded as illegal. Accordingly the proceedings, findings, and sentence were disapproved. This action was taken solely upon the ground of the irregular and illegal constitution of the court, and with regret that the accused should go unpunished for the offense of which he had pleaded guilty. C. M. O. 34, 1901. *See also* C. M. O. 68, 1898; 125, 1900, 1–2.

Digitized by Google

41. **Same**—A general court-martial consisted originally of seven members. One officer was detached from his station and duty by the convening authority (Secretary of the Navy) and another by order of the Brigadier General, Commandant of the United States Marine Corps. Neither officer was expressly relieved by the convening authority from service as a member of the general court-martial. The court-martial then proceeded to the trial of an enlisted man with five members present. The department approved the case since the general court-martial was not reduced below the minimum number prescribed by law, and in order that the accused might not go entirely unpunished for the offense to which he pleaded guilty. C. M. O. 125, 1900, 1–2.
42. **Same**—Upon the question of the constitution of a court-martial, under article 39 of the Articles for the Government of the Navy, the convening authority is charged with discretion. (Mullan *v.* U. S., 140 U. S. 245.) C. M. O. 125, 1900, 2.
43. **Same**—The record must show on its face that the court-martial is properly constituted. File 26251–5344. *See also* CHARGES AND SPECIFICATIONS, 91.
44. **Same**—In a case where an officer sat as a member of a general court-martial, although no orders had been issued by the convening authority, the department disapproved since the tribunal which tried the accused was illegally constituted. C. M. O. 21, 1905, 3.
45. **Same**—The convening authority alone is empowered to make changes in the constitution of a general court-martial. C. M. O. 68, 1898; 155, 1897, 1; 125, 1900, 1–2; 34, 1901; 49, 1910, 6. *See also* CONVENING AUTHORITY, 32.
Orders of the Bureau of Navigation or Major General Commandant of the Marine Corps can not relieve an officer as member or judge advocate of a general court-martial. *See* C. M. O. 125, 1900; 34, 1901.
46. **Same**—An order detaching an officer from duty at any particular station does not *per se* relieve him from service as a member of a general court-martial, although such an order, duly issued by the authority which convened the court-martial, may be assumed as intended to relieve the officer concerned from duty as a member of such court-martial. C. M. O. 125, 1900, 1.
47. **Same**—Where a judge advocate acted as such in a trial without being properly ordered to such duty by the convening authority, the department disapproved the proceedings, findings, and sentence. C. M. O. 155, 1897, 1–2.
48. **Same**—A precept designated two officers as members, while in the list of members present upon the convening of the court the names of these two officers did not appear, and no mention is made of their absence during the entire proceedings of the court, but after the court had adjourned, a note appeared upon the record signed by the judge advocate, accounting for their absence. For this and other irregularities the department disapproved. C. M. O. 155, 1897, 1–2.
49. **Same**—Specific orders are necessary for ordering a retired officer to court-martial duty. C. M. O. 23, 1910, 5. *See also* RETIRED OFFICERS, 23.
50. **Same**—Summary court-martial. *See* SUMMARY COURTS-MARTIAL, 15.
51. **Same**—Deck court. *See* DECK COURTS, 10–12.
52. **Contempt of court.** *See* CONTEMPT OF COURT.
53. **Continuance.** *See* ARMY, 13; CONSTITUTIONAL RIGHTS OF ACCUSED, 17; CONTINUANCES; COUNSEL, 20; COURT, 134.
54. **Convening authority.** *See* CONVENING AUTHORITY.
55. **Convening of.** *See* CONVENING AUTHORITY, 27–32; DECK COURTS; SUMMARY COURTS-MARTIAL.
56. **Same**—On foreign territory. *See* JURISDICTION, 53.
57. **Same**—Courts-martial, other than naval courts-martial, can not be convened on vessels of the regular Navy. *See* ARMY, 7; NAVAL MILITIA, 35, 38, 39.
58. **Counsel for accused**—Duty of court. *See* COUNSEL, 4, 19, 20, 31, 32.
59. **Court-martial orders**—Should be consulted in adjudging sentences—Members should have file of—Officers strictly accountable for ignorance of instructions contained in—Court-martial orders have full force and effect as regulations. *See* COURT-MARTIAL ORDERS, 8, 15, 17, 18, 33, 35, 36, 37, 39, 40, 41, 42.
60. **Crimination.** *See* SELF-INCRIMINATION.
61. **Criticism of court.** *See* CRITICISM OF COURTS-MARTIAL.
62. **Death of member**—Before signing record. *See* MEMBERS OF COURTS-MARTIAL, 24.
63. **Deck courts.** *See* DECK COURTS.
64. **Degree of criminality involved**—Court should call for evidence after plea of guilty, if necessary, to show the degree of criminality involved. *See* DEGREE OF CRIMINALITY INVOLVED, 1.
65. **Delegation of power**—The court attempts to delegate its powers and duties when it allows an expert witness to express his opinion as to the guilt or innocence of the accused. C. M. O. 24, 1914, 22. *See also* C. M. O. 49, 1915, 15; OPINION, 15–17.

Digitized by Google

66. **Depositions**—Necessity of approval by court and convening authority. *See* DEPOSITIONS, 3.
67. **Dereliction of.** *See* C. M. O. 25, 1915, 2. *See also* COURT, 93.
68. **Dissolved**—After a general court-martial has been dissolved further proceedings by it in revision, pursuant to order of convening authority, are wholly void and without legal effect. Sentence imposed prior to dissolution may be approved. C. M. O. 4, 1914, 1, 4. *See also* C. M. O. 214, 1901, 1; COURT, 71.
69. **Same**—Where the court had been dissolved, or by reason of any casualty or exigency of the service can not practically be reconvened, there can, of course, be no correction of its proceedings. C. M. O. 7, 1911, 14.
70. **Same**—Where a court had been dissolved it was impossible to return the record for revision. C. M. O. 22, 1913, 6.
71. **Same**—Where a record was returned to the convening authority by the reviewing authority, directing that the court be reconvened for the purposes of reconsidering the finding and sentence, the court having been, dissolved by the convening authority before the receipt of the record from the reviewing authority, it was held by the department that the court having been legally dissolved, it could not legally meet to reconsider its proceedings, since it ceased to exist as a legal body when dissolved and an order subsequently issued, revoking the order dissolving the court will be futile and ineffective. C. M. O. 7, 1911, 14. *See also* COURT, 68.
72. **Documents**—Court should not permit documents or certified copies of same to be appended to record unless they have been offered in evidence. *See* EVIDENCE, DOCUMENTARY, 45.
73. **"Due form and technically correct"**—Means that the charge and specification are in the form required, and the facts alleged in the specifications constitute the offenses set forth in the charges. That the specification supports the charge. C. M. O. 43, 1906, 2. *See also* COURT, 14; FILE 26251–12159, p. 17.
74. **Evidence—May** be introduced out of usual order for satisfactory cause at discretion of court. *See* EVIDENCE, 89–90.
75. **Same**—Court should not "originate" evidence. C. M. O. 216, 1901, 2; 19, 1915, 3.
76. **Same**—Court should call for better evidence if it is available. C. M. O. 37, 1909, 4.
77. **Same**—Misinterpretation by court. C. M. O. 37, 1915, 10.
78. **Same**—By receiving incompetent evidence the court permits a miscarriage of justice and the accused to escape punishment. C. M. O. 37, 1909, 6. *See also* EVIDENCE, 75.
79. **Same**—Courts-martial in their proceedings should be governed by the rules of evidence as laid down in the United States courts. *See* EVIDENCE, 106–109.
80. **Evidence in extenuation**—Procedure when evidence in extenuation is inconsistent with plea of "guilty." C. M. O. 30, 1910, 4. *See also* EVIDENCE, 51.
81. **Exception or protest**—Neither the judge advocate, the accused, nor any member of the court, has any right to enter an exception or protest on the record. *See* EXCEPTIONS, 2, 3.
82. **Executive branch of the Government**—A naval court-martial is a branch of the executive, not of the judicial, department of the Government. *See* COURT, 113.
83. **Facts**—Court as judge of. *See* COURT, 103.
84. **Facts in dispute.** *See* CRITICISM OF COURTS-MARTIAL, 14.
85. **Facts not in dispute.** *See* CRITICISM OF COURTS-MARTIAL, 14.
86. **Finding**—Court should not eliminate essential gravamen from specification in its finding and then find guilty of charge. C. M. O. 41, 1903, 2; 29, 1909, 2; 17, 1910, 4; 4, 1913, 54. *See also* C. M. O. 146, 1900, 2; 12, 1904, 3.
87. **Same**—Incorrect finding due to ignorance of law. C. M. O. 4, 1913, 13.
88. **Same**—Court should not eliminate words in specification so as to make specification incomplete. C. M. O. 12, 1904, 3; 29, 1909, 2.

    In one case the department stated that "such a conclusion or finding of a court is beyond understanding and unreasonable." C. M. O. 49, 1910, 13.
89. **Foreign country**—Courts-martial convened in foreign countries. *See* JURISDICTION, 53.
90. **Forms of Procedure**—Naval courts-martial are required to conform to the approved Forms of Procedure. C. M. O. 10, 1897, 3; 4, 1913, 56; 26, 1910, 3; 28, 1913, 7; 51, 1914, 1.

    In one case the department called attention to the court's failure to follow strictly the Forms of Procedure, and cited the order of the Secretary of the Navy on page 3 of the Forms of Procedure, 1910. C. M. O. 17, 1910, 10.

    The department stated, "It is further to be noted that the remarks made by the court in revision, apparently intended to justify the inadequate sentence originally imposed, were highly irregular and unauthorized by the approved Forms of Procedure to which naval courts-martial are required to conform." C. M. O. 28, 1913, 7.

Digitized by Google

Naval courts-martial should carefully follow the procedure as established in Navy Regulations, Forms of Procedure, and Court-Martial Orders, by which they are governed, never at any time losing sight of the fact, as expressly stated in the department's order promulgating the Forms of Procedure, 1910, that "deviation therefrom may be fatally irregular and erroneous." (Forms of Procedure, 1910, p. 3.) C. M. O. 51, 1914, 1. *See also* C. M. O. 49, 1915, 9.

Full force and effect as regulations. C. M. O. 12, 1911.

91. **General courts-martial**—Who may convene. *See* CONVENING AUTHORITY, 27–32.
92. **Same**—Constitution or composition of. *See* COURT, 33–35, 37–49.
93. **"Guilty in a less degree than charged," plea of**—Court should reject and try accused for offense as charged. *See* GUILTY IN A LESS DEGREE THAN CHARGED, 9–11.

The court and the judge advocate are guilty of a dereliction of their duties when the latter recommends and the former accepts a plea of guilty in a less degree than charged when witnesses are available to prove the offense as charged. C. M. O. 10, 1912, 8.

94. **Holiday**—Court may not adjourn over holiday without permission of convening authority. *See* ADJOURNMENTS OF COURTS-MARTIAL, 1, 2, 3.
95. **Hypotheses**—Court not required to indulge in hypotheses to supply evidence which it was duty of accused to supply. C. M. O. 39, 1913, 13. *See also* COURT, 32.
96. **Illegally constituted.** *See* COURT, 37, 38, 39, 40, 41, 44; DECK COURTS, 19, 26.
97. **Joinder, trials in.** *See* JOINDER, TRIALS IN.
98. **Judge advocate**—Not to usurp functions of court. *See* JUDGE ADVOCATE, 123–126.
99. **Same**—Court should not usurp functions of judge advocate. C. M. O. 81, 1897, 2. *See also* G. C. M. Rec. 29764; JUDGE ADVOCATE, 61.
100. **Same**—Censure—Court should not. *See* JUDGE ADVOCATE, 60.
101. **Same**—Court, adviser to. *See* JUDGE ADVOCATE, 49–59.
102. **Same**—"Closed court"—Should not be present. *See* JUDGE ADVOCATE, 105.
103. **Judge of fact**—The court, in its capacity of jury, is the sole judge of fact. G. C. M. Rec. 24745; File 26251-9649.
104. **Jurisdiction**—A naval court-martial is a court of limited jurisdiction. C. M. O. 49, 1910, 9; 14, 1910, 8; 15, 1910, 9, 49–59. *See also* COURT, 82, 112; EVIDENCE, 21; JURISDICTION, 29, 73.

Jurisdiction over retired officers. *See* JURISDICTION, 114; RETIRED OFFICERS, 3–5, 22, 33, 60, 61, 71, 74.

Over resigned officers. *See* JURISDICTION, 113.

Jurisdiction of naval courts-martial in general. *See* JURISDICTION, 18, 26–39.

105. **Same**—Convened in foreign countries. *See* JURISDICTION, 53.
106. **Juror—Capacity of members as jurors.** C. M. O. 94, 1905, 1. *See also* 6 Op. Atty. Gen., 200, 206; JURORS, 1.
107. **Jury**—The court in its capacity of jury has the power of determining the weight to be given to the testimony of the accused and consider it in coming to its findings. File 26251-9649.
108. **Law**—Misapplication of, by court. C. M. O. 37, 1915, 10.
109. **Same**—Court-martial should not "make law." *See* COURT, 113.
110. **Same**—Duty to enforce law. C. M. O. 4, 1913, 6.
111. **Leniency of court** (C. M. O. 14, 1915, 1)—"Unwarranted leniency." (File 26262-2610, Sec. Navy, July 21, 1916.) *See* CRITICISM OF COURTS-MARTIAL, 32.
112. **Limited jurisdiction**—A naval court-martial is a court of limited jurisdiction. *See* COURT, 104.
113 **Making law**—It is not for a naval court-martial, which is a branch of the executive, and not of the judicial, department of the Government, to make law or attempt to blaze the way in the direction of reforms, if they be "reforms," which have been specifically rejected by the Federal courts. C. M. O. 24, 1914, 19. *See also* C. M. O. 1, 1914, 8; 14, 1914, 5; CRITICISM OF COURTS-MARTIAL, 20.
114. **"Marine summary court-martial"**—There is no tribunal known to the law as a "marine court-martial." Letter, Sec. Navy, July 5, 1877.
115. **Members.** *See* MEMBERS OF COURTS-MARTIAL.
116. **Motion to strike out evidence**—Court should rule on. C. M. O. 49, 1915, 12.
117. **Nature of**—The essence of all military proceedings is summary and vigorous action, since the certainty of prompt punishment is more conducive to discipline than punishment deferred long after the offense. Naval courts-martial are no part of the judiciary of the United States, are not even courts in the full sense of the term, but are, in peace as well as in war, simply bodies of officers of the naval service ordered to investigate accusations, arrive at facts, and, where just, recommend a punishment. In the absence, therefore, of statutory direction they can scarcely be held bound by

Digitized by Google

the same strict adherence to common-law rules as are the true courts of the United States; and, upon trials, they may properly be allowed to pursue a more libera course in regard to the admission of testimony and the examination of witnesses than do habitually the civil tribunals. Their purpose is to do justice, and if the effect of a technical rule is found to be to exclude material facts or otherwise obstruct a ful investigation the rule may and should be departed from. (*See* WINTHROP, 473.) 13 J. A. G., 59-60; File 6465-03, J. A. G., July 22, 1903, p. 10. *See also* COURT, 127.

118. **Oath**—General court-martial—Disclosing vote, opinion and sentence. *See* CRITICISM OF COURTS-MARTIAL, 22, 35; OATHS, 20, 47.

Summary court-martial—Disclosing vote, opinion and sentence. *See* OATHS, 47.

119. **Same**—Taken by members of general courts-martial. *See* OATHS, 20.

120. **Same**—Until a court is duly sworn according to law it is incompetent to perform any judicial act, except to hear and determine challenges against its members. C M. O. 29, 1914, 3.

121. **Objection**—Where a member is a witness and an objection to a question is made he should only resume his status as a member to act on the objection when it is necessary to constitute a quorum of five. C. M. O. 49, 1915, 12, 15. *See also* MEMBERS OF COURTS-MARTIAL, 52.

122. **Obstinate.** C. M. O. 36, 1905, 3; 14, 1914, 5. *See also* CRITICISM OF COURTS-MARTIAL, 16, 35, 48.

123. **Obtundity.** *See* CRITICISM OF COURTS-MARTIAL, 44, 48.

124. **"One-man court"**—A commanding officer is not a "one-man court." C. M. O. 7, 1914, 10, 12. *See also* COURT, 27; COMMANDING OFFICERS, 14.

125. **"One-officer court"**—A deck court is a "one-officer court." C. M. O. 7, 1914, 11.

126. **"Open court"**—The sessions of a general court-martial shall be public, and in genera all persons except such as may be required to give evidence shall be admitted. However, in cases where it may seem desirable that certain classes of spectators, such as women, children, and others, should be excluded during the trial, the court, when convened by the Secretary of the Navy, or the convening authority in other cases, should communicate with the Secretary of the Navy requesting permission therefor and giving a full statement of the reasons. (*See*, in this connection, Navy Regulations, 1913, R-761; G. C. M. Rec. No. 21478*a*; File 26504-115, J. A. G., Jan. 24, 1911) C. M. O. 51, 1914, 3. *See also* File 26504-115, J. A. G., Jan. 24, 1911, which holds that the sessions of a naval general court-martial should be public.

127. **Same**—While a court-martial may technically, within its legal right, close its doors to the public during the trial of an accused, such a procedure is contrary to authority of textwriters, the spirit of the Constitution, and to the usual practice of the Federa courts. File 26504-115, J. A. G., Jan. 24, 1911.

The statutes regulating the course of procedure in military courts show that in contemplation of Congress these courts stand on the same footing as other judicial tribunals of the country. Their sittings, for example, are *free to the attendance of the public*, like those of other courts. (11 Op. Atty. Gen. 137, 141.) Again, the Sixth Amendment to the Constitution provides that the accused shall enjoy a speedy and *public trial*. While it seems evident that this constitutional provision does not refer to trials by court-martial, yet it is indicative of the view which Congress took of the matter in framing the amendment. "All trials before courts-martial, like those in the civil courts of judicature, are *conducted publicly* and with open doors." (Macomb, 29.) "Deliberations of the court takes place always with closed doors. At other times it is open to the public, military or otherwise, with such restrictions as the convenience of the court and the parties and the capacity of the room may dictate." (De Hart, 94.) *In this connection see also* Harwood, 65; Coppee, 50; Army Digest, 1902, par. 1012. In civil courts it has been held that where the evidence is of a peculiarly indecent and vulgar character the court may exclude all parties from the room who are not necessary for conducting the trial. (12 Cyc. 520n.)

The exclusion of persons in certain cases was held to be contrary to the spirit if not to the letter of the Constitution, and in the case of courts-martial it is certainly contrary to a practice that has extended uniformly, so far as precedents have been discovered, for very many years. In a Federal case where the subject was considered (United States *v.* Buck, 24 Fed. Cas. No. 14680) the syllabus states as follows: "A court of the United States ought never to sit with its doors of entrance closed so as to prevent publicity to its proceedings." In that decision the court recognized that for its own protection certain persons *as a class*, but not as individuals, might be excluded as a prudential measure to safeguard the administration of justice." File 26504-115, J. A. G., Jan. 24, 1911.

A person who was to be a witness desired to have his counsel present during a tria at which he was later to testify. Counsel for the accused objected, and the court ruled

Digitized by Google

as follows: "The court decides that the witness can not be present either in person or by counsel, nor can he address the court in any way." The counsel for the witness thereupon withdrew. The department approved this procedure. G. C. M. Rec. No. 21478s.

128. **Same**—Accused should be present. *See* ACCUSED, 1–9.
129. **Opinion**—Court should not allow witnesses to state directly their opinion upon the specific question whether or not upon the evidence the accused is guilty or innocent. *See* OPINION, 15–17.
130. **Orders**—As members or judge advocates. *See* CONVENING AUTHORITY, 32; COURT, 35, 37–49.
131. **Originating evidence.** *See* COURT, 75.
132. **Pardon**—Court can not pardon offenses or award a nominal punishment equivalent to a pardon. C. M. O. 89, 1897, 2; 132, 1897, 2. *See also* ADEQUATE SENTENCES, 5; PARDONS, 9.
133. **Physical condition of accused**—It is not within the province of general courts-martial to determine the physical condition of an accused and his ability to serve sentence. These are not matters for it to consider. The law making it the duty of naval courts-martial to adjudge punishment adequate to the nature of the offense permits no allowances being made because of a man's physical disability. If an accused's physical condition is such as to warrant, in the opinions of the members, the exercise of special clemency the members of the court might recommend him to clemency or the medical officers at the prison where the accused is ordered confined might take suitable action. C. M. O. 49, 1910, 12–13. *See also* CLEMENCY, 41, 42.
134. **Postponement**—Where an accused states he is not ready for trial giving his reasons for stating that he wanted to secure the testimony of a certain witness and also desired to secure certain documentary evidence, the court should grant a postponement of the trial, unless it be shown to have been impracticable to accede to such a request, and where it is practicable such noncompliance with Article XI of the amendments to the Constitution of the United States would constitute a grave error. C. M. O. 17, 1910, 8–10. *See also* CONSTITUTIONAL RIGHTS OF ACCUSED, 17; TRIALS, 7.
135. **Precept**—Convening authority may grant court permission to adjourn over holidays in precept. C. M. O. 51, 1914, 4. *See also*, ADJOURNMENT OF COURTS-MARTIAL, 1, 2. Precept is sufficient authority for officers to sit as members of general courts-martial. C. M. O. 28, 1910, 5. *See also* PRECEPTS, 12, 15, 21.
136. **President of a general court-martial**—Absent on leave without knowledge or permission of convening authority. *See* MEMBERS OF COURTS-MARTIAL, 4.
137. **Previous convictions.** *See* PREVIOUS CONVICTIONS.
138. **Public trial.** *See* COURT, 126, 127; PUBLIC TRIAL.
139. **Question by member**—If rejected recorded as "Question by a member," and not as "Question by court." C. M. O. 17, 1910, 7; 19, 1915, 1, 3. *See also*, MEMBERS OF COURTS-MARTIAL, 40; WITNESSES, 40.
140. **Quorum**—An absence of a legal quorum does not prevent the entering of a nolle prosequi by the prosecution. File 26251–8038:7.
141. **Same**—Procedure when court is reduced below. File 26504–176; G. C. M. Rec. 26948.
142. **Same**—Not practicable for court to be reconvened as court was reduced below legal minimum. *See* C. M. O. 5, 1914, 6; 29, 1914, 10; 40, 1915, 12.
143. **Reconvened**—Court could not be reconvened as membership was reduced below legal minimum. C. M. O. 5, 1914, 6; 29, 1914, 10; 40, 1915, 12.
144. **Same**—A revision by a court reconvened after dissolution is of no legal effect. C. M. O. 4, 1914, 1. *See also* COURT, 68–71.
145. **Same**—The judge advocate introduced and the court received evidence of previous convictions which was clearly inadmissible. As this evidence may have influenced the court in adjudging its sentence the court was reconvened for the purpose of reconsidering the sentence, excluding during such reconsideration the above-mentioned evidence of previous convictions. C. M. O. 17, 1910, 6.
146. **Same**—Cases where the court could not be reconvened because of exigencies of the service or because it was impracticable. C. M. O. 49, 1910, 13; 23, 1913, 15; 32, 1913, 2; 39, 1913, 14; 4, 1914, 1, 4. *See also* CONVENING AUTHORITY, 51, 52.
147. **Reconvening of itself**—A general court-martial in the case of an officer reconvened the day after the completion of the trial at the call of the president of the court and reconsidered the sentence because of inadequacy. The record had not been sent to the convening authority. The court revoked its former sentence and substituted a new one. Convening authority (station) approved without comment and the department permitted the procedure to stand without comment. G. C. M. Rec. 27923. *See also* 1 Op. Atty. Gen. 297; G. C. M. Rec. 9427 (1901).

Digitized by Google

148. **Same**—Accused was tried by general court-martial, found guilty, and sentenced. The court then signed the record and proceeded with another case. On the following day, however, the court met at the call of the president, and, when cleared on the request of a member, reconsidered the case of the accused, revoked its former sentence, and in lieu thereof sentenced him to three years' confinement, dishonorable discharge, etc. (Former sentence was one year's confinement, dishonorable discharge, etc.)

The department's action thereon was expressed as follows:

"The proceedings in reconsideration in this case, without any apparent reason, show lack of proper deliberation on the first sentence. This man has already been confined for a month and placed in irons * * *. The sentence is disapproved and the accused restored to duty." C. M. O. 8, 1908, 3–4.

149. **Same**—Summary court-martial—The record shows that the trial was finished and that the court found the specification "proved," but the record also shows that the court decided to reconvene itself to "reform its finding and sentence, the court having been informed by the recorder of an error in the name of the accused as stated in the specification and also in the evidence."

Such procedure was irregular and indicated a lack of preparation of the case by the recorder and carelessness on the part of the court in not noticing the error referred to at the proper time and before reaching its finding and rendering judgment. Article 1694, paragraph 2, U. S. Navy Regulations, 1909 [Navy Regulations, 1913, R–620 (2)] provides, that after the proceedings and trial have been completed and *recorded*, they shall be signed by the senior member and the recorder, and transmitted to the convening authority. Paragraph 1 [R–52] of the above article states that the sentence of the court shall be signed by all the members and the recorder (see also Navy Regulations, 1913, R–810). C. M. O. 15, 1910, 12. *See also* File 26287–494; 10 p. Atty. Gen. 297.

150. **Record**—Signing of. *See* COURT, 175; MEMBERS OF COURTS-MARTIAL, 12, 24, 48.

151. **Same**—Members as well as judge advocate are responsible for errors in record. *See* CRITICISM OF THE COURTS-MARTIAL, 13, 28, 35, 40; RECORD OF PROCEEDINGS, 53, 54.

152. **Same**—Binding of. *See* BINDING OF COURT-MARTIAL RECORDS.

153. **Recorder of deck court**—Nature of. *See* DECK COURTS, 48, 58.

154. **Recorder of summary court-martial**—Not to usurp functions of court. C. M. O. 42, 1909, 15–16.

155. **Refusing to correct errors.** *See* CRITICISM OF COURTS-MARTIAL, 15, 19, 20, 35, 36, 38, 48.

156. **Relief**—From duty as member. *See* CONVENING AUTHORITY, 32; COURT, 45, 46.

157. **Remarks of court**—Justifying an inadequate sentence were highly irregular and unauthorized, C. M. O. 28, 1913, 7.

158. **Reprimanded for leniency.** *See* ADEQUATE SENTENCES, 3, 10; COURT, 111; CRITICISM OF COURTS-MARTIAL, 55.

159. **Revealing vote.** *See* CRITICISM OF COURTS-MARTIAL, 22, 36; OATHS, 47.

160. **Reviewing authorities**—Power of reviewing and revising authorities over naval courts-martial. *See* REVIEWING AUTHORITY, 15; REVISION, 24.

161. **Revision.** *See* REVISION.

162. **Secrecy of trials.** *See* COURT, 126, 127, 171.

163. **Sentence**—Law imposes on courts-martial duty to adjudge adequate sentences in cases of convictions. *See* ADEQUATE SENTENCES.

164. **Same**—Court assumes prerogatives of reviewing authority by adjudging an inadequate sentence. C. M. O. 42, 1909, 8; 15, 1910, 6; 7, 1912, 3; 8, 1912, 3; 16, 1912, 3; 1, 1913, 7; 9, 1913, 3; 16, 1913, 3; 28, 1913, 6.

165. **Same**—"Ill-judged leniency" of the court. C. M. O. 47, 1906.

166. **Same**—Illegal to exercise power of mitigation in sentence. C. M. O. 16, 1912, 3.

167. **Same**—Court should not exercise power of pardon in sentence. *See* PARDONS, 9.

168. **Same**—Court should not prescribe in its sentence how or when such sentence shall be executed. Such matters are properly within the province of the convening authority. C. M. O. 60, 1892; 36, 1914, 3, 4. *See also* C. M. O. 38, 1914, 5; SENTENCES, 87.

It is not competent for a court-martial to sentence a man to be released and restored to duty upon the expiration of the period of confinement. C. M. O. 37, 1909, 3.

169. **Same**—The law makes a sentence of dismissal mandatory in Army where officer is convicted of "Conduct unbecoming an officer and a gentleman," and a court-martial composed of naval officers should not refuse to accept for the service of which they are members the standard fixed by law to which officers of the Army must conform in order to retain their commissions. C. M. O. 49, 1915, 23. *See also* CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN, 6.

Digitized by Google

170. **Service**—Service upon naval courts-martial is strictly recognized by statute as a duty of the very highest order, as is witnessed by the provision embodied in A. G. N. 46; to the effect that no member of a general court-martial shall, after the proceedings are begun, absent himself therefrom, except in case of sickness, or of an order to go on duty from a superior officer, on pain of being cashiered. C. M. O. 125, 1900, 2.

171. **Sessions of**—Meeting at unusual hours—A general court-martial commenced the trial at 5.15 p. m. and completed the trial on the same day. The record disclosed many irregularities and errors, and the department stated:

The court was not informed by the convening authority that this case was one of extraordinary urgency requiring to be tried at unusual hours or in undue haste. With reference to courts-martial in the Army, Congress, by the 94th article of war (which was in effect until March 2, 1901) provided that "proceedings of trials shall be carried on only between the hours of eight in the morning and three in the afternoon, excepting in cases which, in the opinion of the officer appointing the court, require immediate example." And a similar statute has been in effect in England from a very early period. While there is no such law with reference to our Navy, the reasons governing such enactments are equally applicable thereto. Thus, the object of the law, as stated by the Attorney General (11 Op. Atty. Gen. 141) was "to guard against improper secrecy." In Winthrop's Military Law (Vol. 1, p. 421) the purpose of the enactment was stated to be "to prevent the daily attendance upon the trial from being too protracted and onerous, and to obviate hasty action on the part of the court, and to afford an opportunity to the judge advocate to write up the daily record." In Hough's "Practice of Courts-Martial" (London, 1825) it is stated, with reference to the provisions of the English statutes limiting the hours of trial by court-martial:

"The clear intention of the article is, to prevent the possibility, except under any urgent circumstances, of the overfatigue of the mind, by which the interests of the service, or the due administration of justice, might be affected. Though at the assizes, which are held twice a year before the judges of assize, it is not uncommon to continue their sittings till a very late hour, to insure an uninterrupted course of justice; still there is a wide distinction between such cases, and those of a similar nature, whenever they fall under the cognizance of a general court-martial—in the former there is frequently a popular feeling against the accused—publications are issued from the press and, therefore, it becomes right and proper, not to suffer any delay to take place in the administration of justice. With respect to a general court-martial, the same causes do but rarely exist; added to which, those who are not used to a sedentary life, are not so well fitted to give a steady attention to any subject, which requires a constantly patient and watchful vigilance of the mind. It is, therefore, the interests of general practice, that have given a limit to the duration of the sittings of courts-martial." (p. 377).

The present case strictly exemplifies the consequences resulting from attempts to conduct a trial by general court-martial in undue haste, and at unusual hours. C. M. O. 27, 1913, 11. *See also* CRITICISM OF COURTS-MARTIAL, 66; TRIALS, 27. C. M. O. 49, 1910, 11.

172. **Same**—Temporary adjournments over holidays, etc. *See* ADJOURNMENTS OF COURTS-MARTIAL, 1, 2.

173. **Same**—The clause of A. G. N. 45 enjoining a daily session seems to be directory in character rather than mandatory. C. M. O. 27, 1898, 1.

174. **Same**—An accused was charged with "Scandalous conduct tending to the destruction of good morals," the specification thereunder alleging that the accused, while judge advocate of a general court-martial, "*in session at said yard*," was under the influence of intoxicants. He pleaded guilty except to the words "*in session* at said yard." The department held that although the court was not actually meeting at the time alleged it was "in session" within the definition of the expression, and that a court is "in session" during "temporary intervals of adjournment." C. M. O. 104, 1896, 4.

175. **Signatures of members**—The omission of a signature of one of the members of a naval court-martial to the findings and sentence will have no effect provided a legal quorum remained and signed. G. C. M. Rec. 24534.

176. **Statement of accused.** *See* STATEMENT OF ACCUSED.

177. **Statutory**—There can be no plainer expression of the law than that in the case of a court-martial, their authority is statutory, and the statutes under which they proceed must be followed throughout. The facts necessary to show their jurisdiction must be stated positively. File 3980-650, J. A. G., July 10, 1911, p. 4.

178. **Stubborn.** *See* CRITICISM OF COURTS-MARTIAL, 15, 19, 20, 35, 36, 38, 48.

179. **Sufficiency of evidence.** *See* CRITICISMS OF COURTS-MARTIAL, 14.

Digitized by Google

180. **Summary courts-martial.** *See* SUMMARY COURTS-MARTIAL.
181. **Technicalities**—Should not be introduced into naval court-martial procedure. *See* COMMON LAW, 12.
182. **Trial**—Conducted in undue haste. *See* COURT, 171; CRITICISM OF COURTS-MARTIAL, 66.
183. **Undisputed facts.** *See* CRITICISM OF COURTS-MARTIAL, 14.
184. **Same**—Duty of court as to finding. C. M. O. 43, 1906. *See also* COURT, 86–88.
185. **Usurp**—Court shall not usurp functions of reviewing authority. *See* ADEQUATE SENTENCES, 3–20; CRITICISM OF COURTS-MARTIAL.
186. **Same**—Court shall not usurp functions of judge advocate. *See* COURT, 99; JUDGE ADVOCATE, 61.
187. **Same**—Court should not usurp functions of convening authority by trying men in joinder without authority. C. M. O. 10, 1911, 4; 42, 1914, 4. *See also* JOINDER, TRIAL IN.
188. **Same**—Judge advocate shall not usurp functions of court. *See* JUDGE ADVOCATE, 123–126.
189. **Vote, revealing**—Members of a summary court-martial called upon to reveal their votes "before a court of justice in due course of law" in case of trial of Commander * * *. 1 Penna. Law Journal Reports, 356.
190. **Same**—Members of a summary court-martial disclosing vote or opinion. *See* OATHS, 47.
191. **Same**—The vote of the members of a general court-martial being a confidential matter, it can not be known what it was. C. M. O. 125, 1900, 2; VOTING, 1.
192. **Warrant officers**—A warrant officer not being a commissioned officer, can not act as a deck court officer, and in a case where one acted as such the department stated that a deck court "so constituted has no legal status, has no jurisdiction, and that its acts are *ab initio* [from the beginning] null and void." (*See* Navy Regulations, 1913, R–502; C. M. O. 7, 1914, 11.) File 27217–1648, Sec. Navy, March 24, 1915. C. M. O. 12, 1915, 5.
193. **Same**—Commissioned warrant officers may sit as members of general courts-martial. *See* CHIEF BOATSWAINS, 2.
194. **Same**—May convene a summary court-martial if actually in command of a naval vessel, but may not sit as a member. *See* COURT, 196; SUMMARY COURTS-MARTIAL, 105.
195. **Same**—May convene a deck court if actually in command of a naval vessel. *See* DECK COURTS, 4.
196. **Same**—The words "commander of any vessel" in A. G. N. 26 are construed by the Secretary of the Navy to include a warrant officer when he is actually commanding a naval vessel. C. M. O. 6, 1915, 5. *See also* SUMMARY COURTS-MARTIAL, 7, 21, 105.
197. **Witnesses**—Examination by court—Scope of. *See* WITNESSES, 40–42.
198. **Same**—Court has witnesses before it and can thus observe their appearance and manner. C. M. O. 129, 1898, 6; G. C. M. Rec. 30485, pp. 701, 738. *See also* C. M. O. 28, 1913, 6; File 26262–2445, J. A. G., March 3, 1916, p. 7; EVIDENCE, 129; WITNESSES, 76. The court is confronted with the witnesses and has opportunity for observing their demeanor before the court and determine the weight to be given to their testimony. File 26251–9574.
199. **Same**—Court errs in allowing witnesses to state their opinions as to guilt or innocence of accused. C. M. O. 49, 1915, 12, 15; 22, 1916. *See also* OPINION, 15–17.
200. **Same**—Exclusion of. *See* COURT, 126, 127; EXPERT WITNESSES, 10.

COURTS, CIVIL. *See* CIVIL COURTS.

COURT OF CLAIMS.

1. **Documentary evidence required of department**—Such documentary evidence as a plaintiff can himself produce, and which in an ordinary action at law or a suit in equity he would produce on his own behalf as a matter of course, the claimant here can not compel the defendants to produce through calls upon the departments. (In Re Calls for Evidence, 33 Ct. Cls. 354, 355.) File 26266–444, Sec. Navy, July 14, 1916.
2. **Jurisdiction.** *See* EMBEZZLEMENT, 25 (pp. 210–211).
3. **Law involved in claims**—It is not believed that this department should, through means of a call by the Court of Claims, be required to advise counsel for claimants as to the law involved in their claims against the United States. File 26266–444, Sec. Navy, July 14, 1916.

COURTS OF INQUIRY.

1. **Accuser**—May not demand copy of record. C. M. O. 20, 1915, 6. *See also* COURTS OF INQUIRY, 12.
2. **Action of department**—When received the court of inquiry record must be reviewed and recorded in accordance with law. File 14625–183:25, April 9, 1912; J. A. G., 101.

Digitized by Google

3. **Article 60 A. G. N.**—Was not intended to restrict admissibility of court of inquiry records in evidence where such records might have been admitted under general principles of the law of evidence; but was intended to enlarge the rules of evidence by authorizing the records of courts of inquiry to be admitted in evidence in certain cases where they would otherwise have been inadmissible, as, for example, where it is necessary in the interests of justice to introduce against an accused person testimony previously given before a court of inquiry by a person other than the accused, instead of confronting the accused at his trial with such witness. C. M. O. 51, 1914, 6. *See also* C. M. O. 88, 1895, 13–16; File 26251–12895, 1917.
4. **Authentication**—The proceedings of courts of inquiry shall be authenticated by the signature of the president of the court and of the judge advocate. C. M. O. 88, 1895, 13. *See also* C. M. O. 12, 1904, 4; COURTS OF INQUIRY, 21.
5. **Challenge**—"Objection" to a member of a court of inquiry sustained by court. Ct. Inq. Rec. 4952, p. 29.
6. **"Commander cruiser squadron and commander in chief, detached squadron"**—Convening courts of inquiry. C. M. O. 6, 1915, 9. *See also* CONVENING AUTHORITY, 10, 28.
7. **Confession**—Statements made by accused before a court of inquiry. *See* CONFESSIONS, 12.
8. **Constitution of**—A court of inquiry shall consist of not more than three commissioned officers as members, and of a judge advocate, or person officiating as such. (A. G. N. 56.)
9. **Same**—"One officer" court of inquiry. *See* COURTS OF INQUIRY, 38.
10. **Convening of**—Courts of inquiry may be convened by any officer of the naval service authorized by law to convene general courts-martial. (Act of Aug. 29, 1916, 39 Stat. 586.) *See* CONVENING AUTHORITY, 27.
    See File 26896–62, J. A. G., May 18, 1911, with reference to convening of courts of inquiry in cases of accidents, etc.
11. **Copies of record**—Neither accuser nor defendant can demand. *See* COURTS OF INQUIRY, 12.
12. **Same**—Not furnished to interested persons—Neither the accuser nor the defendant before a court of inquiry can demand a copy of the proceedings. The evidence, of whatever nature, is intended only for the officer convening the court. (Navy Regulations, 1913, R–422.) Where copy of a court of inquiry record is requested for use before a civil court, the department will be governed by the provisions of General Order No. 121, September 17, 1914, paragraph 18 (c). File 26262–1705 : 3, J. A. G., May 1, 1915; C. M. O. 20, 1915, 6.
    See also File 5475–04, Sec. Navy, June 24, 1904; 636–9, J. A. G., Oct. 10, 1905; 26261–69, J. A. G., June 14, 1909; 20971 : 9, J. A. G., July 17, 1909; 26836–7 : 4, J. A. G., Mar. 3, 1910; 14, J. A. G., 330; 13 J. A. G., 326, June 11, 1904.
13. **Counsel.** *See* COUNSEL, 23.
14. **Defendant**—May not demand a copy of the record. *See* COURTS OF INQUIRY, 12.
15. **Depositions**—Used before courts of inquiry. *See* DEPOSITIONS, 6.
16. **District attorney**—To assist court of inquiry—Procedure to secure. File 9608–44 : 3, Sec. Navy, March 21, 1914.
17. **Evidence, as**—The official record of a court of inquiry is admissible in evidence to prove what an accused stated in his testimony before the court of inquiry, which testimony forms the basis of the charge of "perjury" for which the accused is on trial. C. M. O. 51, 1914, 9.
18. **Same**—"The voluminous record of the proceedings of the court of inquiry and of the testimony taken before it, and the various maps, diagrams, and exhibits appended to the record, give every indication of a patient, industrious, and exhaustive investigation. Under these circumstances the evidence taken before the court of inquiry was mutually accepted, by the Government and by the accused, as competent and sufficient evidence before the court-martial, subject only to the reservation that either party might, if desired, introduce additional evidence. The *findings*, however, of the court of inquiry were not, and could not be, in evidence before the court-martial; could not, in any manner, legally or officially, influence its proceedings, and hence could not, in any way, trammel or interfere with its action, but, having been the result of an investigation ordered in pursuance of law for the express information of the department, they are entitled, upon a full and final consideration of the case, to such weight as their accordance with the testimony and other evidence, both before the court of inquiry and the court-martial, may, in the judgment of the department, reasonably give to them." C. M. O. 41, 1888, 5–6.

Digitized by Google

19. **Same**—A general court-martial refused to allow the record of a court of inquiry which investigated matters that formed the basis of the charges and specification preferred against the accused to be introduced in evidence for the purpose of impeaching the testimony of a witness. The department held that under the rules of law any testimony given or statement made by a witness on a former occasion, whether under oath or not at the time, may be introduced for the purpose of impeaching his testimony if a proper predicate has been made by calling the attention of the witness to such evidence while upon the stand; and it does not matter whether such statement be part of a record or not. C. M. O. 88, 1895, 16. *See also* G. C. M. Rec. 6974; 7913; 8164; 11279; 24258; 26651; Mullan *v.* U. S., 212 U. S. 516.
20. **Same**—At several points during the progress of a general court-martial trial the judge advocate sought to introduce the record of this court of inquiry, but the court ruled against its admission upon the following grounds:

1. That the proceedings of the court of inquiry could not be introduced for the sole purpose of refreshing the memory of the judge advocate (who officiated as such before both courts), he offering to testify as a witness.

2. That the record of the court of inquiry could be introduced only as evidence, and then only when oral testimony upon the points sought to be established thereby could not be obtained.

3. That the confession of the accused made before the court of inquiry in the course of his testimony could not be admitted because the court was not satisfied that proper and timely warning was given the accused when his testimony was taken before the court of inquiry.

It is the official duty of the judge advocate of a court of inquiry faithfully to record the proceedings and the testimony taken before such court, and he must attach his signature thereto. I am of opinion that such a record is therefore admissible, as would be any memorandum made by the witness at the time, for the purpose of refreshing his memory, whether or not he has an independent recollection in the matter. This, of course, is a different thing from introducing the record in evidence.

Further, it would appear that this record should have been admitted in evidence under the previous rulings of the department, which were before the court, as soon as the court became satisfied that oral testimony on important features of the case sought to be established thereby could not be obtained. The exclusion of this evidence, however, in so far as it operated at all, was in favor of the accused, and therefore, in my judgment, does not in any way invalidate the proceedings, which appear to be in all other respects regular. C. M. O. 12, 1904, 3–4. *See also* File 995–04, J. A. G., Feb. 8, 1904; COURTS OF INQUIRY, 3, 17; WITNESSES, 96.

21. **Same**—The department stated in a court-martial order that from the evidence adduced before the court of inquiry as well as before the court-martial the department was satisfied that certain events occurred. C. M. O. 38, 1905, 2.

Testimony before a court of inquiry is given under oath. C. M. O. 51, 1914, 5.

The proceedings of courts of inquiry shall be authenticated by the signature of the president of the court and of the judge advocate, and shall, in all cases not capital, nor extending to the dismissal of a commissioned or warrant officer, be evidence before a court-martial, provided oral testimony can not be obtained. (A. G. N. 60.) C. M. O. 88, 1895, 13.

The evidence adduced before a court of inquiry is surrounded by all the solemnities of evidence taken before a court of record or before a court-martial. (Mullan *v.* U. S., 42 Ct. Cls. 157, 176.)

The evidence adduced and preserved before courts of inquiry is superior in every respect to depositions. (Mullan *v.* U. S., 42 Ct. Cls. 157, 176.)

22. **Expert witnesses**—Fees for. C. M. O. 12, 1915, 13. *See also* EXPERT WITNESSES 4.
23. **False testimony before**—The law provides for the punishment of persons who give false testimony before courts of inquiry. C. M. O. 51, 1914, 5. *See also* PERJURY, 3.
24. **Findings**—Of a court of inquiry as evidence before a trial by general court-martial. C. M. O. 41, 1888, 5–6. *See also* COURTS OF INQUIRY, 18.
25. **Foreign countries**—*See* JURISDICTION, 53.
26. **Grand Jury**—Court of inquiry compared with. *See* JURY, 2.
27. **Impeaching testimony**—Use of a record of a court of inquiry as evidence to impeach the testimony of a witness. C. M. O. 88, 1895, 16. *See also* COURTS OF INQUIRY, 19.
28. **Index for.** *See* INDEX, 3.
29. **Jeopardy, former**—If a court of inquiry, after completing an exhaustive investigation, should decide that the accused is not to blame and, therefore, recommends that no further action be taken, this is not an acquittal nor is it conclusive upon superior authority; so, as held by the Attorney General, if the court of inquiry finds the accused

Digitized by Google

was to blame and recommends that he be punished by the commander in chief, such recommendation and punishment imposed pursuant thereto does not bar subsequent trial by court-martial for the same offense. C. M. O. 7, 1914, 6, 9. *See also* File 2639-04, J. A. G., March 23, 1904, p. 1; PRIVATE REPRIMANDS, 3.

30. **Judge advocate**—Is sworn to keep a true record of the proceedings of the court and the evidence in the case. C. M. O. 51, 1914, 5.

It is the official duty of the judge advocate of a court of inquiry faithfully to record the proceedings and the testimony taken before such court, and he must attach his signature thereto. C. M. O. 12, 1904, 4; File 995-04, J. A. G., Feb. 8, 1904.

Solicitor assigned as assistant and associate of a judge advocate of a court of inquiry. *See* COUNSEL, 49.

31. **Members of courts of inquiry**—Exemption from other duties, etc. *See* MEMBERS OF COURTS-MARTIAL, 1.
32. **Member of court-martial**—The reading of the proceedings of a court of inquiry by a member of a naval court-martial which is trying matters that grew out of the investigation made by such first-mentioned court is regarded as irregular, but in a case tried in May, 1882, in which the same irregularity occurred, the department unqualifiedly approved the proceedings of the court. C. M. O. 39, 1901, 3.
33. **Midshipmen**—Court of inquiry convened to investigate alleged irregularities of midshipmen at the Naval Academy. C. M. O. 22, 1915, 9.
34. **Nature of.** *See* COURTS OF INQUIRY, 39, 51.
35. **Oath**—The law authorizes courts of inquiry to administer oaths to witnesses. C. M. O. 51, 1914, 5.
36. **Same**—Judge advocate of a court of inquiry is authorized by law to "administer oaths for the purposes of the administration of naval justice and for other purposes of naval administration." C. M. O. 5, 1916, 7.
37. **Object of**—The object of a court of inquiry is to assist the convening authority in forming judgment as to whether a general court-martial should or should not be ordered. 15 Op. J. A. G. 273; File 4865-19, Sec. Navy, July 8, 1907. *See also* COURTS OF INQUIRY, 51; File 26262-1194.

The record and report of a court of inquiry are intended for the use and information of the officer ordering the inquiry, and any other use of them is discretionary. 13 J. A. G., 326, June 11, 1904.

38. **"One-officer" court of inquiry.** Ct. Inq. Rec. 5864; 6333; File 6692-212.
39. **Same**—One officer acted as a court of inquiry without a judge advocate. File 6692-212.
40. **Perjury**—False testimony under oath before a court of inquiry will sustain a charge of "perjury." C. M. O. 51, 1914, 9. *See also* PERJURY, 3; C. M. O. 88, 1895, 13.
41. **Proceedings**—As used in A. G. N. 60. C. M. O. 88, 1895, 13.
42. **Purpose of.** *See* COURTS OF INQUIRY, 37, 51.
43. **Record**—Signed by president and judge advocate. C. M. O. 88, 1895, 13. *See also* C. M. O. 12, 1904, 4; COURTS OF INQUIRY, 4.

Original record sent up to Congress for its information. File 8369-109:2, 1916.

44. **Record, copy of.** *See* COURTS OF INQUIRY, 12.
45. **Regulations**—For a construction and interpretation of the Navy Regulations relating to courts of inquiry. *See* File 26806-62, J. A. G., May 18, 1911.
46. **Representative**—Member of the House of Representatives as a witness before a court of inquiry. *See* CONGRESS, 12.
47. **Revision**—Navy Regulations, 1913, R-427, permits new evidence to be received and recorded on revision of courts of inquiry, and previous witnesses to be recalled and reexamined, provided that in either case all parties to the inquiry are present if they so desire. File 26250-802:7, Sec. Navy, Aug. 5, 1916. *See also* File 2639-04, J. A. G., March 23, 1904, p. 1; File 26250-802:7, Sec. Navy, Aug. 5, 1916.
48. **Secretary of the Navy**—Action of, on record. *See* COURTS OF INQUIRY, 2.
49. **Senate resolution, reopening on**—The Senate passed a resolution requesting the Secretary of the Navy to reopen and review the findings of a certain court of inquiry in the case of an officer of the Navy, who had been permitted to resign, "with the object of ascertaining whether these findings were based upon facts of established record, and to take and consider any additional evidence or facts which may be presented bearing on this case, and to render his findings on the whole record so made." The case was reopened and an exhaustive investigation and review made. A careful and sympathetic consideration of the testimony submitted by a large number of witnesses of unimpeachable character, of diverse stations and duties, and varying in grades from enlisted men of the lowest ratings to officers of the highest ranks, left possible no other conclusion but that the findings of the court of inquiry were justified beyond any reasonable doubt. File 8369-109:2, September, 1916.

Digitized by Google

50. **Testimony**—Given under oath, recorded pursuant to law, and the record is required to be filed in the Navy Department. C. M. O. 51, 1914, 5.
51. **Trial, not a**—The proceedings of a court of inquiry is in no sense a trial of an issue or of an accused person. This court performs no real judicial function, but is convened only for the purpose of informing the department in a preliminary way as to the facts involved in the inquiry. C. M. O. 7, 1914, 6. *See also* COURTS OF INQUIRY, 37.
An inquiry of this nature is peculiar. There is, strictly speaking, no prosecution, although the officers concerned are necessarily on the defensive. File 7893-03, J. A. G., Sept. 22, 1903, p. 2.
If officers are exonerated they should be so advised. File 2639-04, J. A. G., Mar. 23, 1904, p. 3.
52. **Witnesses**—Courts of inquiry have power to issue like process to compel witnesses to appear and testify as United States courts of criminal jurisdiction; and refusal of any person to appear and testify when so subpœnaed is punishable as a misdemeanor. (Act of Feb. 16, 1909, secs. 11, 12, 35 Stat. 621, 622.)
53. **Same**—Testify under oath. C. M. O. 51, 1914, 5.
54. **Same**—Member of House of Representatives. *See* CONGRESS, 12.
55. **Same**—Court may interrogate witnesses and questions of members may be propounded without being first submitted to the court. The court during the examination of witnesses, acting as judges, may propound leading questions. (*See* Wigmore, sec. 784.) File 2626-1194, J. A. G., June 16, 1911, pp. 7-8.
56. **Witness fees.** *See* EXPERT WITNESSES, 4.

"COURT-MARTIAL" AT THE NAVAL ACADEMY.

1. **Constitution**—"Not less than three commissioned officers." C. M. O. 31, 1915, 10-12. *See also* HAZING, 6.

COURT-MARTIAL ORDERS.

1. **Acquittals**—In cases where officers are acquitted court-martial orders will be published only in exceptional cases. File 26504-189, Sec. Navy, Mar. 18, 1910.
An acquittal was considered an exceptional case and published in C. M. O. 5, 1913. The policy of the department is now to publish all acquittals. *See* C. M. O. 32, 1915; 36, 1915; 38, 1915; 41, 1915; 21, 1916; 40, 1916. *See also* ACQUITTAL, 6.
2. **Arrest, released from**—Court-martial orders should, in proper cases, contain a statement that the accused was released from arrest and restored to duty. *See* ARREST; 9, CONVENING AUTHORITY, 4.
3. **Bulletin.** *See* BULLETIN IN COURT-MARTIAL ORDERS.
4. **Charges and specifications**—Tabulations as form for. C. M. O. 35, 1915, 7. *See also* CHARGES AND SPECIFICATIONS, 53.
5. **Dating of**—Commencing with C. M. O. 49, 1914, the practice was instituted of dating monthly court-martial orders as of the last business day in the month covered by the subject matter thereof, instead of dating them as of the first business day in the following month. This change was adopted as a matter of convenience, and as a result the court-martial orders for each year will embody the data relating to all cases reviewed during that year. C. M. O. 1, 1915.
6. **Same**—Court-martial orders should be dated as of the date of final action—In cases where the President confirms the sentence, the date of the court-martial order should be of the date of such confirmation. *But see* C. M. O. 30, 1914; 32, 1914, the dates of which are in error.
7. **Same**—C. M. O. 22, 1896, is dated "February 19, 1895," instead of "February 19, 1896." C. M. O. 22, 1896. *See also* ERRORS IN COURT-MARTIAL ORDERS, 2.
8. **Decisions and instructions of department**—Contained in court-martial orders are in such easily accessible form that ignorance of or inattention to them is inexcusable. C. M. O. 42, 1915, 7-8.
9. **Errors**—In court-martial orders. *See* ERRORS IN COURT-MARTIAL ORDERS.
10. **Error of court**—In a case where the action of a general court-martial was irregular, the Secretary of the Navy expressly stated that "in order that its error may be called to the attention of the court, it is directed that the same be published in a court-martial order." C. M. O. 49, 1915, 11.
11. **Evidence, as**—The record showed that after the trial had been finished and the judge advocate had submitted the case to the court without remarks, the court decided to call for a certain court-martial order, and that it be appended as a part of the record as evidence. The purpose of this step did not appear from the record. Its object may have been to rebut the evidence of good character, which the accused had introduced;

Digitized by Google

and if this were the case, it should have been done before spreading upon the record the facts that the defense had closed and that the case had been submitted by the judge advocate. This step may also have been due to the fact that the court desired to have the evidence of previous convictions introduced. If this were the case the evidence should have been introduced at its proper place and the matter clearly set forth in the record. C. M. O. 11, 1897, 3. *See also* COURT-MARTIAL ORDERS, 26–28.

Courts-martial may take judicial notice of court-martial orders. *See* COURT-MARTIAL ORDERS, 27.

12. **Fleet and station court-martial orders**—It is not necessary for the convening authority of a fleet or station general court-martial to delay publishing a court-martial order, awaiting information of possible special action by the Secretary of the Navy. There is no objection to delaying publication of a court-martial order for a reasonable time after the record in such case should, in due course, have arrived at the department; but publication of such orders should not be unduly delayed because of the possibility that some special action may have been taken by the Secretary of the Navy, which in any event, is not required to be included in the court-martial order issued by the convening authority. File 26504–210, Sec. Navy, June 11, 1914; C. M. O. 22, 1915, 7.
13. **Fleet court-martial order**—Published in full in a Navy Department court-martial order. C. M. O. 14, 1879.
14. **General summary**—Explained. *See* GENERAL SUMMARY IN COURT-MARTIAL ORDERS.
15. **Judge advocates**—Should carefully read and study court-martial orders in order that they may follow precedents of the department and avoid the common errors. This is indicated in C. M. O. 1, 1914, p. 6, which states: "The department, in court-martial orders, has repeatedly condemned the tendency of judge advocates in some cases to usurp the functions of the court," etc.
16. **Judge Advocate General**—In a certain case suggested that the department's views upon the matters contained in his opinion be embraced in the court-martial order promulgating the case, for the guidance of general courts-martial in future cases where similar questions arise. C. M. O. 88, 1895, 15.
17. **Members**—General courts-martial in deliberating upon sentences, should consult the court-martial orders published periodically by the department, in order that the sentences adjudged for the various offenses therein enumerated may be noted and considered. C. M. O. 1, 1913, 4. Bound by oath to observe. File 26251–12159.
18. **Same**—Members of general courts-martial should have copies of the monthly court-martial orders published by the department. C. M. O. 22, 1913, 4.
19. **Names of members and judge advocate**—Published in court-martial order. C. M. O. 38, 1915, 3.
20. **Numbering of**—A court-martial order in 1890 was numbered 61½. C. M. O. 61½, 1890.
21. **Same**—The last court-martial order published in 1909 was No. 45, dated December 30, 1909, and the first eleven court-martial orders published in 1910 were numbered 46 to 56, inclusive. A new series was then started, the first court-martial order being numbered 12, since eleven court-martial orders had already been published in 1910. This will explain why there are no court-martial orders in 1910 corresponding to Nos. 1–11, inclusive, or subsequent to No. 56. File 26504–243, J. A. G., Sept. 10, 1915. *See also* File 26504–276, J. A. G., April 6, 1916.
22. **Officers**—Court-martial orders, in proper cases, should show that the officer was released from arrest and restored to duty. *See* ARREST, 9; CONVENING AUTHORITY, 4.

Officers held accountable for ignorance of information contained in court-martial orders. *See* COURT-MARTIAL ORDERS, 18, 39–42.

23. **Officer and enlisted man**—Court-martial order contained the cases of enlisted men and officers. C. M. O. 12, 1900.
24. **Posted.** *See* COURT-MARTIAL ORDERS, 30.
25. **Praised by a civilian magazine writer**—The following comment upon court-martial orders is quoted from an article published in a well-known periodical during the year:

"For years the Navy has been issuing as a regular part of its routine a monthly leaflet or bulletin that contains the summary of court-martial cases for that particular month. The list itself is brief, but following under the heading of 'Remarks,' is a commentary on the special cases that have occurred. It is a course in law. It bristles with pointed and biting phrase where it points out to officers of courts-martial their errors of law and procedure; it argues, explains, analyzes, expounds, and condemns the court unsparingly when needed; it quotes from the Federal courts' decisions and

Digitized by Google

from the decisions of State courts. The thoroughness with which this legal laboratory work is done under that innocuous heading of 'Remarks' is a guaranty that a legal error or violated regulation is as little likely to slip by as it would be in the most exacting civil court of appeals." Annual Report of J. A. G., 1915.

26. **Previous convictions**—A counsel for an accused officer addressed a letter to the Secretary of the Navy, in which he contended that when evidence of previous conviction was introduced the Navy Department general court-martial order containing evidence of such previous conviction should have been read aloud to the court by the judge advocate. The department held that it was not necessary to read the order to the court. C. M. O. 9, 1908, 3. *See also* G. C. M. Rec. 30485, Exhibit 7.
27. **Same**—The following telegram was received from a general court-martial which was trying an officer: "Is court authorized to introduce printed court-martial order as evidence of previous conviction in * * * case? If not, will department forward duly authenticated copy of record; latter not here." The department replied "Courts may take judicial notice department's printed court-martial orders. See Forms of Procedure, pages 137 and 141." File 26251-8681: 4; G. C. M. Rec. 28613. *See also* G. C. M. Rec. 31925, p. 31, and Exhibit 4.
28. **Same**—The department approved without comment the case of an officer in which the judge advocate offered as evidence of previous conviction a printed copy of a department court-martial order, which was accepted by the court, but no copy of such court-martial order was appended to record. G. C. M. Rec. 28560. *See also* G. C. M. Rec. 31925, p. 31, and Exhibit 4.
29. **Public reprimand**—Court-martial order should show that a public reprimand involved in a general court-martial sentence was administered, etc. *But see* C. M. O. 7, 1912, 7; 9, 1913, 3.
30. **Publicity to be given**—It is the desire of the department to increase the exemplary effect of the punishments adjudged by general courts-martial, and to impress more strongly upon the enlisted personnel the extent to which offenders are subject to punishment; likewise, to emphasize the large and increasing percentage of deserters who are apprehended and convicted, and the frequency with which fraudulent enlistments are detected.

    In addition to publishing the general monthly court-martial orders, the department believes it will be conducive to better discipline, and tend to a diminution of desertion if there be published to the enlisted force reports of specific cases in which men, formerly members of the same command, have been apprehended, convicted, and sentenced.

    Hereafter, therefore, in pursuance of this policy, upon the receipt of the usual letter notifying a commanding officer of the conviction of a man formerly attached to his command, a brief extract will be made from such letter, and copies thereof posted in several appropriate places in the ship, barracks, etc., in such manner as best to serve as a warning to others and to secure the desired deterrent effect of the conviction and adjudged punishment.

    The accomplishment of this deterrent effect depends largely upon the notoriety given to the matter, particularly among the offenders' former comrades. Therefore, in order that this system may operate as a restraining influence upon others as far as possible, and to obtain the most efficient results therefrom, it is directed that publicity be given to the convictions by general courts-martial upon receipt of notice thereof, as above indicated. C. M. O. 16, 1912, 2-3.
31. **Read on board ship**—A court-martial order stated: "This order will be read at muster on the quarter-deck of every vessel of the Southern Squadron, Asiatic Fleet, on the first Sunday after receiving it." C. M. O. 29, 1903.
32. **Reflection**—A court-martial order stated: "The publication of his general court-martial order carries with it no reflection upon any witness who testified before the court." C. M. O. 214, 1901.
33. **Regulations**—Court-martial orders "Have full force and effect as regulations for the guidance of all persons in the naval establishment." *See* COURT-MARTIAL ORDERS, 39.
34. **Secretary of the Navy, action of**—Not necessary to publish in fleet and station court-martial orders. *See* COURT-MARTIAL ORDERS, 12.
35. **Sentences**—Court-martial orders should be consulted in order to secure uniform sentences. *See* COURT-MARTIAL ORDERS, 17.
36. **Specifications abbreviated**—In some cases the specifications printed court-martial orders have been abbreviated, merely stating the substance. C. M. O. 21, 1885.
37. **Tabulated statements**—In monthly court-martial orders, show how offenses should be charged in certain cases. C. M. O. 25, 1914, 5. *See also* CHARGES AND SPECIFICATIONS, 53.

Digitized by Google

38. **Title of**—Court-martial cases were first published in General Orders (until Jan. 9, 1877). Later they were published as "General Court-Martial Orders." (Beginning Feb. 4, 1879.) This title was changed to "Court-Martial Order" beginning with C. M. O. 1, 1911.
39. **Weight of**—The Navy Regulations, 1913 (R-901-3), expressly provide that court-martial orders "shall have full force and effect as regulations for the guidance of all persons in the Naval Establishment"; and the department has emphatically announced that court-martial orders are published by the department for the information and guidance of all officers in the service, and that they may be held accountable for ignorance thereof when occasion arises in which they should be governed by instructions contained in such orders. C. M. O. 33, 1913, 3; 49, 1914, 5; 12, 1915, 11. NOTE.—The above quotation from the Navy Regulations appears at the head of Court-Martial Order No. 6, 1915, and all subsequent monthly court-martial orders. *See also* File 26251-12159, Sec. Navy, Dec. 9, 1916, pp. 2, 10.
40. **Same**—They are "published for the information of the service," and "set forth in concise form the essentials of legal procedure" "with the object of guiding" courts-martial in conducting trials. C. M. O. 5, 1914, 5; 7, 1914, 14. *See also* C. M. O. 25, 1916, 2.
41. **Same**—Courts-martial in deliberating upon sentences, should consult the court-martial orders published periodically by the department, in order that the sentences adjudged for the various offenses therein enumerated may be noted and considered. C. M. O. 1, 1913, 4.
42. **Same**—All remarks made by the department in acting upon general court-martial cases and which the department deems proper for publication to the service at large are printed in Court-Martial Orders. File 26504-190.

COVER PAGE OF RECORDS.
1. **"Copy waived"**—Not only should "copy waived" be placed on the cover page of a general court-martial record, but the waiver should be appended last. C. M. O. 21, 1910, 11.
2. **Date**—Of trial on front sheet of a general court-martial record should be the correct date. C. M. O. 27, 1913, 12.

COWARD.
1. **Midshipman**—A specification under "Conduct to the prejudice of good order and discipline" alleged that accused called another midshipman "a sneak and a coward." C. M. O. 128, 1905, 4.

"COWARDICE."
1. **Officer**—Charged with—In that he kept out of danger at the time of the capture of an enemy ship. G. O. 57, June 9, 1865.

COWARDLY AND INHUMAN CONDUCT TO THE SCANDAL AND DISGRACE OF THE NAVAL SERVICE.
1. **Enlisted man**—Charged with. C. M. O. 37, 1909, 7.

CREDIBILITY OF WITNESSES. *See* SELF-INCRIMINATION, 11, 12; WITNESSES, 51, 52.

CRIMINALS.
1. **Refuge for**—Government property should not be a haven for.
2. **Discharged**—And turned over to civil authorities. *See* CIVIL AUTHORITIES, 8, 12; CONVICTS, 2.
3. **Enlistment of**—To escape punishment by civil courts. *See* ENLISTMENTS, 5.

CRIMINAL CODE (35 Stat. 1088).

CRIMINAL NEGLIGENCE. C. M. O. 35, 1914, 4.

CRIMINAL PROCESS. *See* CIVIL AUTHORITIES; GENERAL ORDER NO. 121, September 17, 1914; JURISDICTION.

CRITICISM OF COURTS-MARTIAL.
1. **Acquittal**—Courts-martial criticized for acquitting accused. *See* CRITICISM OF COURTS-MARTIAL, 18-22.
2. **Adequate sentences**—Criticism for adjudging inadequate sentences. *See* ADEQUATE SENTENCES.
3. **Animadversion**—Convening authority may express animadversion upon courts-martial, the prosecution, administration of a command, etc. File 7719-03, Sec. Navy, Nov. 18, 1903. *See also* CRITICISM OF COURTS-MARTIAL, 35.

Digitized by Google

4. **Appeal**—Member of court-martial appealed against criticism of convening authority. *See* CRITICISM OF COURTS-MARTIAL, 35, 36.
5. **Carelessness, gross**—C. M. O. 78, 1905, 1; 14, 1913, 5. *See also* COURT, 10; CRITICISM OF COURTS-MARTIAL, 25.
6. **Censure**—C. M. O. 23, 1910, 3; 10, 1912, 8; 14, 1913, 5; 22, 1913, 5. *See also* CRITICISM OF COURTS-MARTIAL, 16, 35, 36.
7. **Compromise**—Between those members who believed accused guilty and others who believed him not guilty. G. O. 68, Dec. 6, 1865, quoted in File 7719–03, Sec. Navy, Nov. 18, 1903. *See also* CRITICISM OF COURTS-MARTIAL, 35.
8. **Convening authority**—General court-martial may censure members. *See* CRITICISM OF COURTS-MARTIAL, 35.
9. **Same**—Summary court-martial—May censure members. *See* CRITICISM OF COURTS-MARTIAL, 36.
10. **Department**—May reprimand, censure, criticise, commend, etc. *See* COMMENDATORY LETTERS, 2; CRITICISM OF COURTS-MARTIAL, 35, 36; SECRETARY OF THE NAVY, 63.
11. **Discipline of the Navy**—"While the commissioned officers of the court hold in such light estimation the discipline of the Navy, and have such mild ideas as to the gravity of offenses committed against its laws, the subordinates in all degrees can not be expected to consider them more seriously." *See* ADEQUATE SENTENCES, 13.
12. **"Due form and technically correct"**—Court errs if it pronounces faulty charges and specifications in "due form and technically correct." C. M. O. 35, 1915, 6–7; File 26251–12159, Sec. Navy, Oct. 19, 1916. *See also* COURT, 73.
13. **Errors in procedure**—These errors in procedure and omissions seem to indicate negligence and carelessness on the part of the court and of the judge advocate, and are most reprehensible and go far to defeat the objects for which courts-martial are intended, and in this case are more than sufficient to render the entire proceedings invalid. C. M. O. 36, 1905, 3.
14. **Facts undisputed**—"The department has heretofore announced that it is not its 'desire or policy to coerce courts-martial in their judgment of cases when the facts are in dispute, or there is such a conflict in the evidence that reasonable men might differ as to the facts established thereby'; but that, when 'there is no conflict whatever in the evidence, all material allegations of the specifications being clearly established thereby, and the only difficulty existing is one of law, a different question is presented. Under such circumstances, decisions of the courts, opinions of law officers of the Government, or decisions of the department based thereupon, are not to be lightly disregarded by courts-martial without incurring the full measure of responsibility which must be ascribed to them for the resulting miscarriage of justice'. (C. M. O. 4, 1913, 57. *See also* UNITED STATES *v.* MCGLUE, 26 Fed. Cas., 1095.)" C. M. O. 88, 1905, 14; 43, 1906; 6, 1908; 4, 1913, 57; 24, 1914, 7; 29, 1914, 9; 51, 1914, 3; 28, 1915, 3; 32, 1915; 36, 1915, 2; 25, 1916, 1; File 26251–12045, Sec. Navy, Aug. 7, 1916; 26251–12159, Sec. Navy, Dec. 9, 1916, p. 2; G. C. M. Rec. 32388.

    Where there is no conflict in the evidence, all material allegations of the specifications being established thereby, naval courts-martial are to be governed by the decisions of the Federal courts, opinions of law officers of the Government, and decisions of the Secretary of the Navy. C. M. O. 25, 1916, 4. *See also* SECRETARY OF THE NAVY, 39.
15. **Findings, inconsistent**—It will readily be seen that it is a miscarriage of justice when a court, with such plain facts before it, arrives at such contradictory findings upon a charge and specification of a charge. And, furthermore, the refusal to materially correct such findings when the error is pointed out by the department, constitutes a naked nonconcurrence with the disciplinary acts of Congress and the Articles for the Government of the Navy, approved by the President, which each member of a court of justice is bound by oath to uphold. C. M. O. 6, 1908, 5.
16. **Same**—Where a general court-martial entirely ignored instructions in the department's letter, and caused a miscarriage of justice by obstinately adhering to their opinion and rendered a finding wholly inconsistent with the evidence, the department stated that "the court thus signally failed in its duty, and its conduct is subject to censure." C. M. O. 42, 1909, 14. *See also* C. M. O. 43, 1906, 3; 6, 1908, 6.
17. **Finding, interlineations.** C. M. O. 28, 1915.
18. **Findings and acquittal**—Not in accord with evidence. *See* ACQUITTAL, 7, 8, 10; CRITICISM OF COURTS-MARTIAL, 19–22.

Digitized by Google

19. **Same**—Where a court twice adhered to its findings and acquittal when the facts were not in dispute and clearly showed the guilt of the accused, the department stated: "It is considered that the action of the court in obstinately adhering to its acquittal in this case notwithstanding the evidence, and the decisions to which it had been referred, exhibits a tendency to make law rather than to administer the law, and deserves the severe animadversion of the department.

"The department, accordingly, disapproved the finding and acquittal in this case in order that it may not be accepted as authority for persons in the service to take trips to distant points without thinking to request permission from their commanding officers for leave of absence sufficient to cover the journey; and also in order that it may not mislead courts-martial into thinking that men who, while absent with or without permission, are arrested by the civil authorities and held in confinement for extended periods due to their own misconduct, as evidenced by conviction and sentence by the civil courts, are, nevertheless, in a duty status or in a status of being on authorized leave and entitled to be paid by the Government out of naval appropriations during such time as they are in a prison expiating the sentence of a civil court adjudged in consequence of misconduct of which they have been found guilty." C. M. O. 14, 1914, 5.

20. **Same**—It is considered that the action of the court in obstinately adhering to its acquittal in this case notwithstanding the evidence, and the decisions to which it had been referred, exhibits a tendency to make law rather than to administer the law, and deserves the severe animadversion of the department. C. M. O. 14, 1914, 5. *See also* C. M. O. 1, 1914, 8; COURT, 113; C. M. O. 28, 1915; 32, 1915; 36, 1915; 38, 1915; 41, 1915, 9.

21. **Same**—In a case where an officer was charged with "Culpable inefficiency in the performance of duty" and was acquitted, the Secretary of the Navy, after a review of the evidence, disapproved the finding, saying, by inference, that the court had shielded the officer accused by unjustly condemning another officer, and that if upon the state of facts shown "no naval officer can be punished therefor, the responsibility for such impotent conclusion shall always rest solely upon officers composing courts-martial and not upon the Navy Department." C. M. O. 3, 1884. *See also* file 7719-03.

22. **Same**—Where an officer was acquitted by the court on a charge of "Culpable negligence and inefficiency in the performance of duty" and the court adhering to its findings and acquittal when it was reconvened for revision, the department stated: That an officer thus proved, by his own admission, to have been inefficient in the performance of the duties assigned to him, and inefficient in a most aggravated degree, should be acquitted—and fully and honorably acquitted—by even four of the seven members of the court, is a startling revelation * * *. Surely the members of the court who voted "fully and honorably" to acquit the accused under such circumstances could not have appreciated the importance of the duty devolving upon them to guard and maintain the efficiency and high standards of the naval service.

"The department deeply regrets that the names of those officers who succeeded in making the court record such findings, wholly without support from the evidence, must remain unknown, and it is unfortunate indeed that the remaining members of the court—for there must have been such—who acted in accordance with the undisputed evidence of" the accused's guilt, "can not be separated from those whose action in this case must tend to lessen the confidence of the public in the efficiency of the naval service." G. C. M. Rec. 23553; file 26251-4527, Sec. Navy, Apr. 22, 1911.

Concurring in the recommendation of the Bureau of Navigation the Secretary of the Navy addressed letters of admonition to the members of a general court-martial stating in part: "While the department is unable to state which of the officers composing the court voted for acquittal or to ascertain how any member voted, in view of the oath required by law, which prohibits each member from divulging his vote unless required to do so by due process of law, I can not, however, believe that the acquittal of Lieutenant * * * represents the opinion of more than a bare majority of the members. In the absence of positive proof to the contrary, I am unwilling to believe that the ideals of duty and responsibility of all the members of the court are so low as to exonerate Lieutenant * * * of neglect of duty. File 26251-10788, Sec. Navy, Nov. 19, 1915.

23. **Forms of procedure**—Violations of instructions contained in. *See* CRITICISM OF COURTS-MARTIAL, 36.

24. **Glaringly inadequate sentence.** *See* ADEQUATE SENTENCES, 15; CRITICISM OF COURTS-MARTIAL, 35.

25. **Gross carelessness**—Of court and judge advocate. *See* COURT, 10; CRITICISM OF COURTS-MARTIAL, 5.

Digitized by Google

26. **"Honor and dignity of Navy"**—The findings and acquittals of the court were disapproved by the convening authority, who stated:
"The action of the court in this case shows a decided lack of appreciation of the honor and dignity of the Navy, but as the commander in chief has exhausted his power in the premises, he can only place the evidence of his disagreement on the record." C. M. O. 5, 1913, 7.
27. **"Incapacity or disregard of duty."** *See* CRITICISM OF COURTS-MARTIAL, 35.
28. **Irregularities**—Numerous minor irregularities in record. C. M. O. 28, 1915.
29. **Judge advocate**—Criticized, etc. *See* JUDGE ADVOCATE, 13–14, 49–50, 67–69.
30. **Law**—Imposes on courts-martial, in all cases of conviction, a duty to adjudge punishment adequate to the nature of the offense. *See* ADEQUATE SENTENCES, 2–20; CRITICISM OF COURTS-MARTIAL.
31. **Same**—Courts-martial must administer law as it stands and not modify it so that it might accord with their own notions of justice. *See* ADEQUATE SENTENCE, 6; CRITICISM OF COURTS-MARTIAL, 35.
32. **Lenient sentences.** *See* ADEQUATE SENTENCES, 3, 10; COURT, 111; CRITICISM OF COURTS-MARTIAL, 55.
33. **Ludicrously inadequate sentences.** *See* ADEQUATE SENTENCES, 11.
34. **"Making law."** *See* COURT, 113; CRITICISM OF COURTS-MARTIAL, 20.
35. **Member of general court-martial**—Appealed and protested against the criticism of a convening authority—The following memorandum in the matter of the protest of a member of a general court-martial relative to comments by the Commander in Chief of the Asiatic Fleet in Fleet General Court-Martial Order No. 22, is published for the information of the naval service:
The protest of this officer against the action of the convening authority in Fleet General Court-Martial Order No. 22 has been considered with the utmost care by the department. This officer was a member of a general court-martial, convened by the commander in chief for the trial of an officer of the Navy upon three charges—"Drunkenness," "Scandalous conduct tending to the destruction of good morals," and "Falsehood." The court found the accused guilty of the first two charges, and not guilty of the third charge, and sentenced him to be reduced five numbers in his grade. Three members of the court, of whom this officer was one, recommended the accused to the clemency of the revising power. The convening authority returned the record of proceedings to the court for a reconsideration of the findings and sentence, expressing his astonishment at the finding of "not guilty" upon the third charge, and calling the attention of the court to section 1624, par. 51, of the Revised Statutes, and to paragraphs 3 and 4 of article 1905 of the Navy Regulations which, in substance, provide that it is the duty of courts-martial to adjudge an adequate punishment for offenses of which an accused is convicted, and that mitigating circumstances, if any appear, may be reported to the convening authority as grounds for recommending clemency. [Navy Regulations, 1913, R–808, R–811.] Upon reconsideration, the court decided to adhere to its former findings and sentence. The convening authority thereupon approved the proceedings and findings upon the first and second charges, and disapproved the finding upon the third charge and the sentence, expressing the opinion that the finding upon the third charge should have been "guilty," and that the sentence imposed was so inadequate for the offenses of which the accused was found guilty that it ought not to serve as a precedent in future cases.
The result of this action by the convening authority is that the officer tried escapes punishment altogether, as no sentence can be carried into execution which has been disapproved by the reviewing authority. No question, therefore, which concerns the accused officer is before the department, which is without power in the premises.
In his review, however, of the proceedings, the convening authority adversely criticized the court for its action, and expressed his intention not again to assign the three officers who joined in the recommendation for clemency to duty as members of courts-martial. It is unnecessary to set forth in full the criticism which, with a discussion of the evidence, appears in the General Court-Martial Order referred to. It is enough to say that it was extremely severe. Against this criticism this officer protests and appeals to the department for redress.
This protest and appeal, forwarded through military channels, comes to me bearing the indorsement of the convening authority, asserting that the action which he took upon the court-martial was within the limits of the authority conferred upon him by law, regulations, and practice; also an indorsement by the Bureau of Navigation, submitting that the officer who appealed proceeds upon a mistaken view of his rights in the premises, and that "the action of the commander in chief in this case should be

Digitized by Google

fully and plainly supported, and that an order should be published looking to the reformation of the apparent lax ideas of certain officers of the Navy, when members of general courts-martial convened to try one of their comrades."

The authority of the convening authority is derived from article 38 of the "Arucles for the Government of the Navy":

"General courts-martial may be convened by the President, the Secretary of the Navy, or the commander in chief of a fleet or squadron; but no commander of a fleet or squadron in the waters of the United States shall convene such court without express authority from the President." [This has been modified by act of August 29, 1916 (39 Stat. 586). *See* CONVENING AUTHORITY, 27.]

The commander in chief, therefore, of a fleet or squadron in foreign waters has the same right to convene a general court-martial as the President or the Secretary of the Navy.

The convening authority is the reviewing authority, except where the sentence is death or the dismissal of a commissioned or warrant officer. (Article 53, "Articles for the Government of the Navy.") The sentence of the court can be executed upon the approval of the convening authority, and it is rendered of no effect by his disapproval. The commander in chief of a fleet or squadron in foreign waters who has convened a court-martial has the right and duty of either approving or disapproving its proceedings, findings, and sentence, as his own judgment shall dictate. By law, the discretion is vested in him, and can not be exercised by any other person.

The language of the Supreme Court in the case of Runkle *v.* United States (122 U. S., 543), while speaking of the authority and duty of the President when he is the reviewing authority, applies equally in the case of the Secretary of the Navy or the commander in chief of a fleet or squadron in foreign waters, when either of those officials is the reviewing authority. The court said: "He has been made by law the person whose duty it is to review the proceedings of courts-martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him, and decide personally whether they ought to be carried into effect. Such a power he can not delegate. His personal judgment is required, as much so as it would have been in passing on the case if he had been one of the members of the court-martial itself." While the Secretary of the Navy, acting with the authority of the President, may mitigate or remit any penalty imposed by a court-martial, yet over the discretion thus vested by law in the commander in chief of the fleet he has no control. The Secretary can only inquire whether, in the exercise of his discretion, the commander in chief has acted within the limits of his authority or has overstepped them. In considering this question, it is deemed clear that in this respect the limits of his authority are exactly those of the President, or the Secretary of the Navy, when they are the convening and reviewing authorities.

Winthrop, in his "Military Law and Precedents," second edition, volume 1, page 692, states the law as follows:

"The expression of a disapproval is sometimes and properly accompanied by animadversion upon the court, the prosecution, the administration of a command, etc. Such comment has not unfrequently been added where the court, in the opinion of the reviewing authority, has failed to appreciate the gravity of the offense and awarded a too lenient punishment."

And on page 730: "To the formal action or orders thus indicated the commander or President may, if he thinks proper, add such reflections upon the proceedings or conclusions of the court, the conduct of the prosecution or defense, the make-up of the record, etc., as the facts may warrant. Such comments have the more frequently been resorted to where the finding, sentence, etc., has been in whole or in part disapproved; the same, however, have been not unusual where it has upon the whole been deemed expedient that the proceedings or sentence should be approved. In some instances the remarks have taken the form of emphatic stricture or censure. Thus courts have been severely criticized for acquitting where, in the opinion of the reviewing officer, the testimony called for a conviction; for imposing sentences regarded by him as inadequate to the offenses found; for findings held by him to be unwarranted by the proof; for errors in admitting or rejecting evidence; for ignorance or neglect inducing grave irregularities in the proceedings or form of the record; for the personal misbehavior of the members, etc." And on page 732: "In this connection it may be said that where the subject of the unfavorable criticism is an error capable of being corrected by the return of the proceedings to the court for the purpose, it is but just that this course should first be pursued. Further, the reviewing authority, if he deems it his duty to indulge in reflections such as above instanced, should in general,

Digitized by Google

where practicable, confine himself to comments upon facts, and, rather than resort to direct strictures upon individuals, should prefer or cause to be preferred against them formal charges. Such strictures, however, are in some cases quite legitimate and can not be avoided. In such cases, if the party reflected upon demands a trial by court-martial for the misconduct imputed, his application can not in general fairly be denied."

The practice in the War Department, as well as the Navy Department, has been in accordance with these statements of Winthrop. There have been very many instances of severe criticism of courts-martial by the reviewing authority. It would be burdensome to recite all of such instances, but some of them may, with profit, be referred to.

A sentence was disapproved by the Secretary of the Navy, as inadequate, the Secretary saying: "Yet the public is to be informed that a court of officers of the Navy consider this capital offense, attended by no circumstances of mitigation, sufficiently punished by suspension for six months without pay, and with pay for the same period, the latter being equivalent to leave of absence for six months. The department declines to outrage public opinion and its own sense of justice, or to mislead the younger officers of the Navy, by approving a sentence so glaringly inadequate." G. O. 58, June 29, 1865.

In a case where the accused was charged with failing to do his utmost to capture or destroy an enemy's vessel, the court adjudged him "guilty of the charge in a less degree than charged," and sentenced him to be suspended from duty on leave pay for two years. The Secretary of the Navy returned the record to the court for a revision of the finding, whereupon the court, upon revision, found the accused "guilty," but awarded the same sentence as before. The Secretary disapproved the sentence as inadequate, saying, among other things: "The court, in this case of conviction of a capital offense, has adjudged a punishment which is obviously nothing more than a nominal punishment, if it be even as much. Suspension from duty for two years on 'leave pay' is, in itself, nothing more than leave of absence for the same period. * * * Such punishment as this no officer could obtain from the department as a favor. The department is therefore forced to conclude that in awarding this pretended punishment the court-martial * * * has disregarded the law. It may be that the court, or members of it, deemed the law under which the accused was arraigned one of a harsh character; but even admitting that it be so, it is still law, and they were bound by a solemn obligation to administer it as it stands, and not to modify it so that it might accord with their own notions of justice. They had no more authority to do so than to repeal the law. The final proceedings of the court are inexplicable to the department. * * * Their finding on the charge declares him guilty, but their finding on the specification and the nominal punishment awarded, imply that they considered him not guilty. The incongruous whole has the aspect of an unsuccessful attempt at compromise between those members of the court who believed the accused guilty and others who believed him not guilty." G. O. 68. Dec. 6, 1865.

It may be observed that the court thus criticised was presided over by Vice Admiral Farragut and had as members Rear Admirals Paulding, Davis, and Dahlgren.

In a case where an officer was charged with "Culpable inefficiency in the performance of duty" and was acquitted by the court, the Secretary of the Navy, after a review of the evidence, disapproved the finding, saying, by inference, that the court had shielded the officer accused by unjustly condemning another officer, and that if upon the state of facts shown "no naval officer can be punished therefor, the responsibility for such impotent conclusion shall always rest solely upon officers composing courts-martial and not upon the Navy Department." C. M. O. 3, 1884.

Where an officer was charged with "Neglect of duty" and acquitted by the court, the Secretary of the Navy, after a discussion of the evidence, disapproved the finding. C. M. O. 41, 1888.

Where an apprentice was found guilty of the charge of "Conduct to the prejudice of good order and discipline," and upon reconsideration by direction of the department the court adhered to the sentence awarded, the Secretary of the Navy disapproved the proceedings, finding, and sentence, saying: "It is better that the accused should escape punishment than that a manifestly improper sentence should receive the approval of the department and thus become a precedent for the guidance of courts-martial in future cases." C. M. O. 102, 1893.

Where an officer was charged with "Drunkenness on duty," the court sustained his plea in bar, and, after the record was returned to it for reconsideration, adhered to its

Digitized by Google

former decision, the Secretary of the Navy disapproved the action of the court, saying: "It is difficult to understand the display of obstinacy or obtundity thus presented, inasmuch as the court thereby assumes to put its own interpretation of precedents and decisions originally established and rendered by the department above the interpretation placed thereon by the department itself. For the failure of justice which thereupon ensues, and the injury which the discipline of the service must necessarily suffer at the hands of those to whom it is entrusted, and by whom it should be most zealously guarded, the court is responsible." C. M. O. 104, 1897.

Where an officer was charged with "Absence from duty without leave" and "Scandalous conduct tending to the destruction of good morals" and found guilty of both charges and sentenced to be reprimanded by the Secretary of the Navy, the sentence was disapproved by the Secretary of the Navy, who said: "By the sentence awarded, the court not only disregards explicit provisions of law and regulations on the subject, but usurps the functions of the convening authority by practically exercising clemency, and, furthermore, in imposing so slight a punishment for a grave offense brings the discipline of the service into disrepute." C. M. O. 132, 1897.

When an officer was charged with "Drunkenness on duty," and "Conduct unbecoming an officer of the Navy," and was acquitted by the court, the proceedings, findings, and acquittal were disapproved by the Secretary of the Navy, who, after a review of the evidence, said: "In view of the foregoing the department is compelled to express its simple astonishment that any court of officers could be found, a majority of whom, at least, should exhibit such evidence of their incapacity or disregard of duty as to acquit the accused of a charge so thoroughly and completely proven. * * * In the opinion of the department such a result tends greatly to injure the discipline of the service and to impair all confidence in courts-martial, especially on the part of enlisted men, who can not help noting the contrast between such an indication of favoritism toward an officer and the severe accountability to which they are held under similar charges." C. M. O. 36, 1898.

Where an officer was charged with "Absence from his duty and station without leave," "Disobedience of orders," and "Drunkenness," a commander in chief, as the convening authority, expressed the opinion that the sentence of the court was entirely inadequate to the nature of the offense, although he approved the sentence as the accused would otherwise go unpunished. (C. M. O. 30, 1885.)

A commander in chief, under the same conditions, pronounced a sentence inadequate, and approved it only because otherwise the accused would escape punishment altogether. C. M. O. 9, 1893.

In the War Department like instances may be found. Some of such instances are cited by Winthrop in the note on page 731 of volume 1, to which reference is made. It appears there that by General Order 64, Department of the Ohio, 1864, a General of the Army ordered the members of a court to be reprimanded, and cautioned the Assistant Adjutant General of the department against putting any officer of this court on any important court-martial duty.

Some additional cases may be cited. For example: Where an officer was acquitted of "Disobedience of orders," and "Neglect of duty," the Secretary of War, in disapproving the findings, says: "The ruling made that the accused was not acting under orders is creditable neither to the court that made it nor to the officer who permitted such a defense to be presented. * * * It is not encouraging to find that a court-martial, composed of officers of the Army of experience, does not think proper even to censure an officer who, though without criminal intent, has conducted an important business matter intrusted to him in a manner which would not be tolerated by a private employer." (War Department, General Court-martial Order No. 46, Oct. 15, 1883.)

Where an officer serving with the Army in the Philippines was acquitted by court-martial of the charge made against him, the major general commanding, after reviewing the evidence, disapproved the acquittal, saying: "There has been a miscarriage of justice in this case." (May 7, 1902.)

Where an officer of the Army was charged with "Conduct unbecoming an officer and a gentleman" and by the court found "not guilty," but guilty of "Conduct to the prejudice of good order and discipline," and sentenced to suspension from rank, duty, and pay for three years, the President of the United States returned the record to the court for reconsideration of the findings and sentence, saying: "Neither are believed to be commensurate with the offenses" found proved in the specifications. In return-

Digitized by Google

ing it to the court he accompanied it with a communication of the Attorney General, in which the President expressed his concurrence. In that communication the following language is used: "I find it difficult to reconcile this conclusion with any recognized standard of either officerlike or gentlemanlike conduct. * * * The action of the court as a whole seems to involve a serious lowering of that high standard of honor which from the earliest days has been the pride and glory of our military service." [18 Op. Atty. Gen., 113, 117, 118.] The court upon reconsideration adhered to its finding, but changed the sentence to suspension for one year and a reduction in rank. The President again returned the record to the court for a reconsideration of the sentence, which was incapable of execution. The court thereupon sentenced the accused to suspension from rank and duty for twelve years and forfeiture of one-half pay. The President approved the sentence, so that the proceedings should not be without results, and said: "It is difficult to understand how the court could be willing to have the officer tried retained as a pensioner upon the Army Register while it expressed its sense of his unfitness to perform the duties of his important office by the imposition of two different sentences." (War Department, General Court-martial Order No. 19, Feb. 24, 1885.)

The validity of the final sentence in the above cited case was questioned in the courts upon the ground, among others, that the action of the President was unwarranted. The action, however, was sustained by the Supreme Court. (Swaim *v.* United States, 165, United States, 553.) [*See also* 28 Ct. Cls. 173.]

It thus appears in practice that the reviewing authority has disapproved findings of acquittal and condemned sentences as inadequate, criticized and censured courts-martial and directed that their members no longer serve in such positions. I am advised by the Judge Advocate General that such practice has been continuous, and that many instances of it can be found, and that hitherto no question has been raised that the practice was regular and lawful.

The conclusion of the department, therefore, is that the commander in chief as the convening and reviewing authority of the court-martial in question was within the limits of his authority in criticizing the finding of "not guilty" upon the third charge and pronouncing the sentence inadequate and in his criticism and animadversion upon the court.

It is not to be inferred from this decision that, although the power of censure by the reviewing authority of courts-martial is clearly shown to exist by an unbroken practice of many years, it should be indiscriminately exercised. It is to be kept in mind that members of courts-martial must be independent in their action and are not subject to control. It is to be regretted that an occasion has arisen which, in the judgment of the reviewing authority, demanded so severe a censure as was inflicted in this case. Nevertheless, as the members of the courts must be the judges of the measure of their duty, so the reviewing authority must be the judge of the measure of his duty. While the exercise of the discretion of the reviewing authority is uncontrollable, there is a clear remedy for an abuse of it. If it should appear in any case that, in the exercise of his authority of reviewing the proceedings of courts-martial convened by him, a commander in chief had acted capriciously, cruelly, with evident lack of judgment, or from improper motives; in short, if he had shown himself unfit to be intrusted with the authority which the law attaches to his position, the department has the power to withhold from him that authority in the future by recalling him from his station. It is, however, considered that in this instance the convening authority has not shown himself unworthy of the continued confidence of the department. On the contrary, in view of the evidence before the court, without weighing too nicely the terms of his censure, it is believed that he was actuated by a high sense of duty and inspired by a regard for the honor and welfare of the service.

I am invited by the Bureau of Navigation to publish an order concerning performance of the duties of courts-martial. It seems to me that nothing more impressive can be said than to present the fact that the bureau charged with the immediate government and discipline of the personnel of the Navy has deliberately presented to the department such a request.

The foregoing decision of the department will be communicated to the officers who have protested against the action of the convening authority in the case, and to the commander in chief of the Asiatic Squadron for the information of the officers belonging to the squadron under his command. File 7719–03, Sec. Navy, Nov. 18, 1903.

36. **Members of a summary court-martial appeal and protest against criticism of senior officer present**—The right of the reviewing authority to censure members of a court-martial individually for the manner of performing duty was carefully con-

Digitized by Google

sidered and sustained by the Secretary of the Navy in a decision published to the service November 18, 1903 (*see* CRITICISM OF COURTS-MARTIAL, 35), upon the protest of an officer who was a member of a general court-martial. In support of its conclusion the department, in the case mentioned, cited precedents existing in both the Army and Navy, and held that direct strictures upon individuals are in some cases quite legitimate and can not be avoided, although in general the members of the court should themselves be brought to trial upon formal charges. (On appeal the department's decision was approved by the President, file 155-04.)

The entire membership of a general court-martial has repeatedly been censured by the department for errors in the record. (*See* C. M. O. 14, 1913, 5; 27, 1913, 12.) Again, the department has commented on the fact that in violation of instructions contained in the Forms of Procedure the president of a general court-martial in an important case throughout the trial made rulings upon the admissibility of evidence and other questions raised by counsel without consulting the other members of the court, and that the errors so made were obvious and fully covered by elementary rules,. G. C. M. Rec. 23553.

In the present case, the inadequacy of the sentences imposed by the summary court-martial in question is so plainly apparent on its face as to render discussion with reference thereto unnecessary.

The commanding officer is charged with the discipline of his command, and is presumably more experienced than the officers under his jurisdiction. Nevertheless, when he convenes a court-martial for the trial of an offender, if he deems the punishment adjudged inadequate his power over it is limited to disapproval. He can not dictate what sentence shall be imposed, nor can he add to the punishment adjudged. But while he is without such power over the sentence, he is not without remedy against the members of the court if he considers them responsible for a miscarriage of justice. In such cases the members of the court themselves may be brought to trial or they may be individually censured for their action. In the case of general courts-martial the trial of the members under such circumstances would ordinarily be the only course open, for the reason that their oath binds them to secrecy both as to their own vote and the vote of each other, unless required to disclose same "before a court of justice in due course of law." As to summary courts-martial, it is not necessary that the members be brought to trial, as they are not bound by oath to secrecy and their vote may be officially ascertained without judicial proceedings.

In this case the department held that the reviewing authority had full authority to censure the members of the summary court-martial for adjudging an inadequate sentence and to place the censure on the reports on fitness of such officers. File 25675-9-10-11, Sec. Navy, Oct. 28, 1915. *See also* OATHS, 47; REPORTS ON FITNESS, 3.

37. **Members and president criticised**—The Secretary of the Navy concurred in the opinion of the convening authority (fleet) relative to the inadequacy of the sentence adjudged in this case, and in accordance with the recommendation of the Bureau of Navigation so informed the president and members of the court by letter. C. M. O. 6, 1916. *See also* CRITICISM OF COURTS-MARTIAL, 35.

38. **Same**—Where a court adjudged an inadequate sentence in the case of a warrant officer and twice refused in revision to make it adequate, the convening authority (fleet) remarked: "Attention having been twice called to the inadequacy of the sentence the court has entirely failed to realize its responsibilities to the naval service." The department concurred in these remarks, stating that the sentence was grossly inadequate. "The department also feels that to permit this officer to continue to lower the reputation of the commissioned personnel by his irresponsible and unofficerlike conduct is adverse to the interests of justice and discipline in the naval service, and that the action of the court in this case has resulted in a miscarriage of justice. A copy of the department's remarks in this case will be forwarded to the commander in chief in order that he may refer it to the president and members of the court." This officer pleaded guilty to "Drunkenness" and had twice before been found guilty by general courts-martial of offenses involving drunkenness. File 26262-2610, Sec. Navy, July 21, 1916. *See also* C. M. O. 12, 1895, 2; 34, 1916; CRITICISM OF COURTS MARTIAL, 35.

39. **Miscarriage of justice.** *See* CRITICISM OF COURTS-MARTIAL, 16, 35.

40. **Misspelled words**—In record of proceedings. C. M. O. 27, 1913, 11-12; 28, 1915.

41. **Names of members**—And judge advocate published in Court-Martial Order. C. M. O. 38, 1915, 3.

42. **Nominal punishment.** *See* CRITICISM OF COURTS-MARTIAL, 35.

Digitized by Google

43. **Obstinate.** C. M. O. 104, 1897, 5–6. *See also* CRITICISM OF COURTS-MARTIAL, 16, 19, 20, 35, 48.
44. **Obtundity.** C. M. O. 104, 1897, 5–6. *See also* CRITICISM OF COURTS-MARTIAL, 35, 48.
45. **Outraging public opinion**—The department declined to outrage public opinion and its own sense of justice, or to mislead the younger officers of the Navy, by approving a glaringly inadequate sentence. G. O. 58, June 29, 1865. *See also* ADEQUATE SENTENCES, 15; CRITICISM OF COURTS-MARTIAL, 35.
46. **Pardon**—Courts-martial have not the power to pardon. *See* ADEQUATE SENTENCES, 5; PARDONS, 9.
47. **Pay, forfeiture of**—Court-martial criticized for adjudging loss of pay in an officer's case. C. M. O. 48, 1915. *See also* Pay, 100.
48. **Plea in bar**—It is difficult to understand the display of obstinacy or obtundity thus presented, inasmuch as the court thereby assumes to put its own interpretation of precedents and decisions, originally established and rendered by the department above the interpretation placed thereon by the department itself. For the failure of justice which thereupon ensues, and the injury which the discipline of the service must necessarily suffer at the hands of those to whom it is entrusted, and by whom it should be most zealously guarded, the court is responsible. The fact that an officer, presumably guilty of a very serious offense, has, by the strained and illogical construction adopted by the court in this case, escaped punishment, while a grave matter, is of less consequence than the permanent injury which would result to the service should the department allow the action of this court to stand as a precedent, and sanction thus be placed upon the admission into naval jurisprudence of pleas in bar of trial of the character advanced in this instance. The action of the court in sustaining the plea in bar was accordingly disapproved. C. M. O. 104, 1897, 5–6.
49. **"Pretended punishment."** *See* CRITICISM OF COURTS-MARTIAL, 35 (p. 142).
50. **Public reprimand**—Court-martial criticized for adjudging public reprimand. *See* PUBLIC REPRIMAND, 5, 6, 11.
51. **Record of proceedings**—Errors in. *See* CRITICISM OF COURTS-MARTIAL, 13, 28, 35, 40.
52. **Reflections**—Convening authority may make. *See* CRITICISM OF COURTS-MARTIAL, 35, 36.
53. **Regulations**—Courts-martial should uphold—The department considers it timely to advise courts-martial that neglect on the part of members of naval courts-martial to uphold the regulations governing the Navy is as grave a neglect of duty and as far-reaching in its injurious effect upon the service as neglect or violation of those regulations by officers in positions of responsibility. C. M. O. 43, 1906, 3.
54. **Repealing law.** *See* ADEQUATE SENTENCES, 6.
55. **Reprimanded for leniency**—Letters were addressed to officers who constituted the court, by express direction of the President of the United States, calling attention to the fact that by their leniency in permitting the accused (officer) to remain in the service after committing offenses meriting dismissal they had, without benefiting him, prejudiced the best interests of the Navy, the officer having a second time brought scandal and disgrace upon the naval service. C. M. O. 47, 1906. *See also* file 3401–16.
56. **Rulings upon admissibility of evidence**—President of general court-martial criticized. *See* CRITICISM OF COURTS-MARTIAL, 36 (p. 145).
57. **Secretary of the Navy**—May reprimand, censure, criticize, commend, etc. *See* COMMENDATORY LETTERS, 2; PUBLIC REPRIMAND, 18; REPRIMAND, 10. SECRETARY OF THE NAVY, 63.
58. **Sentence, inadequate.** *See* ADEQUATE SENTENCES; CRITICISM OF COURTS-MARTIAL.
59. **Shielding accused.** *See* CRITICISM OF COURTS-MARTIAL, 35.
60. **Stricture, emphatic.** *See* CRITICISM OF COURTS-MARTIAL, 35.
61. **Stubborn.** *See* CRITICISM OF COURTS-MARTIAL, 35, 43.
62. **Summary courts-martial**—Senior member of a summary court-martial was criticized by name by reviewing authority and printed in Court-Martial Order. C. M. O. 5, 1912, 6.
63. **Same**—Members censured and censure entered on reports on fitness. *See* CRITICISM OF COURTS-MARTIAL, 36; REPORTS ON FITNESS, 3.
64. **Suspension from duty**—Court-martial criticized for adjudging. *See* SUSPENSION FROM DUTY, 4, 5, 9–13.
65. **Trial**—At unusual hour. *See* COURT, 171; CRITICISM OF COURTS-MARTIAL, 66.
66. **"Undue haste" in conducting a trial**—The department criticized a court for irregularities in record and for meeting at unusual hours. "The present case strikingly exemplifies the consequences resulting from attempts to conduct a trial by general court-martial in undue haste and at unusual hours." C. M. O. 27, 1913, 11. *See also* COURT, 171.

Digitized by Google

CROSS-EXAMINATION.
1. **Accused—As a witness.** *See* WITNESSES, 1–11.
2. **Same—Must be afforded his right to cross-examine witnesses against him.** *See* ACCUSED 28; CONSTITUTIONAL RIGHTS OF ACCUSED, 16; WITNESSES, 2.

CROSS-INTERROGATORIES.
1. **Depositions.**—C. M. O. 47 1910, 9; 5, 1916, 6. *See also* DEPOSITIONS, 3.

CRUELTY.
1. **Commanding officer—Toward crew.** *See* COMMANDING OFFICERS, 4, 15.

CRUSHED BY TURRET. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 17.

CULPABLE.
1. **Definition**—"Culpable" means "deserving of blame or censure." It states a mere conclusion of law, and is not necessarily essential to the validity of a charge or specification, if improperly excepted by court in its finding. C. M. O. 4, 1914, 1, 3.

CULPABLE INEFFICIENCY IN THE PERFORMANCE OF DUTY.
1. **Defined and distinguished**—From "Neglect of duty." C. M. O. 129, 1898, 6.
2. **Degree**—A higher degree than the offense "Negligence in performance of duty." *See* GUILTY IN A LESS DEGREE THAN CHARGED, 12.
3. **Same**—Not a lesser degree of "Cowardly and inhuman conduct to the scandal and disgrace of the naval service." C. M. O. 37, 1909, 7.
4. **Finding**—"Culpably inefficient in the performance of duty," in specification, found "not proved." C. M. O. 9, 1897.
5. **Gravamen, is not**—"Culpable" not gravamen of the charge of "Culpable inefficiency in the performance of duty" but immaterial allegation embodying a mere conclusion of law—"What is useful is not vitiated by the useless."
   Accordingly, when the facts alleged and found proved show that conduct of accused is "deserving of blame or censure," a charge and specification are good and will support a sentence, although court erroneously finds the word "culpable" not proved. C. M. O. 4, 1914, 1, 6. *See also* C. M. O. 21, 1885; 40, 1891; 56, 1898; 70, 1898; 129, 1898, 6; 89, 1901; 19, 1905, 1; 5, 1906, 1; File 26262–1797.
6. **Officers**—Charged with. C. M. O. 9, 1897; 20, 1909; 32, 1909; 52, 1910; 12, 1910; 22, 1910; 27, 1910; 11, 1911; 13, 1911; 24, 1911; 27, 1911; 4, 1913, 15; 3, 1914; 4, 1914; 3, 1915; 7, 1915; 7, 1916; 8, 1916; 43, 1916; 7, 1917.
7. **Warrant officer (commissioned)**—Charged with. C. M. O. 14, 1912.

CULPABLE INEFFICIENCY IN THE PERFORMANCE OF DUTY IN VIOLATION OF THE NINTH CLAUSE OF THE EIGHTH ARTICLE OF THE ARTICLES FOR THE GOVERNMENT OF THE NAVY.
1. **Officer**—Charged with. C. M. O. 23, 1913.

CULPABLE INEFFICIENCY IN THE DISCHARGE OF DUTY.
1. **Officer**—Charged with. G. O. 47, Jan. 27, 1865.

CULPABLE NEGLIGENCE IN THE PERFORMANCE OF DUTY.
1. **Officer**—Charged with. G. M. O. 19, 1916.

CULPABLE NEGLIGENCE AND INEFFICIENCY IN THE PERFORMANCE OF DUTY.
1. **Chief pay clerk**—Charged with. C. M. O. 28, 1916.
2. **Guilty in a less degree than charged**—Guilty of "Neglect of duty." C. M. O. 8, 1915, 2.
3. **Officers**—Charged with. C. M. O. 29, 1910; 6, 1911; 3, 1912; 7, 1913; 28, 1914; 3, 1915; 4, 1915; 8, 1915; 9, 1915; 37, 1915; 38, 1915; 7, 1916; 8, 1916; 25, 1916; 26, 1916; 31, 1916.
4. **Warrant officer (commissioned)**—Charged with. C. M. O. 36, 1915.

CURRENT. *See* NAVIGATION, 21–23.

CUSTODY.
1. **Definition of.** *See* WALES *v.* WHITNEY, 114 U. S. 564; GENERAL ORDER No. 121, Sept. 17, 1914, 11.

Digitized by Google

CUSTOMS.

1. **Appointing power**—Can not be restricted by a custom. *See* APPOINTING POWER, 1.
2. **"Conscience fund"**—It is possible that the courts would give legal effect to the custom of the Treasury Department receiving funds, such custom having continued many years, and not being in conflict with any express provision of law. *See* CONSCIENCE FUND.
3. **Crime**—There can be no such thing as a lawful custom to commit a crime. C. M. O. 128, 1905, 5. *See also* EVIDENCE, 25.
4. **Evidence of.** *See* COLLISION, 8, 9.
5. **Force of law**—Established custom may have force of law. C. M. O. 29, 1915, 7. *See also* COMMISSIONS, 12.
6. **Power of President**—To change established customs. *See* File 3973–107, Feb. 16, 1915. *See also* 30 Op. Atty. Gen. 234.
7. **Same**—To appoint officers can not be restricted by custom. *See* APPOINTING POWER, 1.
8. **Promotion**—Under the laws, *customs*, and usages of the naval service, no officer who is unable to establish his fitness for promotion can be retained indefinitely in a fixed position in the Navy List, delaying promotion all along the line. File 26260–1592, J. A. G., June 29, 1911, p. 6. *See also* PROMOTION, 206.
9. **Regulation**—There can be no such thing as a legal custom to disregard a valid regulation. *See* REGULATIONS, NAVY, 26.

CUSTOMS OF THE SERVICE.

1. **Clemency extended**—In view of the unanimous recommendation of the members of the court that clemency be shown the accused, in consideration of his evident sincerity, of his ignorance of the *customs of the service*, etc. C. M. O. 50, 1901.
2. **Exemption of $3 in sentences**—The regulations permitting an exception of $3 per month for prison expenses, and the *customs of the service* provide that this exception is for necessary prison expenses, and this should be set forth in the sentence. C. M. O. 42, 1909, 5. *See also* EXEMPTIONS IN SENTENCES, 4.
3. **Officer**—The convening authority in his remarks stated that the accused (boatswain) was thoroughly conversant with the customs of the service, etc. C. M. O. 38, 1914, 1–2.
4. **Precedents**—Customs of service can only be taken as precedents to follow, when intrinsically proper in themselves and supplementary of the written law and regulations, on points on which the latter are silent.

   A custom of the service can not be created by isolated or occasional instances, or by the practice of a particular command or commander, but must be a usage of the service at large or of commanders in general. An illegal or unauthorized practice, however frequent or long continued, can not abrogate a plain requirement of the regulations, and the following of an unauthorized and pernicious practice constitutes no good defense for any neglect on the part of the accused. C. M. O. 43, 1906, 3.
5. **Specifications**—Of naval courts-martial must on their face allege facts which constitute a violation of some law, regulation, or *custom of the service*, etc. C. M. O. 33, 1914, 6.
6. **Usages**—Customs and usages of the service, whether originating in tradition or in specific orders or rulings, are now, as such, not numerous in the Army (or Navy), a large proportion, in obedience to a natural law, having changed their form by becoming merged in written regulations. (*See* 1 Winth, 42.) File 26836–7: 35, Feb. 13, 1913, p. 4. *See also* C. M. O. 18, 1897, 3.

CUSTOMS OF WAR. *See* CONSTITUTIONAL RIGHTS OF ACCUSED, 4.

DANGER.

1. **Precautionary orders**—By commanding officer. *See* COLLISION, 19.

"DAY IN COURT."

1. **Department**—In its action on an officer's general court-martial case stated that the accused "has had his 'day in court' and has failed to make any defense which is legally sufficient to the charge." C. M. O. 39, 1913, 10. *See also* EMBEZZLEMENT, 25 (p. 209).

DE FACTO. *See also* WORDS AND PHRASES.

1. **Commander in chief.** C. M. O. 14, 1910, 17. *See also* CONVENING AUTHORITY, 30.
2. **Enlisted man**—A minor enlisted and was convicted of "Desertion." Department held that he was not only a *de facto*, but *de jure* enlisted man. (*See* In re Morrisey, 137 U. S. 157.) C. M. O. 217, 1902, 4. *See also* FRAUDULENT ENLISTMENT, 22.
3. **Officer.** *See* PAY, 33.
4. **Pay.** *See* PAY, 31.

Digitized by Google

DE JURE. *See also* WORDS AND PHRASES.
1. **Enlisted man.** *See* DE FACTO, 2.

DEAD RECKONING. *See also* NAVIGATION, 27, 28, 31.
1. **Navigator and commanding officer**—Failing to allow a prudent factor of safety for errors in "dead reckoning" and for the effects of the current. Vessel stranded on shoal and both officers tried by general court-martial. C. M. O. 2, 1915; 3, 1915.

DEATH.
1. **Boards of inquests.** *See* BOARDS OF INQUESTS.
2. **Certificates.** *See* MEDICAL RECORDS, 5.
3. **Civilian coal handler**—Court of inquiry records, where sent. Ct. Inq. Rec. 6196.
4. **Commissions**—Officer died after he was nominated for promotion but prior to confirmation by the Senate. File 28687-4:4, J. A. G., Oct. 30, 1916.
5. **Gratuity, death.** *See* DEATH GRATUITY.
6. **Inquests.** *See* BOARDS OF INQUESTS; INQUESTS.
7. **Members of courts-martial**—Before signing records. *See* MEMBERS OF COURTS-MARTIAL, 24.
8. **Officers**—Supposed death of. *See* DESERTION, 89-91.
9. **Presumption of death**—At common law was 7 years. *See* COMMON LAW, 7.
10. **Same**—Presumption was warranted that a naval officer was lost at sea. The department, therefore, assumed and decided that, for official purposes and as a conclusion of fact, the officer died on August 16, 1915. File 25809-205:40, Sec. Navy, Oct. 11, 1915.
11. **Sodomy**—Common law punishment for sodomy was death. *See* COMMON LAW, 10 SODOMY, 15.

DEATH GRATUITY.
1. **Accounting officers' jurisdiction**—Accounting officers have no jurisdiction to consider a claim for payment of death gratuity until the Paymaster General has acted upon and allowed same; and when a claim is allowed by the Paymaster General, this establishes claimant's right and he is entitled to demand payment without being required to establish his claim anew to the satisfaction of the accounting officers. File 26543-66, Sept. 8, 1911. *Compare* 22 Comp. Dec., 532, File 26543-148.
2. **Acting assistant surgeons.** *See* ACTING ASSISTANT SURGEONS, 3.
3. **Administrator**—Of beneficiary. *See* DEATH GRATUITY, 13.
4. **Appeals**—The beneficiary of a death gratuity may appeal to the Secretary of the Navy from the action of the Paymaster General of the Navy in refusing to pay the gratuity. File 26543-66, J. A. G., Sept. 8, 1911, p. 16. *See also* DEATH GRATUITY, 6, 23.
5. **Same**—To Congress—The law (act Aug. 22, 1912, 37 Stat., 329; Navy Regulations, 1913, R-4551(1)) prevents the payment of death gratuity to the mother of a deceased enlisted man unless she has been "previously designated" by him. (*See* C. M. O. 31, 1915, pp. 5-6.) Accordingly where the deceased left no widow or children and the mother has not been "previously designated" her only redress "lies in an appeal to Congress." (*See* File 7657-303:3; 26256-275.) File 26543-137:4, Sec. Navy, Nov. 20, 1015; C. M. O. 42, 1915, 9-10.
6. **Auditor**—Authority of auditor to order payment made—The party to whom payment has not been made by a disbursing officer may present his demand, or claim, to such disbursing officer's superior who, if he deems the claim to be a just one, may require the subordinate to make the payment. But in such a case the paying officer is no longer responsible financially; the order of his superior has relieved him from danger of checkage, and the disallowance, if any, would fall upon the superior. In such a case, it is not the *accounting officers* who have power to order payment. File 26543-66, J. A. G., Sept. 8, 1911, p. 6. *See also* DEATH GRATUITY, 23.
7. **Beneficial in its nature**—The death-gratuity law is beneficial in its nature, and should be construed very liberally as to evidence required; otherwise the intention of Congress, which was plainly to afford *immediate* relief to dependent relatives upon the death of an officer or enlisted man, would be defeated. File 26543-87:2, Sec. Navy, Apr. 28, 1913, p. 5. *See also* File 26254-1936; DEATH GRATUITY, 25.
8. **Beneficiary slips**—Form approved by the department. File 26543-87:2, Sec. Navy, Apr. 28, 1913.
9. **Brother**—May be designated as a beneficiary, if a "dependent relative" as the beneficiary who is to receive the gratuity in case the designor should not be survived by a widow or child. File 26543-91, J. A. G., Jan. 22, 1913.

Digitized by Google

10. **Check**—Cashing of, by administrator of beneficiary. *See* DEATH GRATUITY, 13.
11. **Commandant's clerks**—The act of May 13, 1909 (35 Stat. 128) does not apply to commandant's clerks, in connection with death gratuities. File 5460–31, Sec. Navy.
12. **Common-law wife**—As beneficiary—The following rule is adopted: "Where parties live together ostensibly as man and wife, demeaning themselves toward each other as such, and are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married." (Travers *v.* Reinhard, 205 U. S. 347.) File 26254–1936, J. A. G., Jan. 29, 1916.
13. **Death of beneficiary before payment is made**—The law (act of Aug. 22, 1912, 37 Stat. 329; Navy Regulations, 1913, R–4551 (1) provides for the payment of death gratuity in the case of any officer or enlisted man dying in the service from causes not the result of his own misconduct, 1st, to the widow; 2d, if no widow, to the children; and 3d, if no children, "to any other dependent relative of such officer or enlisted man previously designated by him." *Held*, that where deceased was not survived by a widow or child and had "previously designated" only one "dependent relative" (his mother), who died after the death of deceased, but prior to receipt of the death-gratuity check, the proper legal representatives of deceased's mother may cash the check made to her order. (*See* Case of George B. Phillips, administrator of the estate of Jacob Botner, 49 Ct. Cls. 703, No. 31887, overruling Compt. Dec., Feb. 23, 1912, in same case; File 26266–325; File 26280–49.) File 26543–140, Sec. Navy, Sept. 13, 1915; C. M. O. 312, 1915, 5–6. *See also* File 26543–150, J. A. G., Mar. 21, 1916.
14. **"Dependent relative"**—Definition of. *See* DEATH GRATUITY, 26.
"When the officer or man designates a dependent relative the fact that he or she is designated as such should be given great weight, as none knows better the dependency of the relative than the person making the designation. (Comp. Dec., Jan. 3, 1912, File 26543–87:2.)" File 26443–87:2, Sec. Navy, April 28, 1913, p. 1.
While the mere designation of a dependent relative in the beneficiary slip would hardly be sufficient evidence of itself to authorize payment to such designated beneficiary, the department believes that when the beneficiary slip is subscribed to under oath in due form by the officer or enlisted man making the designation, with a brief statement of the facts upon which the dependency is predicated, this may properly be accepted, in the absence of any indication to the contrary, as evidence of dependency at the time the designation is made. When, in addition to this evidence, there is submitted with the claim for payment an affidavit made by the designated beneficiary, attested by witnesses and accompanied by any available evidence showing the dependency to have continued until the death of the person making the designation, this should in general constitute sufficient basis for making payment to such designated beneficiary so far as concerns the question of dependency. File 26543–87:2, Sec. Navy, April 28, 1913, pp. 1–2.
15. **Minor**—A minor who enlists in the naval service is competent to designate a beneficiary, and the amount should be paid in accordance with such designation. File 26543–38. *See also* File 26543–33, Sec. Navy, June 2, 1909; 26543–33, Sec. Navy, Dec. 15, 1909.
16. **Same**—Minor beneficiary. *See* File 26543–33, Sec. Navy, June 22, 1909, and Dec. 15, 1909.
17. **Misconduct**—Effect upon granting of death gratuity. *See* DEATH GRATUITY, 21.
18. **Misnamed**—Payment of the death gratuity may be paid to the beneficiary, even though the beneficiary was misnamed in the beneficiary slip, provided, if from all the facts and evidence available, the beneficiary intended to be named can be definitely ascertained. File 26543–48, J. A. G., Oct. 10, 1910.
19. **Mother**—Designated as beneficiary. *See* DEATH GRATUITY, 5, 13.
20. **No dependent relative**—Where deceased left no widow or child and designated his dependent relative as "none," the department held that "payment can not be made even though he be survived by a dependent relative." File 26543, Sec. Navy, Oct. 22, 1914.
21. **Paymaster General shall cause to be paid**—Immediately upon official notification of the death, from wounds or disease not the result of his own misconduct, of any officer or enlisted man on the active list of the Navy and Marine Corps, the Paymaster General of the Navy shall cause to be paid to the widow, and, if no widow, to the children, and, if there be no children, to any other dependent relative of such officer or enlisted man previously designated by him, an amount equal to six months' pay at the rate received by such officer or enlisted man at the date of his death, less seventy-five dollars in the case of an officer and thirty-five dollars in the case of an enlisted

Digitized by Google

man, to defray expenses of interment, and the residue, if any, of the amount reserved shall be paid subsequently to the designated person. (Act of Aug. 22, 1912, 37 Stat. 329.) (R-4551.) *See* DEATH GRATUITY, 22, 23.

22. **Paymaster General's decision conclusive**—In death gratuity cases, when the right of a beneficiary has been established to the satisfaction of the Paymaster General of the Navy, and he has authorized payment by the proper disbursing officer of the Marine Corps, such payment will be made by said officer "immediately" as required by law, unless the authorization is for any reason revoked by the Paymaster General of the Navy before payment can be accomplished. File 26543-148 : 5, Sec. Navy, May 29, 1916, C. M. O. 16, 1916. *See also* File 26543-66, J. A. G., Sept. 8, 1911; 26543-87 : 3, Sec. Navy, May 8, 1913; 26543-104, Sec. Navy, Aug. 22, 1913.

23. **Same**—Where Congress by act of May 13, 1908 (35 Stat. 128), provided that, upon the existence of certain facts, the Paymaster General of the Navy shall cause to be paid a gratuity to the beneficiary of a deceased officer or enlisted man of the Navy or Marine Corps, and that the Secretary of the Navy shall establish regulations requiring each officer and enlisted man to designate the proper person to whom the amount should be paid. *Held*, The decision of the Paymaster General, that the facts necessary to authorize payment did not exist in a given case, was necessarily conclusive of the question, except for the right of the claimant to appeal from the action of the Paymaster General to the Secretary of the Navy; and that the Auditor for the Navy Department did not have jurisdiction to review the decision of the Paymaster General. File 26543-66, Sept. 8, 9, 1911. Compare 22 Comp. Dec. 532; File 26543-148. *See also* DEATH GRATUITY, 6.

24. **Presumption of death**—Where a submarine, known to contain certain persons in the naval service, sinks and remains submerged about 2½ months, the department decided that said persons were dead, and that the necessary steps could be taken without further delay to pay the death gratuity authorized by law to their beneficiaries; that it was not deemed advisable to fix the definite date on which such persons may be regarded as officially dead, pending additional evidence which might be available when the submarine is brought to the surface. File 26453-137, Sec, Navy, June 17, 1915; C. M. O. 22, 1915, 7.

25. **Purpose of the death gratuity law**—In connection with the purpose of this law, *see* 27 Op. Atty. Gen., 346, 354, with reference to the Government personal injury act: "The purpose of the law was not to set in motion an interminable series of technical inquiries such as would puzzle the minds of learned and profound judges, but to provide immediate pecuniary relief * * * taking the language of that section in its obvious sense and as intended to be addressed to administrative officers," etc. 27 Op. Atty. Gen., 346, 354, quoted in File 26254-1936, J. A. G., Jan. 29, 1916, p. 6. *See also* DEATH GRATUITY, 7.

"Should the Paymaster General be required in every case to make a thorough investigation for the purpose of determining whether the marriage of claimants for death gratuity complied with all legal requirements in the jurisdiction in which such marriages were contracted, it is possible that some legal defect might occasionally be discovered and payment accordingly resisted. On the other hand, it is certain that such a system would defeat the principal purpose of the law in a very large proportion of cases by requiring innocent claimants to wait for unwarrantedly long periods to receive the money which Congress intended for their *immediate relief*. Indeed the length of time required to investigate such claim in this way would be so great that the accumulated claims and the complicated questions which they involved might soon prove too numerous to handle at all with the present equipment, and the law would thus in effect be nullified." File 26254-1936, J. A. G., Jan. 29, 1916, p. 7.

"Congress could not have contemplated any exhaustive investigation by the Navy Department of these questions, and it did not provide the means necessary to undertake such a burden." File 26254-1936, p. 6.

There are "other classes of cases in which the Secretary of the Navy is forced to decide questions for administrative purposes without delving into all the complicated questions of law and fact which a court equipped with the necessary machinery would have to consider and investigate before making a judicial decision which would be controlling for all purposes." (*See* 28 Op. Atty. Gen. 80; 29 Op. Atty. Gen. 14.) File 26254-1936, J. A. G., Jan. 29, 1916, p. 6.

With reference to the act of May 13, 1908, it was stated: "This legislation would appear to have been intended to confer a gratuity upon the members of the immediate family of the officer or enlisted man, or upon some other person who had been benefited by his salary, which was suddenly cut off by his death. * * * The benefits

Digitized by Google

conferred by this clause are not included in the term 'pay and allowances,' but the payment provided for is simply a gratuity—more in the nature of a pension—payable directly to the person designated and in which the officer or enlisted man himself has no property rights." File 26254-78, J. A. G., July 24, 1908, p. 3.

"The expressed intent of the law being that payment should be made immediately to the person who has been regularly designated by the man himself under oath * * * and whose source of income has suddenly been stopped by the death of such man while in the naval service from causes not the result of misconduct." File 26254-1936, Sec. Navy, Jan. 29, 1916.

26. **"Relative"**—Meaning of—In my opinion the word "relative" as used in the act of August 22, 1912 (37 Stat. 329), concerning the payment of gratuity in certain cases, upon the death of an officer or enlisted man in the naval service, is to be interpreted as meaning relative by consanguinity only and not relative by affinity. Such is practically the unanimous decisions of the courts in defining the word "relative" as used in statutes and wills. File 26543-86, J. A. G., Oct. 19, 1912. *See also* State *v.* Tucker, 26 Ann. Cas. 100, 93 N. E. 3, 174 Ind. 715; Compt. Dec. Apr. 10, 1913; File 26543-92: 1; 26543-87: 5, Sec. Navy, Sept. 2, 1913; 26543-87: 4, J. A. G., Aug. 22, 1913. *See also* DEATH GRATUITY, 14.

27. **Retired officers.** *See* RETIREMENT OF OFFICERS, 20.

28. **Seal**—If the officer before whom the beneficiary slip is subscribed and sworn to has no official seal, he is not required to affix a seal to the beneficiary slip. File 26543-87 : 4, J. A. G., Aug. 22, 1913.

29. **Truth of statements in beneficiary slip**—In general the oath of an officer or enlisted man in support of the statements made in the beneficiary slip should be accepted, in the absence of any indication of the contrary, as sufficient evidence that the facts as stated in the beneficiary slip were true at the time the beneficiary slip was signed. It would be altogether impracticable for the department to investigate in every case whether, for example, the person making the designation was legally married of whether the children are legitimate. These questions would involve, in the first place, the ascertainment of the status of the marriage contract, which in general furnishes the "proper law" to determine the capacity of the parties to marry, the formalities of a valid marriage, etc. In the next place it would be necessary to ascertain what were the laws and decisions in the jurisdictions which govern the various questions involved in the different cases. If one party had been previously divorced, further complications might arise as to the validity of the divorce and its effect upon the capacity of the party to remarry. There is no uniformity in the laws of the different States as to these questions, which are often in themselves very complicated, have formed the subject of numerous legal treatises, and upon which the courts of the United States and of the different States are not always in accord. In some jurisdictions common-law marriages are recognized, while in others certain formalities are essentially prerequisite to the existence of the marriage status. So, also, in some jurisdictions the law would recognize children as legitimate under circumstances which would make such children illegitimate if the laws of other jurisdictions were to govern. Congress could not have contemplated any exhaustive investigation of these questions and it did not provide the means necessary to undertake such a burden. File 26543-87: 2, Sec. Navy, April 28, 1913, pp. 2-3.

30. **Widow or children**—The law specifically provides for making payment to the widow or children of deceased officers and enlisted men. In such cases payment is made without reference of dependency, and whether the widow or children had been previously designated in a beneficiary slip or not. However, with reference to other relatives, designation must be specifically made by the officer or enlisted man and evidence must be furnished of dependency of such relatives *at the time of death* of the person making the designation. File 26543-87: 5, Sec. Navy, Sept. 2, 1913.

DEBATING SCHOOL.

1. **Military command**—Not to be turned into a debating school upon the receipt of orders. *See* ORDERS, 39.

DEBAUCHES. C. M. O. 146, 1896, 2; 132, 1897, 1. *See also* DRUNKENNESS, 16, 19, 76.

DEBTS.

1. **Collecting agency**—"The department must not be converted into a collecting agency, but it will not fail to take note of such disgraceful practices and to bring those who commit them to speedy and condign punishment." C. M. O. 36, 1881, 3. *See also* DEBTS, 16; PAY, 71.

Digitized by Google

"The department does not intend to act as an agency for the collection of debts, but it does intend to enforce the observance of the provisions of the Navy Regulations and to see, particularly, that each and every officer conducts his affairs, both public and private, in a manner becoming an officer and a gentleman." File 26251-12117 (G. C. M. Rec. 32614), p. 4, of charges and specifications.

"Executive departments are not permitted to lend their aid to the collection of private claims against persons in their service. In the Navy, however, where a member of the personnel, by failing to pay debts or failing to comply with a court's order to 'pay to his wife and minor child certain moneys as alimony,' which conduct brings scandal and disgrace upon the naval service, he may under certain circumstances be subjected to appropriate disciplinary proceedings upon evidence sufficiently establishing the facts." File 26524-275: 5, J. A. G., Aug. 8, 1916.

2. **Conduct unbecoming an officer and a gentleman.**—Failure to pay debts chargeable under. *See* DEBTS, 12.
3. **Same**—Failure to discharge debts constitutes the offense of "conduct unbecoming an officer and a gentleman." (Fletcher *v.* U. S., 26 Ct. Cls. 541, 542.)
4. **Dismissal**—Commissioned warrant officer tried by general court-martial and dismissed for failure to pay debts after officially promising to pay same. C. M. O. 2, 1916.
5. **Same**—Commissioned officer tried by general court-martial and dismissed. *See* DEBTS, 21.
6. **Enlisted man**—Officer in debt to. C. M. O. 48, 1910.
7. **Same**—It is not regarded as good economy to retain an enlisted man in the naval service who has been sentenced to bad-conduct discharge and who is in debt, merely in order that he may be able to earn sufficient money to cancel his indebtedness. File 9770-01, J. A. G. *See also* File 1245-01; 3015-04; 9770-01; 26251-4260: 3; 26251-4260: 3.
8. **Same**—Whether indebtedness is an offense or not. *See* File 16670-14, J. A. G., Apr. 20, 1912.
9. **Failure to satisfy**—The failure to satisfy debts has been repeatedly held by the department to be "scandalous conduct." C. M. O. 12, 1899, 4; 13, 1899, 2; 78, 1905. *See also* DEBTS, 24.
10. **Same**—An indifference on the part of an officer to his pecuniary obligations of so marked and inexcusable a character as to induce repeated just complaints to his commanding officer or the Secretary of the Navy by his creditors, and to bring discredit and scandal upon the military service, held to constitute an offense. C. M. O. 16, 1916, 1-2.
11. **Habit of neglecting to pay debts**—Meets with the strong disapproval of the department and can not be permitted to become general. "The present instance shows a carelessness and lack of foresight in financial matters that are unworthy of an officer, and the reasons given for the nonpayment of these debts only serve to accentuate these faults on the part of the accused." C. M. O. 98, 1905, 1.
12. **Nonpayment of**—Charged under "conduct unbecoming an officer and a gentleman." C. M. O. 23, 1881; 5, 1909; 16, 1909; 15, 1915; 2, 1916; 12, 1916; File 26251-12117, Sept., 1916.
13. **Officers**—Debt claims against officers must be handled by Bureau of Navigation and Major General Commandant of Marine Corps. *See* File 7731-03; 10034-04.
14. **Same**—Failing to discharge his indebtedness to an enlisted man. C. M. O. 48, 1910.
15. **Same**—Officers serving afloat shall before leaving port pay, or provide for paying, any debts they may have incurred. No officer shall at any time or place contract debts without a reasonable expectation of being able to discharge them.

    It is enjoined upon all officers that failure to discharge their just indebtedness brings discredit not only upon themselves but upon the naval service. (R-1508.) File 26260-1392, J. A. G., June 29, 1911, p. 11.
16. **Same**—"There are, undoubtedly, instances where officers find themselves hampered by pecuniary embarrassments from which they can not, without difficulty, at once extricate themselves. In such cases it becomes proper that they should practice a rigid economy, and so gradually pay their debts.

    "But when an officer has taken advantage of the circumstances that he belongs to the naval service of the Nation to establish a credit among tradesmen and merchants, he owes it to that service, as well as to his own reputation and to common honesty, that he should see his way clear to meet within a reasonable time the obligation he incurs. If in a spirit of recklessness he makes use of his position to live beyond his means, and runs in debt in face of a certainty or the strong probability that he will be unable to meet his engagements; if he takes advantage of the immunity with which the law protects his pay from seizure in order to defeat his honest creditors, such

Digitized by Google

conduct is dishonorable and dishonest, unbecoming an officer and a gentleman, and calculated to bring scandal and disgrace upon the service.

"Whilst it is in the near borderland of the crime of common swindling at law, it is undoubtedly amenable to punishment under the rules and practices governing the Navy.

"The department must not be converted into a collecting agency, but it will not fail to take note of such disgraceful practices and to bring those who commit them to speedy and condign punishment." C. M. O. 36, 1881, 3.

"While officers of the Navy and Marine Corps who do not pay their debts are the exception rather than the rule, the delinquency of a few officers may tend to bring the service into disrepute, as it is the disposition of tradesmen to give credit to officers upon the strength of their official positions merely, and although when brought to book the delinquents may pay their debts this does not wipe out the stigma their conduct has placed on the service." File 9836-03, J. A. G., Nov. 28, 1903, p. 7.

17. **Orders to pay**—An officer can not be ordered to pay his debts, but he can be tried for failure to pay them.

The department in practice unhesitatingly orders the trial of an officer for "conduct unbecoming an officer and a gentleman," growing out of nonpayment of debts, the validity of which is conceded by him or established by the judgment of a civil court, where the attending circumstances are such as to constitute the military offense named. File 26251-9522: 22.

18. **Same**—An order issued by the Secretary of the Navy directing an officer (or enlisted man) to pay a private debt would not be a "lawful" order for the disobedience of which he could be punished under the Articles for the Government of the Navy. The department, therefore, has no legal right to compel officers of the naval service to pay private debts.

Should the debt be claimed as a result of services of an attorney in procuring legislation such would be void as against public policy which makes all contracts based upon "lobbying," void *ab initio*. File 17789-12: 1, J. A. G., Feb. 25, 1910, overruling. File 26287-733.

The nonpayment of a debt or debts in general is not of itself an offense and can not subject the debtor to punishment either in civil or military life. Such disregard or neglect of one's moral obligations does, however, gradually become an offense under military law, as the continual and persistent refusal to pay a certain undisputed claim, or the repeated refusal to pay numerous undisputed claims, becomes notorious and thereby brings discredit upon the delinquent debtor within the service or tends to subject the naval service to reproach from those without. *Held*: That an order by a commanding officer to an enlisted man under his command to settle a just debt is not a lawful order, even when given at the time the claim was undisputed, and therefore the proceedings of the summary court-martial were disapproved. File 26287-733, Sec. Navy, Feb. 28, 1911.

An order issued by the Secretary of the Navy directing an officer to pay a private debt would not be a "lawful" order, for the disobedience of which he could be punished under the Articles for the Government of the Navy. Moreover, if such an order could be enforced it would constitute a taking of property without due process of law, as every person who questions the validity of a claim against him is entitled to have the matter judicially determined, with a full opportunity to urge any defense he might be able to make. File 17789-12: 1, J. A. G., Feb. 25, 1910, quoted approvingly by the Secretary of the Navy in File 26287-733, Sec. Navy, Feb. 28, 1911.

The Government can not properly act as collector of private indebtedness due from officers or enlisted men of the naval service. In such cases resort should be had to civil courts. Where, however, the question becomes one of conduct unbecoming an officer and a gentleman on the part of an officer or of conduct to the prejudice of good order and discipline on the part of either an officer or an enlisted man, action may be taken by the Navy Department on these questions only. File 26287-733, Sec. Navy, Feb. 28, 1911. *But see* File 26251-12117; 26251-12462, Oct., 1916; G. C. M. Rec. 32614.

19. **Payment of**—Can not be enforced by the department. *See* CLAIMS, 5; DEBTS, 17, 18.
20. **Payment before trial**—As grounds for clemency. *See* DEBTS, 23.
21. **Pledge to pay debts**—An officer failing to keep a pledge made to the department to pay a certain amount each month to his creditors, was tried by general court-martial under the charge of "Scandalous conduct tending to the destruction of good morals, in violation of the first clause of the eighth article of the Articles for the Government of the Navy," and dismissed. C. M. O. 55, 1894.

Digitized by Google

22. **Promises to pay**—Failure to carry out specific promises, regarding settlement of debts, made in official communications, may be charged under "Scandalous conduct tending to the destruction of good morals." C. M. O. 98, 1905; 5, 1909.
Failure to carry out specific promises regarding settlement of debts made to the Major General Commandant of the Marine Corps in official communications may be charged under "Scandalous conduct tending to the destruction of good morals." C. M. O. 98, 1905. *See also* C. M. O. 5, 1909.
Chief gunner dismissed by general court-martial for failure to pay just debts after repeated promises to do so. C. M. O. 2, 1916.
23. **Restitution**—Officer tried for failure to pay debts made a part payment without solicitation and before he was aware that he was to be brought to trial before a court-martial. This fact was stated in a recommendation by the members to the clemency of the revising power and the department exercised clemency. C. M. O. 23, 1909.
24. **Scandalous conduct tending to the destruction of good morals**—Neglect and failure to pay long overdue debts to merchant by officer, charged under. C. M. O. 48, 1907; 48, 1910. *See also* DEBTS, 9.
The court not only acquitted the accused upon both charges preferred against him but did "most fully and honorably acquit" him, this being the very highest degree of the six different forms of acquittal known to naval procedure. By such action the court in effect put the highest stamp of approval not only upon the action of any person in the commissary department of the Navy who may borrow money without security from a Government contractor furnishing supplies to the Navy, but also upon the nonpayment of debts. C. M. O. 27, 1913, 9.
25. **Same**—Violations of pledges or promises charged under. *See* DEBTS, 22.
26. **Sentence**—That part of a sentence providing that the sum of $10 should be checked monthly against the accounts of the accused, to be paid to his creditor, until such payment shall liquidate the debt, was disapproved as it was not authorized by law.
27. **Specification for failure to pay**—An enlisted man was tried by general court-martial for nonpayment of debts under the charge of "Conduct to the prejudice of good order and discipline." The question arose as to whether the specification alleged any offense when it did not expressly charge the accused "with refusal to pay the debts, nor is it even alleged that the debts are even *due* for payment." It is desirable that specifications alleging nonpayment of debts, after the necessary preliminary allegations, contain an averment somewhat in the following form, "and said debt being thereafter due and owing." File 26262-1626, J. A. G., Dec. 28, 1912.
28. **Sword as payment of a debt**—Officer tried by general court-martial for leaving his sword in payment of a debt. C. M. O. 1, 1908.

DECEASED PERSONS.

1. **Disposition of effects.** *See* DISPOSITION OF EFFECTS.

DECEIT.

1. **Clemency**—Among other grounds assigned for granting clemency was the fact that the accused possibly did not intend criminally to deceive, when he was charged with "falsehood." C. M. O. 23, 1909.
2. **Specifications**—In cases of officers which allege deceit. C. M. O. 9, 1909; 10, 1909.

DECISIONS.

1. **Department**—Decisions and instructions of department in easily accessible form in Court-Martial Orders and ignorance of or inattention to them are inexcusable. C. M. O. 42, 1915, 7, 8.
2. **Heads of departments**—Binding on their successors. *See* RES JUDICATA.
3. **Secretary of the Navy**—Decisions of Secretary of the Navy distinguished from opinions of the Judge Advocate General. *See* JUDGE ADVOCATE GENERAL, 30.

DECK COURTS.

1. **Appeals**—Accused may appeal. *See* APPEALS, 6, 7. *See also* File 27217-1752, Sec. Navy, Sept. 23, 1915, for an actual appeal denied by the Secretary of the Navy.
2. **Same**—Except in cases of appeal, separate sheets containing the testimony of witnesses called in a deck court should not be forwarded to the department as a part of such records as the testimony thus recorded is intended only for the guidance of the convening authority in his approval or disapproval of the finding and sentence. (Navy Regulations, 1913, R-516; Forms of Procedure, 1910, p. 181; C. M. O. 33, 1909, p. 2; Act of Feb. 16, 1909, sec. 6 (35 Stat. 621).) C. M. O. 29, 1914, 3.
3. **Bad-conduct discharge**—Not to be adjudged. *See* BAD-CONDUCT DISCHARGE, 2; DECK COURT, 20.

Digitized by Google

4. **Boatswain**—Actually in command of a naval vessel may convene a deck court. File 27217-919. *See also* File 26289-2584; C. M. O. 6, 1915, 5-6; SUMMARY COURTS-MARTIAL, 105.
5. **Same**—May not act as deck court officer. *See* DECK COURTS, 62.
6. **Bread and water**—Medical officer's certificate. *See* CONFINEMENT, 5; DECK COURTS, 8.
7. **Commanding officer**—As deck court officer. C. M. O. 24, 1909, 3; 34, 1913, 4; File 27217-1314. *See also* DECK COURT, 10, 14.
8. **Confinement**—Over 20 days not to be adjudged. C. M. O. 24, 1909, 3; 1, 1914, 5. *See also* CONFINEMENT, 10.
   In cases involving confinement on diminished rations or on bread and water, exceeding a period of 10 days, the deck court record should bear certificate of the senior medical officer that the sentence will not be seriously injurious to the health of the accused. *See* CONFINEMENT, 5.
   Confinement and reduction in rating may not both be included in same sentence. C. M. O. 33, 1914, 5.
9. **Consent to trial**—Accused must consent. File 27217-1927; 27217-1928. *See also* DECK COURTS, 50; SUMMARY COURTS-MARTIAL, 26.
10. **Constitution of**—By act of February 16, 1909, section 2 (35 Stat. 621), the President is expressly authorized to prescribe rules and regulations as to details of the "constitution, powers, and procedure" of deck courts. In carrying out this power, Navy Regulations, 1913, R-503 and R-504, prescribe that—
    "503. Officers shall not be ordered as deck courts who are below the rank of lieutenant in the Navy or captain in the Marine Corps, except in cases where there is no officer of such rank, or of higher rank, attached to the vessel, navy yard, or station, or command, as the case may be.
    "504. An officer empowered to order deck courts shall not designate himself for this duty unless he is the only commissioned officer attached to the vessel, navy yard, or station, or command, or unless the subordinate officers are below the specified rank in which cases he shall constitute the deck court and finally determine the cases tried by him, and no order appointing the court need be issued, but the officer in question shall enter on the record that he is 'the only officer (of the required rank) attached to the vessel (navy yard) (naval station) (present with the command).' In these cases no approval of the sentence is necessary, but he shall sign the record and date his signature in the manner shown by the authorized forms of procedure." C. M. O. 34, 1913, 4. *See also* C. M. O. 7, 1914, 11.
11. **Same**—Inspectors-Instructors of Naval Militia as deck court officers. File 3973-102:2, J. A. G., Aug. 21, 1915.
12. **Same**—A deck court shall consist of one commissioned officer only, who, while serving in such capacity, shall have power to administer oaths, to hear and determine cases, and to impose, in whole or in part, the punishment prescribed by article 30 of the Articles for the Government of the Navy. C. M. O. 14, 1911, 5-6, 8, 9. *See also* C. M. O. 7, 1914, 11.
13. **Convening authority**—Must sign the record constituting the court. C. M. O. 34, 1913, 5.
14. **Same**—Who may convene. C. M. O. 24, 1909, 3; 34, 1913, 4; file 27217-1314; 27217-919. *See also* DECK COURTS, 10; SUMMARY COURTS-MARTIAL, 22.
15. **Convening order**—The order constituting the court shall be in writing. (R-502.)
16. **Court-martial order**—Deck court officer mentioned by name in a court-martial order. C. M. O. 34, 1913, 4.
17. **Date of trial**—The date of trial must appear on the record. C. M. O. 34, 1913, 5.
18. **Designation of**—The proper designation of a deck court is "deck court" and not "deck court-martial." (Act of Feb. 16, 1909, sec. 2, 35 Stat. 621.) C. M. O. 29, 1914, 3.
19. **Disapproval of**—The department disapproved the proceedings and sentence of a deck court because an ensign acted as deck court officer contrary to law as outlined in the act of February 16, 1909, sec. 2 (35 Stat. 621), and Navy Regulations, 1913, R-503 and R-504, the disregard of which was a fatal defect and invalidated the entire proceedings. C. M. O. 34, 1913, 4.
20. **Discharge not to be adjudged**—The act of Congress entitled "An act to promote the administration of justice in the Navy," approved by the President February 16, 1909 (35 Stat. 621), as set forth in the department's General Order No. 12, of February 17, 1909, and in Article R-502, Navy Regulations, provides that in no case shall a deck court adjudge discharge from the service, nor shall it adjudge confinement or forfeiture of pay for a longer period than 20 days. C. M. O. 24, 1909, 3; 1, 1914, 5.

Digitized by Google

21. **Enlistment record**—Entries of conviction by deck courts in enlistment records must be authenticated by the signature of the commanding officer. File 27217-12.
22. **Evidence**—Record of testimony will be forwarded to department only in cases of appeal. C. M. O. 33, 1909, 2. *See also* DECK COURTS, 2.
23. **Extra police duties**—Except when the offender is serving on a receiving ship or at a shore station, sentences involving extra police duties are undesirable, demanding from others increased watchfulness and supervision. (Navy Regulations, 1913, R-619 (5).) C. M. O. 15, 1910, 12. But this will not be construed as prohibiting the imposition of this sentence on board ships on which circumstances render it desirable.
24. **Finding**—The finding and sentence in deck courts should never be typewritten, but should be in the handwriting of the deck court officer. C. M. O. 24, 1909, 3.
25. **I-4893.** *See* NAVAL INSTRUCTIONS, 1913, I-4893.
26. **Jeopardy, former**—A trial by deck court composed of a boatswain, though completed, does not constitute former jeopardy, as the deck court so constituted was without jurisdiction and illegally constituted, in that the law requires the deck court officer to be a commissioned officer. The man may therefore be tried for the same offense before a properly constituted deck court or court-martial. File 27217-1648, Sec. Navy, Mar. 24, 1915; C. M. O. 12, 1915, 7. *See also* C. M. O. 42, 1909, 16; File 27217-1611.
27. **Judge**—Deck court officer, as. C. M. O. 14, 1911, 7.
28. **Jury**—Deck court officer, as. C. M. O. 14, 1911, 7.
29. **Jurisdiction**—Of a deck court is expressly limited by law to minor offenses. C. M. O. 7, 1914, 10.
30. **Limitation of punishments.** C. M. O. 1, 1914, 5; 35, 1915, 7.
31. **Medical officer's certificate**—Required on record when sentence includes confinement on bread and water or reduced rations for over 10 days. *See* CONFINEMENT, 5; DECK COURTS, 8.
32. **Oath**—The deck court officer shall swear the recorder to keep a true record, but the recorder shall not swear the deck court officer. C. M. O. 24, 1909, 3; 14, 1911, 4; File 27217-949, Sec. Navy, Nov. 15, 1912.
    Deck court officer, while serving in that capacity shall have power to administer oaths. C. M. O. 14, 1911, 9. *See also* DECK COURTS, 12.
33. **Officer**—Illegally sworn as a witness. *See* DECK COURTS, 58.
34. **Origin**—Original correspondence proposing the deck court. File 1174-04, J. A. G., Feb. 4, 1904. *See also* An. Rep. J. A. G., 1904, p. 8; 1908, p. 8.
35. **Pay**—In no case shall a deck court adjudge discharge from the service, nor shall it adjudge confinement or forfeiture of pay, for a longer period than 20 days. The order constituting the court shall be in writing. C. M. O. 24, 1909, 3; 1, 1914, 5. *See also* File 3980-452; 2, J. A. G., Dec. 8, 1909, p. 7; 27217-1900, Sec. Navy, Aug. 24, 1916.
    Loss of pay in both summary courts-martial and deck courts should be expressed in dollars and cents—not days' pay—and should be based upon the actual pay, not including extras for mess cook, gun pointer, acting coxswain, etc. C. M. O. 24, 1909, 3. *See also* File 2214-62.
36. **Same**—Summary courts-martial and deck courts are authorized by section 8 of the act of February 16, 1909 (35 Stat. 621), to award a loss of pay by itself, without confinement. C. M. O. 24, 1909, 3.
37. **Same**—Loss of pay in summary courts-martial and deck courts should be checked upon approval by the Senior Officer Present or convening authority, respectively, and no notation should be made as to the loss of pay being "Subject to the approval of the Secretary of the Navy." Such reference is no longer necessary, as is evident from section 17 of the act of February 16, 1909 (35 Stat. 621), embodied in General Order No. 12, Feb. 17, 1909. C. M. O. 24, 1909, 3.
38. **Same**—Notation must be placed on the record that checkage or deduction of pay has been made pursuant to the sentence. C. M. O. 34, 1913, 5.
39. **Same**—Officer making checkage or reduction of pay must *sign* notation that pay has been checked or deducted. C. M. O. 34, 1913, 5.
40. **Same**—Rate of pay should appear on the record. C. M. 34, 1913, 6. *sn*
41. **Same**—In both summary court-martial and deck court records, the pay officer should show over his signature the *amount* of checkage or deduction made in each case. C. M. O. 24, 1909, 3.
42. **Place of trial**—Should appear on the record. C. M. O. 34, 1913, 5, 6.
43. **Plea**—Record must show plea of accused. File 27217-1675, Sec. Navy, Apr. 26, 1915.
44. **Precept.** *See* DECK COURTS, 15.

Digitized by Google

45. **Rate of pay**—Should appear on the record—The rate of pay of an accused should be indicated on the records of deck courts. The statement of the pay status of an accused is incorporated in deck court records as a means of preventing excessive or illegal sentences involving pay. (Forms of Procedure, 1910, p. 161, 180; C. M. O. 28, 1910, 4.) C. M. O. 34, 1913, 4; 12, 1915, 7.
46. **Rank of deck court officer.** C. M. O. 24, 1909, 3; 34, 1913, 4. *See also* DECK COURTS, 10.
47. **Record**—The record of a deck court shall, when completed, be at once forwarded by the convening authority to the Judge Advocate General. (R-516.)
48. **Recorder**—Is not a part of the deck court; he is merely detailed to perform the clerical duty. C. M. O. 14, 1911, 8-9. *See also* DECK COURTS, 58.

The law does not require the deck court officer to be sworn and although it requires the recorder to be sworn, a neglect in this respect would be proper grounds for objection by accused at time of trial, and not one that he could use or not use at his own pleasure when the result of the trial becomes known. C. M. O. 24, 1909, 3; 14, 1911, 4; File 27217-949. *See also* DECK COURTS, 58.
49. **Reduction in rating**—And confinement, not both to be included in same sentence. *See* CONFINEMENT, 11. *See also* File 27217-787, J. A. G., May 18, 1912.
50. **Refusing trial by deck court**—In case a man refuses trial by deck court and is brought to trial before a summary court, no mention concerning such refusal should be made in the record of the summary court-martial. C. M. O. 24, 1909, 3. *See also* CHALLENGES, 3; DECK COURTS, 9; SUMMARY COURTS-MARTIAL, 26.
51. **Sentence**—Deck courts can not legally impose sentences not specifically provided for by statute. C. M. O. 33, 1914, 4. *See also* File 27217-1752, Sec. Navy, Sept. 25, 1915.
52. **Same**—Confinement or loss of pay over twenty days or discharge not to be adjudged. *See* DECK COURTS, 35.
53. **Same**—Extra police duties and loss of pay are the only additions which may be made to the other punishments authorized by A. G. N. 30. Part of one of the punishments may not be added to a part of another of those punishments. C. M. O. 33, 1914, 4.
54. **Same**—Must be in handwriting of deck court officer. C. M. O. 24, 1909, 3.
55. **Same**—Reduction in rating. *See* DECK COURTS, 8, 49.
56. **Same**—An enlisted man was tried by deck court and sentenced to "forty-eight (48) hours *extra duty*." The department disapproved the sentence, since deck courts are restricted in their sentences to "the punishments prescribed by article thirty of the Articles for the Government of the Navy: *Provided*, That in no case shall such courts adjudge discharge from the service or adjudge confinement or forfeiture of pay for a longer period than twenty days." (Act Feb. 16, 1909, sec. 2, 35 Stat. 621; *see also* Navy Regulations, 1913, R-502.) Hence, sentences to "extra duties," instead of "extra police duties," are illegal, as imposing a punishment differing in nature from those authorized. (*See* Navy Regulations, 1913, R-619 (1). *See also* Forms of Procedure, 1910, p. 179; C. M. O. 2, 1912, pp. 4-11; 33, 1914, pp. 4-6.) File 27217-1761, Sec. Navy, Oct. 6, 1915; C. M. O. 35, 1915, 7.

Where an enlisted man was sentenced to "two (2) months' restriction," etc., the department set that part of the sentence aside. File 27217-1831, Sec. Navy, Feb. 19, 1916.

The sentence may be carried into effect upon approval of the convening authority or his successor in office. (Act Feb. 16, 1909, 35 Stat. 623.) File 3980-1075, J. A. G. April 6, 1915.
57. **Service records**—Entries in. *See* DECK COURTS, 21.
58. **Setting aside**—An enlisted man was tried by deck court, pleaded "not guilty," found "guilty" by the deck court, and sentenced. He appealed from the sentence in accordance with the act of February 16, 1909, section 6 (35 Stat. 621), and the entire record of the case was transmitted to the department.

The grounds of the appeal were stated as follows:

(*a*) That after every possible effort made, before my person, by the officer holding the court and before the actual trial took place, to procure any suitable witnesses who could be used by the prosecution, no witness could be found who would state positively, when the trial began, that I had been given an order to return at a stated time.

(*b*) That in consequence of the failure of the court to procure this witness the officer before whom I was tried turned prosecuting witness himself, and that while acting as such turned the court over to the recorder, an enlisted man.

(*c*) That I was advised by the court that it was better for me to plead "Guilty," since it was cheaper in the end and would save time, and that I would be foolish to plead otherwise.

Digitized by Google

He therefore maintained that he was illegally tried, and that an examination of the record of testimony and the proceedings of the court sustain this view.

The deck court in this case, consisted of a medical officer, with a yeoman, second class, acting as recorder. The record shows that the deck court officer was called as a witness for the prosecution, was sworn by the recorder, and gave material evidence. No objection was made by the accused to the manner of the swearing of this witness, nor to any of his testimony.

The question presented by this state of facts is as to the effect of the deck court officer taking the stand as a witness for the prosecution and being sworn by the recorder, an enlisted man.

In this case the deck court officer might be a competent witness if there were any method by which he might be legally sworn.

The act of February 16, 1909 (35 Stat. 621, sec. 2), provides that the deck court "shall consist of one commissioned officer who, while serving in such capacity, *shall have power to administer oaths*, to hear and determine cases, and to impose in whole or in part the punishment prescribed * * *."

Owing to the fact that the deck court officer is alone authorized to administer the oath to witnesses, and as he may not swear himself, he was in fact incompetent. But in criminal as well as in civil actions, when the witness leaves the stand, there is an end of all question as to his competency; it is then too late to object on this ground, especially if his incompetency appeared when he was first on the witness stand. (A. & E. Encycl. Law, v. 30, p. 971, and cases cited.)

Therefore the objection, regarded as being to the witnesses' competency, comes too late when not made, as in this case, until after the conclusion of the trial. As stated by De Hart, *supra*, the testimony of an incompetent witness does not necessarily vitiate the proceedings.

There is another question, however, to be considered, and that is as to the effect of the deck court officer taking the witness stand, occupying the position of witness, and relinquishing the conduct of the case to the recorder, whose functions are in no sense judicial, but are purely ministerial and subordinate. If, for example, a question had arisen as to the admissibility of evidence given by the witness in question, by whom would the matter have been decided? By the witness, resuming his seat as deck court officer, or by the recorder? The deck court officer is acting not alone as jury, but also as judge, and in such status he should not also act as a witness. A judge is not a competent witness in a cause being tried before him. (23 Cyc. 589.)

While the authorities are not uniform that a judge must retire from the bench after appearing as a witness, yet, perhaps by the weight of authority, such a withdrawal is now regarded as the more proper one; but it seems, as already stated, that *timely objection must be made* even in such cases. Of course, in the case of a deck court, the voluntary withdrawal of the deck court officer would be impossible and the matter should be provided for by the appointment of a different deck court for the trial of the case. As no objection was made in the case under consideration before the court concluded its consideration thereof, it might therefore be held that technically the accused acquiesced in the reception of the evidence, that the irregularity was thereby cured, and that the proceedings were not objectionable *on that ground alone*. But it is believed that no recent case of good authority supports the view that, where there is but a single judge who acts not only as such but also as jury, he should, if called as a witness, remain on the bench during the remainder of the trial. Such conduct would undoubtedly be highly improper. In this case it is the more so because of the fact that the testimony of the deck court officer, the judge, was highly material to the prosecution, and it would seem that, as it was given by the deck court officer himself, it would inevitably tend to bias his ultimate decision no matter how favorable the evidence of the defense might have been.

The proceedings also show that the deck court officer allowed the recorder, an enlisted man, to conduct the case and to examine the witnesses for both the prosecution and the defense. The status of the recorder of a deck court is not at all the same as that of a recorder of a summary court-martial. Such court consists "of three officers not below the rank of ensign, as members, and of a recorder." (277, A. G. N.) On the other hand, section 2 of the act of February 16, 1909 (35 Stat. 621), provides that the deck court "shall consist of one commissioned officer only," and the recorder of such court is no constituent part thereof, but is *detailed* merely to perform the clerical work of the court. Therefore, in allowing the recorder of this court to perform the functions of the deck court officer himself was contrary to law, and such delegation

Digitized by Google

to the recorder of the duties that should be performed by the deck court officer, including the administration of the oath to him as a witness, was entirely irregular.

In addition to the foregoing facts, if the testimony of the deck court officer be disregarded, the remaining evidence in the case does not appear to prove the alleged offense beyond a reasonable doubt. Nor does it appear from the record, as should be the case and as required by the Forms of Procedure, whether an opportunity was afforded or desired for cross-examination of the witnesses.

In view of the foregoing facts, as well as minor irregularities not deemed necessary to notice specifically because of those already mentioned, the department set aside the proceedings of the deck court in this case. C. M. O. 14, 1911, 9.

59. **Specifications**—The following specifications for alleged offenses have appeared upon deck court records:

"Specification: Disobedience of orders."

"Specification: Returning from liberty three hours overtime."

"Specification: Dirty rifle."

"Specification: In that he made a false statement to his superior officer."

The above specifications are insufficiently drawn and not in accordance with article 1706, United States Navy Regulations, 1909 [R–1713].

It is manifest that failure to set forth in each specification the name and rate of the accused, the offense and the date of the commission thereof, and all other material facts connected with the offense not only militates against the accused, but makes possible a second trial for the same offense. C. M. O. 42, 1909, 16.

60. **Speedy trials.** *See* SPEEDY TRIALS.

61. **Warrant officers**—When actually in command of naval vessels may convene deck courts. *See* DECK COURTS, 4, 5.

62. **Same**—A warrant officer, not being a commissioned officer, can not act as deck court officer, and in a case where one acted as such the department stated that a deck court "so constituted has no legal status, has no jurisdiction, and that its acts are *ab initio* null and void." (*See* Navy Regulations 1913, R–502; C. M. O. 7, 1914, 11.) File 27217–1648, Sec. Navy, Mar. 24, 1915; C. M. O. 12, 1915, 5. *See also* DECK COURTS, 26.

DECORATIONS. *See also* OFFICERS OF THE UNITED STATES.

1. **Act of Congress**—(Private), Jan. 31, 1881 (21 Stat. 603)—Authorizing certain officers to accept certain decorations from foreign governments.—Cross of the Legion of Honor from France.—The Order of Kemehameha the First from the King of the Hawaiian Islands.—A pair of flower vases and a lacquered box from the Japanese Government.—The Grand Cross of Naval Merit, with a white badge, from the Spanish Government. G. O. 261, Feb. 7, 1881.

2. **Jurisdiction**—In view of the fact that the Secretary of State under direction of the President has charge of all matters involving the foreign relations of the United States, the question as to whether an officer may accept medals, diplomas, decorations, etc., from a foreign state without the consent of Congress is one which is under the jurisdiction of the Department of State. File 9644–31, J. A. G., Aug. 20, 1913. *See also* File 9644–27, J. A. G., Jan. 24, 1913. *See also* File 3707–04, J. A. G., June 15, 1904; 13, J. A. G., 332, holding that certain medals tendered through the Department of State from foreign Governments may properly be delivered by Navy Department to the enlisted men for whom they were intended.

3. **Medal**—The acceptance by a naval officer who is a naval attaché at London, of the medal commemorative of the sixtieth anniversary of the reign of Queen Victoria, would be a violation of the act of Congress approved Jan. 31, 1881 (21 Stat. 603). File 4184–97, J. A. G., Aug. 5, 1897.

4. **Medal and diploma**—By an officer from Chinese Government. File 9644–31, J. A. G., Aug. 20, 1913.

5. **Prussian life-saving medal and ribbon**—Acceptance of by enlisted men. *See* File 9644–27, J. A. G., Jan. 24, 1913. *See also* File 9644–31, J. A. G., Aug. 20, 1913; 9644–32, J. A. G., Sept. 25, 1913.

6. **Public wearing**—Of medals presented by foreign governments is not authorized by the Navy Regulations. File 3707, June 15, 1904. *See in this connection* act Jan. 31, 1881, sec. 2 (21 Stat. 604), which is published in full in G. O. 261, Feb. 7, 1881.

DEFENDANT.

1. **Court of inquiry record—Defendant can not demand a copy of.** *See* COURTS OF INQUIRY, 12.

DEGRADE.

1. **Questions**—The answers to which would degrade. *See* SELF-INCRIMINATION, 11, 12.

Digitized by Google

DEGREE OF CRIMINALITY INVOLVED.

1. **Accused pleads "guilty"**—It is directed that in all cases where the accused pleads "guilty," and the specification does not set forth the particulars of the offense, the court call upon, or permit, the judge advocate to adduce testimony that may conduce to the correct understanding, both by the court itself and the reviewing authority as to the degree of criminality involved and the proper measure of punishment to be imposed. C. M. O. 6, 1909, 3. *See also* C. M. O. 50, 1900, 1; EVIDENCE, 42.

DELEGATION OF POWERS.

1. **Courts-martial.** *See* COURT, 65; DECK COURTS, 58 (p. 159).
2. **President.** *See* PRESIDENT OF THE UNITED STATES, 13, 16.
3. **Public officers**—It is a well settled rule that a public officer can not delegate powers which require the exercise of judgment and discretion, but authority to do acts merely administrative or mechanical may be delegated. *See* File 1689–7, Oct. 30, 1906.
4. **Secretary of the Navy**—Must personally review general courts-martial of which he is the convening authority. *See* CRITICISM OF COURTS-MARTIAL, 35; SECRETARY OF THE NAVY, 24.

"DELIBERATELY."

1. **Definition**—"By the use of the word 'deliberately' in describing a crime the idea is conveyed that the perpetrator weighs the motives for the act and its consequences, the nature of the crime, or the things connected with the intention, with a view to a decision thereon; that he carefully considers all these, and that the act is not suddenly committed. It implies that the perpetrator must be capable of the exercise of such mental powers as are called into use by deliberation and the consideration and weighing of motives and consequences." (State *v.* Wells, 1 N. J. Law (Coxe), 424.) C. M. O. 14, 1910, 10.

"DELIBERATELY AND WILLFULLY."

1. **Avoiding foreign service**—An accused was charged with "deliberately and willfully" avoiding foreign service, by absenting himself without authority, and found guilty. C. M. O. 69, 1900.
2. **Fraudulent enlistment**—Where a court found the accused guilty of "deliberately and willfully" concealing certain facts from a recruiting officer, but that such act of the accused was "without culpability" the department held that such findings were utterly inconsistent and that the court, in revision, should not have adhered to such finding, and therefore disapproved the proceedings, findings, and acquittal. C. M. O. 7, 1911, 16.
3. **Missing ship**—Where an accused was charged with "conduct to the prejudice of good order and discipline," the specification alleging that he "willfully and deliberately" remained absent until the ship sailed, thereby avoiding duty on said ship, and to which accused pleaded guilty, and then stated that he left the ship and got drunk and when he "came to" he went to the dock and found the ship gone, the department held that such statement was inconsistent with the plea of guilty to *deliberately and willfully* remaining absent from the ship. These words imply that the act was done in the free activity of the perpetrator's mind, after a careful weighing of the motives and a definite decision to commit the act. C. M. O. 14, 1910, 10–11. *See also* File 26251–12739, Sec. Navy, Jan., 1917.

DEMURRER.

1. **Council for accused**—Demurred and objected to the specification of a charge, and the "objection" was overruled by the court. G. C. M. Rec. 28681, pp. 27, 39.
2. **Same**—After arraignment and before pleading, the accused, by his counsel, offered what he termed a demurrer, alleging that the third charge was merely a repetition of the first, and claiming that the "gravamen of the offense in the first charge is alcoholism and that of the third charge is drunkenness, which are one and the same thing." The court very properly overruled this contention. C. M. O. 104, 1896, 3.
3. **Definition.** *See* WORDS AND PHRASES.
4. **"Motion to strike out"**—Is virtually a demurrer. G. C. M. Rec. 21478, p. 4.
5. **No such thing**—As a demurrer in naval courts-martial procedure. File 26251–12309 J. A. G., Oct., 1916.
6. **Technical errors**—Are, in general, those which the charges and specifications disclose, and which would be sufficient to sustain a demurrer or special plea. C. M. O. 42, 1914, 3. *See also* CHARGES AND SPECIFICATIONS, 33.

Digitized by Google

DENTAL CORPS. *See* DENTAL SURGEONS.

DENTAL RESERVE CORPS.

1. **Acts of Aug. 22, 1912, and Mar. 4, 1913**—The Attorney General held that the laws were properly interpreted by the Judge Advocate General, and that the act of Mar. 4, 1913, did not repeal the provisions of the act of Aug. 22, 1912, establishing the regular Dental Corps of the Navy.
   The Dental Reserve Corps is being and has since its creation in 1913 been administered in all respects the same in relation to the regular Dental Corps as is the Medical Reserve Corps in relation to the regular Medical Corps of the Navy, which was the clear intention of the law. File 13707-39:7, J. A. G., Jan. 15, 1916.

DENTAL SERVICES.

1. **Prisoners**—Payment for dental services rendered general court-martial prisoners is made from such pay as may be due them. If no such pay is due, then it is paid by the Government from "Pay, miscellaneous." File 26287-128, Mar. 28, 1912.
2. **Enlisted men.** File 13707-27, J. A. G., Jan. 17, 1913; 26287-128; 26285-57; 26251-3906:7; 26251-3936:18; 26251-5408:6; 26251-6838:2; 26251-5239:4; 26254-445; 26254-1250:1; 26262-1077:5; 13707-27:1; 10 Compt. Dec., 702; 17 Compt. Dec., 555; 86 S. and A. Memo., 641.

DENTAL SURGEONS.

1. **Acting Assistant Dental Surgeons.** *See* ACTING ASSISTANT DENTAL SURGEONS, 1.
2. **Same**—Where Congress authorized the appointment, from the Navy Dental Reserve Corps, of "dental corps officers of permanent tenure," the language quoted was construed to mean that such appointments were to be made to the grade of acting assistant dental surgeon, which was the only grade in the Regular Dental Corps at the time the law was passed, as the grade of assistant dental surgeon was not to come into existence until more than two years later. File 13707-38: 9.
3. **Circular**—For the information of persons desiring to become. File 1307-48, J. A. G., Aug. 2, 1915.
4. **Dental Reserve Corps**—Act, Aug. 22, 1912 (35 Stat., 891) did not establish. File 13707-24, J. A. G., Oct. 19, 1912. *See also* File 13707-30, J. A. G., Apr. 7, 1913.
   But the act of Mar. 4, 1913, and act of Aug. 29, 1916, did establish such reserve corps.
5. **Examinations**—Scope of. File 13707-53.
6. **Medical Reserve Corps**—Appointments of dental officers to the Medical Reserve Corps of the Navy under act Aug. 22, 1912 (35 Stat., 891). File 13707-20, J. A. G., Feb. 19, 1913.
7. **Naval Academy**—Dentist at the Naval Academy. File 13707-25, J. A. G., Oct. 24, 1912; 26280-58, Sec. Navy, June 17, 1915, pp. 3-4; 13707-36. *See also* APPOINTING POWER, 2.
8. **Naval Dental Corps**—"Shall be a part of the Medical Department of the Navy" (Act, Aug. 29, 1916, 39 Stat. 574).
9. **Rank of.** *See* File 13707-20, J. A. G., Sept. 7, 1912.

DEPARTMENT OF JUSTICE. *See also* ATTORNEY GENERAL.

1. **Collision**—Even though damages are slight, Department of Justice will take cognizance. *See* COLLISION, 7.
2. **Counsel for United States**—In Court of Claims. C. M. O. 12, 1915, 12. *See also* REGULATIONS, NAVY, 16.
3. **Federal judge**—Irregular action of, brought to attention of Department of Justice, C. M. O. 22, 1915, 7. *See also* DESERTERS, 2.
4. **Legal assistance**—For officers and enlisted men. C. M. O. 20, 1915, 5. *See also* LEGAL ASSISTANCE FOR OFFICERS AND ENLISTED MEN.
5. **Naval cases**—Department of Justice will instruct district attorneys to render assistance to officer upon whom a writ of habeas corpus is served (*See* File 26522; G. O. 121); also in other cases of legal proceedings instituted against officers of Navy as result of official acts. *See* LEGAL ASSISTANCE FOR OFFICERS AND ENLISTED MEN.

DEPARTMENT OF LABOR.

1. **Chinese**—Citizenship of. *See* CITIZENSHIP, 5.

DEPOSITIONS.

1. **Act of Congress, February 16, 1909** (35 Stat., 622)—Authorizes the taking and putting in evidence of depositions and provides that the same may be taken and used before naval courts-martial *except* in capital cases and in cases where the punishment may be confinement or imprisonment for *more than one year*.

Digitized by Google

The statute further provides that depositions may be taken *on reasonable* notice to the opposite party, and may be taken of persons in the naval or military service stationed or residing outside of the State, Territory, or District in which a naval court-martial is ordered to sit, or who are under orders to go outside of such State, Territory, or District. C. M. O. 47, 1910, 9–10.

2. **Affidavits**—Differ from depositions, as in the latter the opposite party has an opportunity to cross-examine. C. M. O. 21, 1910, 12; 48, 1915, 2. *See also* AFFIDAVITS, 4.

3. **Approval**—Necessity of approval by convening authority and court.—Where the taking of depositions is explicitly authorized by the law (sec. 16 of the Act of Feb. 16, 1909, 35 Stat., 622), they may be taken by the judge advocate without approval either by the convening authority or the court. In doubtful cases the above law leaves the matter entirely to the convening authority. (C. M. O. 29, 1915, pp. 5–6.) Forms of Procedure, 1910, p. 67, provides the method of procedure to obtain depositions but does not state that the consent of the court must first be obtained before a deposition is taken. In other words, the power of the court is merely to pass upon the interrogatories submitted and to propose such additional questions as it may deem necessary, and not to say whether or not the deposition may be taken. When a deposition has thus been taken, and is offered in evidence, the court may then decide, if objection is offered, whether or not it is admissible. C. M. O. 41, 1915, 1, 11.

4. **Chiefs of Bureaus, by**—Chiefs of Bureaus in the Navy Department have been authorized by the Secretary of the Navy to answer interrogatories propounded before a commissioner duly appointed by a State court to take their testimony without any summons being issued by a justice of the Supreme Court of the District of Columbia, as provided for by R–871. *See for example* File 12475–52, Oct. 31, 1914.

5. **Constitutionality of**—It was held by the Attorney General that an Article of War authorized "depositions taken in accordance with it to be read in cases not capital;" although the Constitution provides that the accused in criminal prosecutions shall have the right to be confronted with the witnesses against him. (9 Op. Atty. Gen. 311, 312.) File 26260–1392; 26260–697, J. A. G., June 29, 1911, p. 30.

6. **Courts of inquiry**—In this case the department directed that the evidence desired by the court of inquiry be obtained by depositions. File 26250–739:1, Sec. Navy, Feb. 25, 1916.

The evidence adduced and preserved before courts of inquiry is superior in every respect to depositions. (Mullan *v.* U. S., 42 Ct. Cls., 157, 176.) *See* COURTS OF INQUIRY, 21.

7. **Dismissal**—If depositions are used by prosecution dismissal should not be included in sentence. *See* DEPOSITIONS, 12.

8. **Maximum sentence, when used**—In any case where it is necessary to use depositions at the trial thereof and depositions are so used, the maximum *punishment* under such circumstances shall in no case exceed imprisonment or confinement for one year. (R–900), overruling C. M. O. 47, 1910, 9–10; 5, 1911, 5. *See also* in this connection, C. M. O. 50, 1893, 6; 99, 1893; 104, 1896, 6; 11, 1897, 2.

9. **Party securing may decline to introduce as evidence**—At the request of the accused the department had directed that the deposition of a certain enlisted man be taken. After this deposition was taken the accused discovered that its contents were against his interests and at the trial declined to introduce it in evidence.

Thereupon the judge advocate attempted to introduce the deposition in evidence, and upon objection being made by the accused the court sustained the objection.

The department held that the action of the court was proper. The law gives an accused the right to cross-examine a witness testifying against him and of this right he should not be deprived. If the judge advocate desired the testimony of the witness in question to be introduced for the prosecution, the proper procedure would have been for him to secure an entirely new deposition, in which case the accused would prepare the cross-interrogatories instead of the judge advocate.

In cases like the above where the party taking the deposition has been taken by surprise, the court should allow the opposite party, if he desires, time to procure another deposition from the deponent. File 26251–11382, Sec. Navy, Feb. 25, 1916; G. C. M. Rec. 31728; C. M. O. 5, 1916, 5–6.

10. **Prisoners.** *See* GENERAL ORDER, No. 121, Sept. 17, 1914, 15.

11. **Private litigation.** *See* GENERAL ORDER No. 121, Sept. 17, 1914, 15.

12. **Used by prosecution to aid in securing conviction of officer**—Sentence of dismissal not approved as a matter of policy—As it became necessary for the judge advocate in order to prove the offenses alleged in the charges and specifications in this case, to

Digitized by Google

introduce, in behalf of the prosecution, a deposition obtained from a witness for the prosecution whose presence before the court the exigencies of the service rendered it impracticable to obtain, the department does not consider it desirable as a matter of policy to approve a sentence calling for the dismissal of an officer in a case where a deposition has been thus used in securing his conviction. C. M. O. 11, 1916.

13. **Weight of**—As compared with evidence adducted by a court of inquiry. *See* COURTS OF INQUIRY, 21.

DEPOSITS.

1. **Acting warrant officers**—Entitled to make deposits and draw interest on them. File 26254-2020, J. A. G., June 6, 1916. *See also* ACTING MACHINISTS.
2. **Fleet Naval Reserve**—Deposits, with interest, of enlisted men transferred to Fleet Naval Reserve under provisions of Act, Aug. 29, 1916 (39 Stat. 589), must be paid to them at time they are so transferred. File 28550-22, Sec. Navy, Nov. 24, 1916.
3. **Marine Corps.** *See* MARINE CORPS ORDER No. 84; File 5460-81; 5252-66, J. A. G., May 13, 1915; 26806-139, J. A. G., Feb. 26, 1916.
4. **Warrant officers**—Act, February 9, 1889 (25 Stat. 657), does not authorize deposits of savings by warrant officers nor the continuance by them on deposit of money deposited prior to appointment as officers; but when an enlisted man is appointed a warrant officer, his deposit account should be treated as though his enlistment had expired, as was formerly held by the department in the cases of mates before the practice of discharging and reenlisting them was commenced. (*See* File 16407, July 28, 1903, 3031-5, Nov. 27, 1906.) File 26254-2020, J. A. G., June 6, 1916. *See also* C. M. O. 17, 1916, 10.

DEPRIVATION OF LIBERTY ON SHORE ON FOREIGN STATION.

1. **Confinement**—Distinguished from. *See* CONFINEMENT, 12; SUMMARY COURTS-MARTIAL, 92.
2. **Same**—Both confinement and deprivation of liberty on shore on a foreign station may not be included in the same summary court-martial sentence. C. M. O. 33, 1914, 5.
3. **Deprivation of liberty**—Adjudged by a general court-martial. C. M. O. 40, 1893; 6, 1896.
4. **Deprived of liberty**—A general court-martial sentenced an enlisted man "to be deprived of liberty." C. M. O. 55, 1893.
5. **"On shore on foreign station"**—A sentence of "deprivation of liberty" is illegal unless the words "on shore on foreign station" are added, and the court in adjudging sentence shall not exceed the limit of three months. C. M. O. 33, 1914, 2.

DEPUTY MARSHALS.

1. **Rewards for deserters.** *See* REWARDS, 3.

DERELICTS.

1. **Department authorized**—Bureau of Navigation to take the necessary steps to sink or destroy a wreck reported by the War Department as being a menace to navigation. File 4278-2, Sec. Navy, Oct. 18, 1907.

DESCRIPTIVE LISTS.

1. **Desertion**—Judge advocate introduced in evidence to prove "Desertion" the descriptive list of accused, wherein it was entered by his commanding officer that he had deserted on or about a certain date. This attempt of the judge advocate to prove desertion by a mere entry on the descriptive list is in error. C. M. O. 141, 1897, 2. *See also* DESCRIPTIVE LIST, 3.
2. **Fraudulent enlistment**—Proof of. *See* DESCRIPTIVE LIST, 3.
3. **Nature of**—In reviewing the record of proceedings of a general court-martial in the case of a private, United States Marine Corps, it was noted that the judge advocate introduced and the court received in evidence the descriptive list furnished by the Adjutant and Inspector of the Marine Corps; which is neither an original enlistment record nor even a certified copy of one, but a paper made up from probably various reports and data furnished the office of the Adjutant and Inspector, and is not competent evidence of the facts set forth therein. (Winthrop's Military Law, 2 ed., pp. 555, 556; G. C. M. Order No. 37, dated Nov. 1, 1909, pp. 5, 6.)

   The judge advocate should have secured and offered in evidence the enlistment record or descriptive book of the accused. C. M. O. 14, 1910, 15.

Digitized by Google

4. **Same**—A private, U. S. Marine Corps, was tried by general court-martial on charges of "Desertion" and "Fraudulent enlistment," and pleaded not guilty to both charges.

The judge advocate introduced in evidence the descriptive list of the accused furnished from headquarters, U. S. Marine Corps, on which this entry appears: "Deserted from the Marine Barracks, navy yard, Mare Island, Cal., June 13, 1909." But this even does not appear to have been read to the court. Furthermore, even had it been, it is remarked that this paper is not such as is considered proper documentary evidence It is neither an original enlistment record nor is it a certified copy of one, but a paper made up from probably several reports, and in no way an original document, and thus is not competent evidence, even if unobjected to. C. M. O. 37, 1909, 5–6.

DESCRIPTIVE ROLL. *See* C. M. O. 141, 1897, 2.

DESERTERS.

1. **Appointment**—Of a deserter as a commissioned officer. *See* DESERTION, 41.
2. **Arrest of**—The act of February 16, 1909, section 15 (35 Stat. 622), provides "that it shall be lawful for any civil officer having authority under the laws of the United States or of any State, Territory, or District to arrest offenders, to summarily arrest a deserter from the Navy or Marine Corps of the United States and deliver him into the custody of the naval authorities." (*See also* act June 18, 1898, 30 Stat. 484, with reference to the Army.) [*See* R–3636 (1) as quoted in File 27403–132:1, J. A. G., Nov. 6, 1916, p. 3.]

A deserter from the Navy, who had been arrested and placed in jail by a deputy constable and deputy county patrolman, was released by a Federal judge on habeas corpus proceedings, on the ground that there is no authority in law for the arrest of *naval* deserters by civil officers as there is in the case of deserters from the Army. This action of the Federal judge was brought to the attention of the Department of Justice for such action as it might deem appropriate. File 26516–178, Sec. Navy, June 29, 1915; C. M. O. 22, 1915, 7. *See also* File 26516–92:1, J. A. G., Sept. 27, 1912; 26516–38, J. A. G., Dec. 3, 1910, p. 4; War Department Circular No. 87, Oct. 23, 1908.

The act, February 16, 1909, sec. 15 (35 Stat. 622), authorizes the arrest of deserters from the Navy by "any civil officer having authority under the laws of the United States, or of any State, Territory, or District to arrest offenders." Outside of his jurisdiction a civil officer has no authority to make arrests but becomes a mere private citizen, and is not, outside of his jurisdiction, a civil officer within the meaning of the act of Congress above quoted. *Held*, That the authority of civil officers to arrest deserters must be coextensive with their authority to arrest other offenders; that the one can not exist without the other under the terms of the act of February 16, 1909, sec. 15 (35 Stat. 622), and that when a civil officer leaves his jurisdiction and loses his power to arrest offenders against the civil laws he at the same time loses his power to arrest deserters from the naval service. File 26516–218, J. A. G., Aug. 24, 1916. *See also* File 26516–92, J. A. G., Sept. 27, 1912.

A deserter from the naval service may be legally arrested by (1) any officer or duly authorized enlisted man in the naval service; (2) any civil officer having general or special authority to arrest offenders within any given jurisdiction (act Feb. 16, 1909, sec. 15, 35 Stat. 622); (3) private detectives who are authorized to make arrests; (4) any person who is expressly authorized by the naval authorities to arrest deserters. File 26516–92 and 92:1, J. A. G., Sept. 27, 1912.

The Navy Department "desires that detective work in connection with the apprehension and delivery of deserters from the Navy in the United States shall be confined to recognized police officers. It is considered undignified and undersirable to encourage or employ the services of private detectives or agents for such purposes, and the practice will be discontinued." File 24918, Sec. Navy, July 17, 1907.

In a letter from the Department of Justice to the Secretary of the Navy, November 17, 1906, it was stated: "Of course the right of military officers, whether of the Army or Navy, to apprehend and return deserters is interwoven in the very fabric of the organization and administration both of the Army and the Navy."

In the case of In re Fair (100 Fed. Rep. 149, 152) the following appears: "A deserter may be arrested by a military officer or private duly authorized to make the arrest."

So also in Hutchings *v.* Van Bokkellen (34 Me. 126), cited in Kurtz *v.* Moffit (115 U. S. 504), it was held that an officer of the Army may lawfully arrest a deserter and hold him for trial by court-martial without a warrant. File 7657–330, Sec. Navy, Dec. 29, 1915.

Digitized by Google

3. **Same**—When a deserter is delivered to the Navy the fact that the person who arrested him was not authorized to make such an arrest is not legal ground for his discharge from naval custody. This a matter in which the Government has no concern, persons who assume to arrest deserters without legal authority therefor doing so at their peril. File 26516-92 and 92:1, Sept. 27, 1912.
4. **Same**—Expenses of unsuccessful attempts to return. File 23120-20. *See also* File 26516-92:1, J. A. G., Sept. 27, 1912.
5. **Same**—Arrest of deserter paroled by civil courts. *See* JURISDICTION, 100.
6. **Same**—By detective agency. *See* CIVIL OFFICERS, 2; DESERTERS, 2.
7. **Civil authorities**—Authority to arrest deserters. *See* DESERTERS, 2.
8. **Deserter's releases.** *See* DESERTERS, 21–23.
9. **Detective agency**—Arresting deserters. *See* CIVIL OFFICERS, 2; DESERTERS, 2.
10. **Discharge**—Where a man has deserted and continued in desertion until a date subsequent to the expiration of his enlistment, the department does not consider it necessary that he be given a *discharge* of any character, unless pursuant to sentence of court-martial, particularly as this would entitle the man to "transportation in kind and subsistence from the place of his discharge to the place of his enlistment," etc. (R–4442 (6), and thus involve unnecessary expense to the Government. File 26516-214, Sec. Navy, July 22, 1916.
11. **Effects of deserters**—Disposition of—Where an enlisted man (ship's tailor) bought sewing machines, etc., from his predecessor and later deserted, the transaction being "an absolute sale on credit and not a conditional sale," the transaction passed complete title in said property to the aforesaid purchaser. The seller's status in the matter is, therefore, that of a creditor of the purchaser to the extent of the unpaid balance due on the sale, but the seller retains no legal title in the property sold. It follows from the foregoing that the sewing machines, etc., may legally be disposed of in accordance with I–4721, the same as any other effects which belonged to the deserter (purchaser) at the time of his desertion.

    The provisions of I–4721 may be waived within the discretion of the department in order that an opportunity may be afforded the seller to institute civil proceedings for the purpose of securing judgment against the purchaser for the balance alleged to be due, and to enforce such judgment against the property which was the subject matter of the sale by him to the purchaser, and such action may be taken upon the approval of the Secretary of the Navy. File 26516–162, J. A. G., Dec. 8, 1914; C. M. O. 6, 1915, 9. *See also* File 1317-01, Sec. Navy, Mar. 27, 1901.
12. **Same**—The offense of desertion *per se* entails the loss of all pay due at the time of desertion, and sale of effects of the deserter, but when a man is not found guilty of desertion, or guilty of absence without leave, he should make claim to the Auditor for the proceeds of the sale of his effects. File 4620-97.
13. **Enlistment of**—Never tried by court-martial—A private served in the Marine Corps over a year; deserted, and the next day fraudulently enlisted in the Army; received an honorable discharge therefrom and then, after his enlistment in the Marine Corps had expired, presented himself for reenlistment in the Marine Corps. *Advised*, That as this man was of mature age when he deserted from the Marine Corps, that he had been serving over a year, that he had fraudulently enlisted in the Army the day after deserting, and that as he stated he had no reason for deserting from the Marine Corps, it would be a bad precedent for the department to condone the offenses committed and reenlist a man who was guilty of the serious offense of desertion and the more serious offense of fraudulent enlistment which involves perjury in this case, particularly as no extenuating circumstances appear, in view of the age, length of service, and statement that he had no reason for deserting from the Marine Corps. File 14535–1088, J. A. G., Nov. 14, 1911. *See also* DESERTION, 114.

    Section 1420, R. S., prohibits the enlistment of deserters at large as well as convicted deserters. Accordingly *held* that the fraudulent enlistment of a deserter (prior to Aug. 22, 1912) from the Marine Corps who had never been convicted of desertion was void *ab initio* and that he could not legally be retained in the service. However, a pardon would remove the disability and permit of his reenlistment. File 7657–132. J. A. G., Feb. 17, 1912. [*But see* DESERTERS, 15.]
14. **Same**—With respect to an unconvicted deserter (who had never been tried) enlisting in the National Guard, this is a matter within the jurisdiction of the State authorities, and the Navy Department is unable to answer such question. File 26282–163:4, Sec. Navy, Jan. 6, 1916.

Digitized by Google

15. **Same**—Under the act, August 22, 1912, amending R. S. 1420, 1624, article 19, the enlistment of persons who have deserted from the naval service in time of peace is not prohibited. File 26516–214, Sec. Navy, July 22, 1916. *See also* File 7657–132, J. A. G. Feb. 17, 1912.
16. **Officers**—Appointment of deserter, as. *See* DESERTION, 41.
17. **Pardon**—Department's policy to issue only after conviction—A landsman, requested granting of pardon, he being in status of desertion, never having been apprehended or surrendered himself for trial by court-martial. *Held*, That while the applicant in this case might still be tried for his desertion committed on February 4, 1899, such a course would now be inexpedient more than 10 years since the war ended; and that, although a pardon might *legally* be issued, it would be contrary to the rules of the Department of Justice and to the policy of the department so to do. File 26282–68, J. A. G., Oct. 6, 1911. *See also* File 26282–84, Mar. 27, 1912.

An enlisted man was convicted of "desertion" in 1908, served sentence, and in pursuance thereof was dishonorably discharged. Thereafter he received a full and unconditional pardon. *Held*: By this pardon the offense is obliterated and he is in legal contemplation no longer a deserter. His disabilities are removed and, among them that relating to reenlistment in the naval or military service of the United States. He is restored to his civil rights, and it is quite within the province of the Navy Department to permit his reenlistment. (Op. Atty. Gen., June 16, 190 .) File 262 2–2.

18. **Same**—In the case of a deserter whose enlistment has expired, but who has not been convicted, and whose trial is barred by the statute of limitations, or is for other reasons deemed inadvisable, no penalty has been incurred, and accordingly, there is nothing upon which a pardon could operate, and it would be contrary to the department's precedents to recommend a pardon in any such case. File 26516–214. Sec. Navy, July 22, 1916.
19. **Same**—Where a man was never tried by court-martial for his desertion, and the period of limitation has expired, he could derive no benefit from a pardon so far as the desertion is concerned. His subsequent reenlistment, while fraudulent, is voidable only, and does not require action by the President in order to retain him in the service. File 26284–42, Jan. 13, 1910. *See also* File 26516–9, Dec. 1, 1908.
20. **Same**—After death of a deserter a pardon can not be issued at request of his representatives. File 3846–98, June 10, 1898. *See also* PARDONS, 11.
21. **Releases**—A so-called "deserter's release or other equivalent paper" should not be issued to deserters at large who are not amenable to trial by court-martial. The practice of granting deserter's releases was never required or authorized by any law and has been discontinued. There appears no good reason why naval offenders whose trials are barred by the statute of limitations should be treated otherwise than is done in the cases of offenders in civil life. Where the proper civil officer decides not to bring an offender to trial because of the statute of limitations, there is no practice, as far as the department is aware, of issuing to such offenders a criminal's release or similar document, nor of obtaining for him an executive pardon. In naval cases it should in general be ascertained by the proper administrative officer, the same as would be done by the proper officer in civil life, whether or not there is reasonable prospect of securing conviction before an accused person is brought to trial, and where it appears reasonably certain that a prosecution can not successfully be maintained for any reason, either on account of the statute of limitations or otherwise, it should not be instituted, as such action would merely involve expense to the Government without return. Nor would it seem ordinarily that a trial should be had merely as an accommodation to a self-confessed violator of the law, or one whose guilt seems clearly apparent, and who desires to have the matter disposed of without substantial punishment, but with a view to paving the way for ultimate pardon or other benefit to himself. Accordingly, in naval cases, as in civil life, where it is decided by the proper officer not to bring the accused to trial, this should be an end to the matter in so far as pertains to the duties of such officer; and the future status or movements, or peace of mind of the offender who has thus escaped the legal penalty prescribed for his offense can hardly be regarded as a matter of official concern to the Government. File 26516–214, Sec. Navy, July 22, 1916.

Department in refusing to give "an official order of release from the penalty of desertion" stated that "this department is not disposed to give any consideration whatever to the case," and the "practice of issuing the so-called 'deserter's release' has been discontinued." File 26539–748, J. A. G., Oct. 7, 1916.

The above decision overrules File 26516–138, Sec. Navy, July 14, 1914.

Digitized by Google

22. **Same**—There is no law or regulation which authorizes the issuance of a so-called "deserter's release" or equivalent paper to deserters from the Navy in any case. It remains for the court to decide in every case whether trial is effectually barred. File 26516–206, J. A. G., Mar. 29, 1915. *See also* File 26516–47, J. A. G., May 18, 1911.
23. **Same**—*Held:* That a "deserter's release should not be issued to a man who deserted 'in time of war.'" File 26516–47, J. A. G., May 18, 1911. *See also* DESERTERS, 21, 22, holding that the issuance of "deserter's releases" is discontinued in all cases.
24. **Restoration to duty**—Restoration to duty of a man convicted of desertion committed prior to the passage of the act of August 22, 1912 (37 Stat., 356), does not have the effect of remitting his disability resulting from conviction of desertion. (*See* C. M. O. 27, 1915, p. 7.) File 9212–59, Sec. Navy, Aug. 26, 1915; C. M. O. 29, 1915, 6.
25. **Reward.** *See* REWARDS.

DESERTER'S RELEASES. *See* DESERTERS, 21–23.

DESERTION.

1. **Abandonment of naval service or pending contract**—The intent of the accused permanently to abandon naval service or pending contract of enlistment is impliedly alleged and must be proved. C. M. O. 10, 1911, 5–7.
2. **Absence**—Of long duration creates presumption of specific intent to desert. *See* DESERTION, 62–64.
3. **Same**—Duration or period of. *See* ABSENCE, 10, 11; DESERTION, 99.
4. **Absence of ten days**—Evidence that accused was granted liberty and failed at the expiration thereof, and after a lapse of ten days he was declared a deserter is not sufficient to prove "Desertion." C. M. O. 30, 1910, 6. *See also* DESERTION, 38.
5. **Absence without leave**—Both "Desertion" and "Absence from station and duty without leave" should not be charged for same period of unauthorized absence. C. M. O. 49, 1910, 15–16; 5, 1914, 7.
6. **Same**—Finding of "Absence from station and duty without leave" on a charge of "Desertion" is an acquittal of the charge of "Desertion." C. M. O. 17, 1910, 9.
7. **Same**—"Desertion" includes the lesser offense of unauthorized absence. C. M. O. 38, 1892; 93, 1893; 96, 1893; 51, 1894, 2; 14, 1895, 2; 121, 1896, 1–2; 140, 1896; 158, 1897, 2; 49, 1910, 15–16.
8. **Same**—Accused charged with "Desertion" may be found guilty of "Absence from station and duty without leave," but the converse is not true. S. C. M. Rec. (1898), 23269, May 12, 1898.
9. **Acquittal of**—Is also acquittal of absence without leave, and when approved entitles accused to pay during period of unauthorized absence. C. M. O. 14, 1914, 4. *See also* PAY, 1, 2; C. M. O. 17, 1910, 8–10.
10. **Acts of accused**—During unauthorized absence may create a presumption of specific intent to desert. C. M. O. 29, 1914, 9; 41, 1914, 3. *See also* DESERTION, 62.
11. **Address**—Change of address of an absentee without notice to naval authorities may lead to a presumption of specific intent to desert. C. M. O. 29, 1914, 9.
12. **Aiding**—A civilian purchasing the clothing of an enlisted man of the naval service for the purpose of aiding that person in an attempt to desert would be liable to prosecution for such aid given. File 26516–49. J. A. G., June 13, 1911, p. 9, *quotiug* R. S. 1553, 5455, act of March 4, 1909 (Criminal Code, 35 Stat. 1097, 1153); Kurtz *v.* Moffitt (115 U. S. 502).
13. **"Animus non revertendi"**—Definition. *See* WORDS AND PHRASES; DESERTION, 24.
14. **Same**—Proof of by documentary evidence. *See* CERTIFICATES, 3–5; DESCRIPTIVE LISTS, 1, 3, 4; REPORTS OF DESERTERS RECEIVED ON BOARD; SERVICE RECORDS.
15. **Same**—The question of *animus non revertendi* must, of necessity, always be a conclusion from certain facts, and is for the court to determine from all the evidence in the case. C. M. O. 31, 1915, 15.
16. **Army**—Fraudulent enlistment as a proof of "Desertion." C. M. O. 23, 1910, 8.
17. **Same**—Specification in proper cases should allege date on which identified while serving in Army. *See* ARMY, 9.
18. **Arrest of deserters.** *See* DESERTERS, 2–6.
19. **Attempting to desert**—Enlisted men charged with. *See* ATTEMPTING TO DESERT, 1.
20. **Same**—Accused should not be charged with both "Attempting to desert" and "Absence from station and duty without leave" for same period of unauthorized absence. *See* ATTEMPTING TO DESERT, 2.
21. **Cause of.** *See* DESERTION.

Digitized by Google

22. **Charge of**—The circumstances under which a man absented himself from his station, the condition of his accounts and outfit, and his own statement, if he has any to make, are pertinent to the question whether or not he should be charged with "Desertion." File 6598–97, Dec. 31, 1897.

23. **Citizenship**—Prior to the act of August 22, 1912 (37 Stat., 356)—A man who forfeited his rights of citizenship by reason of conviction of desertion from the naval service, can have those rights restored only by the President or Congress. Whether or not a man who has deserted from the naval service is "free from the law after a certain period," depends upon the facts of the particular case, and would strictly be a question for determination by the court-martial in the event that the offender should be brought to trial. (*See* C. M. O. 27, 1913, p. 13.) File 26516–183, J. A. G., July 29, 1915; C. M. O. 27, 1915, 7. *See also* File 26507–117, J. A. G., Mar. 5, 1913.

Same—The following decisions of the department indicate how serious the offense of "Desertion" was considered prior to the enactment of the act, August 22, 1912 (37 Stat., 356):

"Convicted deserters are by law incapacitated from holding any office of trust or profit under the United States or from exercising any rights of citizens thereof." C. M. O. 49, 1910, 16; 14, 1910, 7; 26, 1910, 4; 5, 1911, 6; 2, 1912, 3.

This statement is printed on Court-Martial Orders prior to Court-Martial Order No. 23, 1912, dated August 1, 1912. The act of August 22, 1912 (37 Stat., 356), amended the above provision of sections 1996, 1998, of the Revised Statutes, so that it should not apply in time of peace. (Navy Regulations, 1913, R–3644.)

Accused convicted of "Desertion" and among other things sentenced to dishonorable discharge. Convening authority approved the proceedings, findings, and sentence, but *remitted* the *dishonorable discharge*. The department remarked: "The action of the convening authority in remitting the dishonorable discharge would have the effect of restoring the accused to duty upon the expiration of his period of confinement, and is not sanctioned by law. Sections 1996 and 1998 of the Revised Statutes, as set forth in article 829 of the Navy Regulations [Navy Regulations, 1913, R–3644], provide that men who have been convicted of "Desertion" are forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof, and it is therefore illegal for a man who has been so convicted to be reinstated in the naval service." C. M. O. 49, 1910, 16. *See also* File 4817–04; 7066–04.

It has been noticed by the department, in reviewing the records of proceedings of general courts-martial, that the sentences adjudged in the cases of men found guilty of "Desertion" (or who have been previously convicted of that offense and subsequently fraudulently enlist) sometimes do not include dishonorable discharge from the service.

Inasmuch as conviction of "Desertion" carries with it the incapacity for holding any office of trust or profit under the United States, or for exercising any rights of citizens thereof, it necessarily follows that such a person can not be retained in the United States naval service; the sentences of general courts-martial should, therefore, in all such cases include dishonorable discharge therefrom. Secs. 1996, 1998, R. S.; Navy, Regulations, 1909, R–829 [Navy Regulations, 1913, R–3644].

Conviction of the charge of "Desertion" carries with it independently of the punishment which may be awarded by a naval court-martial, certain legal consequences, such, for example, as the forfeiture of the rights of citizenship and the incapacity to hold office under the United States, *et cetera*, in view of which the department is of opinion that courts-martial should be very careful in finding an accused party guilty of desertion unless the *animus non revertendi*, the intention permanently to abandon the naval service, is shown beyond a reasonable doubt. C. M. O. 55, 1897, 2. *See also* C. M. O. 36, 1901, 2; File 4496–66, Aug. 30, 1907; 4496–69, Aug. 30, 1907.

The accused enlisted in the U. S. Army on November 21, 1899, and was discharged therefrom with character "excellent" upon the expiration of that enlistment; he reenlisted on November 21, 1902, and on December 1, 1905, was dishonorably discharged by sentence of a general court-martial. (The records of the department show that he was tried and convicted of desertion.) He enlisted in the Marine Corps on February 13, 1906, concealing the fact that he had been dishonorably discharged from the Army, and though this fact was later brought to the knowledge of the officers of that corps under whom he was serving, no action appears to have been taken, but the accused was permitted to serve out his enlistment, receiving an honorable discharge therefrom on February 12, 1910, as a first sergeant, with character "excellent," and recommendation for a good-conduct medal. He then reenlisted in the Army on February 14, 1910, and on March 29, 1910, was discharged "without honor" for fraudulent enlistment. He then reenlisted in the Marine Corps on June 14, 1910, at which time he concealed his prior discharge "without honor" from the Army.

Digitized by Google

In view of the fact that the records of the department show that the accused was duly tried and convicted of desertion and was dishonorably discharged from the Army therefor, which conviction, according to section 1996, Revised Statutes, prohibits such a person from "holding any office of trust or profit under the United States," the department can not exercise such clemency as would permit the retention of this man in the service, but in consideration of the unanimous recommendation of the members of the court to clemency based upon the accused's previous service in the Marine Corps, and the evidence as to character given by witnesses, the confinement, with corresponding forfeiture of pay and allowances, were remitted, and it was directed that the accused be released from arrest and discharged from the service in conformity with the remaining terms of his sentence. C. M. O. 26, 1910, 4.

An accused was tried by general court-martial (fleet case), found guilty of "Desertion" and the proceedings, findings, and sentence were approved by the convening authority who, in view of the unanimous recommendation of the members of the court to clemency, reduced the period of confinement, with corresponding loss of pay, to six months and *remitted the dishonorable discharge*.

The action of the convening authority in this case in approving the finding and remitting the dishonorable discharge should not be confused with that of a convening authority in *withholding* action on a desertion case, and restoring the accused to duty. In the latter case, there being *no approval* of the finding of the court by the convening authority, the proceedings are not complete and the accused is not treated as a convicted deserter [Kurtz *v.* Moffitt (115 U. S., 487), citing with approval Winthrop's Dig. 1880, p. 225; U. S. *v.* Kelly, 82 U. S. 34; 20 A. and E. Ency., 2d ed., 656; In re Esmond, 5 Mackey (D. C.), 64; 19 Op. A. G. 107; Winthrop's Mil. Law, etc., 663.]

As, in view of the statutes above referred to, it would be illegal for a convicted deserter to be reinstated in the service, except by Executive pardon, the department approved the proceedings, findings, and sentence of the court and the action of the convening authority thereon, except as to remitting the dishonorable discharge; disapproved the action of the convening authority in remitting the dishonorable discharge, and directed that the accused be discharged at the expiration of his period of confinement, as mitigated, "by reason of his conviction as a deserter." C. M. O. 5, 1911, 6.

25. **Same**—Section 1998 of the Revised Statutes, as amended by act Aug. 22, 1912 (37 Stat. 356), provides "that the loss of rights of citizenship heretofore imposed by law upon deserters from the military or naval service may be mitigated or remitted by the President where the offense was committed in time of peace and where the exercise of such clemency will not be prejudicial to the public interests." File 9212-59, Sec. Navy, Aug. 26, 1915.

26. **Same**—A man who forfeited his rights of citizenship by reason of conviction of "Desertion" from the naval service can have those rights restored only by a presidential pardon. Whether or not a man who has been convicted of "Desertion" from the naval service is "free from law after a certain period," depends upon the facts of the particular case, and would strictly be a question for determination by the court-martial in the event that the offender should be brought to trial. File 26516-183, J. A. G., July 29, 1915; C. M. O. 27, 1915, 7.

27. **Same**—Under R. S. 1996, 1998, convicted deserters were deemed to have voluntarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens, and were rendered forever incapable of holding an office of trust or profit under the United States or of exercising any rights of citizens thereof. File 5460-82, J. A. G., June 3, 1916.

28. **Citizenship subsequent to act August 22, 1912, (37 Stat., 356)**—Persons who desert from the military or naval service *in time of war* are deemed to have voluntarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens; and such deserters shall be forever incapable of exercising any rights of citizenship. (Sections 1996 and 1998, Rev. Stat., as amended by act of Aug. 22, 1912, 37 Stat., 356.)

29. **Same**—Under the law, sections 1996 and 1998, Revised Statutes, as amended by act of Aug. 22, 1912 (37 Stat., 356); Navy Regulations, 1913, R-3644), as it now exists, persons who are convicted of "Desertion" from the naval service in time of peace do not forfeit their rights of citizenship as was formerly the case. However, persons convicted of "Desertion" in time of war, and those who have already forfeited their rights of citizenship under the previous laws, can not have their rights restored without being pardoned by the President. File 26516-182, J. A. G., July 28, 1915; C. M. O. 27, 1915, 7. *See also* DESERTION, 135.

Digitized by Google

30. **Civil authorities**—Arrest by, as a defense to "Desertion." *See* ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED, 3, 4.
Arrest of deserters, by civil authorities. *See* DESERTERS, 2–6.
31. **Civilians**—Enticing, procuring, or attempting or endeavoring to entice or procure enlisted men to desert. *See* Desertion, 12.
32. **Civil War cases**—After April 19, 1865. *See* MARK OF DESERTION.
33. **Clothing**—Condition of, as described in "Report of Deserter Received on Board." *See* REPORTS OF DESERTER RECEIVED ON BOARD, 4.
34. **Same**—Statement of disposal of, in Service Records. *See* SERVICE RECORDS, 10, 16.
35. **Continuing offense**—"Desertion" is a continuing offense. C. M. O. 31, 1910, 5; File 5256–04.
36. **Conviction of desertion**—Effect on citizenship rights. *See* DESERTION, 23–29.
37. **Definition**—"Desertion" is unauthorized absence with specific intent permanently to abandon naval service or cancel pending contract of enlistment. C. M. O. 49, 1910, 9; 23, 1910, 7; 41, 1914, 7.
38. **Same**—"Desertion," as defined in R–3632(4) is for purpose of entry on record, not for guidance of courts-martial. The specification under a charge of "Desertion" alleged in part that the accused, having been granted liberty by proper authority at Hongkong, China, well knowing that his ship was on the eve of sailing for Manila, Philippine Islands, did fail to return upon the expiration of his liberty, and that he surrendered himself on board another ship at Hongkong, China, on the same day, after his ship had sailed.
The closing argument of the judge advocate showed that he misconstrued Article R–3632(4) and it is quite probable that a misunderstanding of the true meaning of this article caused the charge of desertion to be preferred against the accused in this case. The judge advocate argued as follows: "The attention of the court is invited to paragraph R–3632, subparagraph (4), U. S. Navy Regulations and Naval Instructions, 1913, which reads as follows: 'If a person deserts his ship which is about to sail, or overstays his leave until after the ship sails, with manifest intention of escaping his duty, and delivers himself on board another ship as a straggler, such offense shall be considered as desertion.'" Article R–3622(4) must be read in conjunction with Article R–3633, and it will then readily be seen that the facts as stated above do not of themselves constitute desertion. Article R–3633 reads as follows: "The provisions of the foregoing article are intended for guidance in making the proper entries on the records when men absent themselves, *but not for the guidance of courts-martial in judicially determining whether a man is guilty of desertion.*" C. M. O. 4, 1906, 1; 25, 1914, 4. *See also* File 8332–98; 1170–01; DESERTION, 4.
39. **Same**—The word "Desertion" is susceptible of two meanings: that given in the naval and military service, meaning the unauthorized absenting himself of a person in the service with an *animus non revertendi;* and that of ordinary usage, defined as the act of abandoning or forsaking. C. M. O. 1910, 8.
40. **Dishonorable discharge.** *See* DISHONORABLE DISCHARGE.
41. **Disabilities of convicted deserters, removal of**—The disabilities imposed upon convicted deserters by sections 1996 and 1998 of the Revised Statutes may be removed by Executive pardon (26 Op. Atty. Gen. 617). The form which such pardon may assume is not at all important (27 Op. Atty. Gen. 178). It has repeatedly been decided that the promotion of an officer under charges or serving sentence is a constructive pardon. (*See* 6 Op. Atty. Gen. 123; 4 Op. Atty. Gen. 8, 124; 8 Op. Atty. Gen. 237.) By a liberal construction it has been held by the department that the appointment of a person by the President, with the advice and consent of the Senate, as a commissioned officer in the Navy (chief pay clerk), which appointed was made with knowledge disclosed by department's records that he was a convicted deserter (prior to act of August 22, 1912), similarly operated as a constructive pardon. This latter case is to be distinguished from one in which an officer deliberately conceals the disabilities rendering him ineligible for appointment. File 5460–82, J. A. G., June 3, 1916.
Restoration to duty of a man convicted of desertion committed prior to the passage of the act of August 22, 1912 (37 Stat., 356), does not have the effect of remitting his disability resulting from conviction of desertion. (*See* C. M. O. 27, 1915, p. 7.) File 9212–59, Sec. Navy, Aug. 26, 1915; C. M. O. 29, 1915, 6.
42. **Disappearance of officers.** *See* DESERTION, 89–91.
43. **Documentary evidence**—In proving "Desertion." C. M. O. 110, 1896, 3; 49, 1915, 14–15. *See also* CERTIFICATES, 3–5; DESCRIPTIVE LISTS, 1, 3, 4; REPORTS OF DESERTERS RECEIVED ON BOARD; SERVICE RECORDS.
44. **Drunkenness**—As a defense. *See* DRUNKENNESS, 29.

Digitized by Google

45. **Duration**—Or period of absence. *See* ABSENCE, 10, 11; ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 29; CHARGES AND SPECIFICATIONS, 92; DESERTION, 99.
46. **Effects of deserters**—Disposition of. *See* DESERTERS, 11, 12.
47. **Enlistment record**—Use of, as evidence. *See* SERVICE RECORDS.
48. **"Enticing others to desert"**—Is an offense. G. C. M. Rec. 23280; File 26251-6552.
49. **Same**—Chargeable under "Conduct to the prejudice of good order and discipline." C. M. O. 49, 1914, 2, overruling C. M. O. 2, 1908, 2.
50. **Escape and absence**—As proving intent. C. M. O. 61, 1894, 2. *See also* ESCAPE, 2.
51. **Fraudulent enlistment**—As a proof of "Desertion." C. M. O. 37, 1909, 5-7; 23, 1910, 8; 28, 1910, 8-9. *See also* C. M. O. 22, 1904, 2; FRAUDULENT ENLISTMENT, 37, 38.
52. **Finding, "Guilty but without criminality"**—A finding of the specification "proved but without criminality" is inappropriate, as the specific intent permanently to abandon the service or pending contract of enlistment is impliedly alleged and must be proved. C. M. O. 10, 1911, 5-7. *See also* C. M. O. 11, 1905, 2; FINDINGS, 69.
Eliminations in finding so as not to support charge "Desertion." C. M. O. 28, 1904, 3.
53. **Foreign countries**—Apprehension of a man who deserted from a naval vessel while in a Japanese port. File 27403-132.
54. **Gravamen**—Of the offense—The essence of the offense of "Desertion" is the intention of the accused permanently to abandon the naval service. C. M. O. 20, 1899, 1. *See also* C. M. O. 31, 1915, 15.
55. **"Guilty in less degree than charged"**—Court should reject this plea. *See* GUILTY IN A LESS DEGREE THAN CHARGED, 9-11.
56. **I-4893.** *See* NAVAL INSTRUCTIONS, 1913, I-4893.
57. **Influencing others to desert**—Is an offense. G. C. M. Rec. 23280.
58. **Intent**—The specific intent as well as unauthorized absence must be proved. *See* DESERTION, 65.
59. **Same**—If the accused at any time during his unauthorized absence had the intent permanently to abandon the naval service or to cancel pending contract of enlistment, that is all that is necessary to establish his guilt, and it is immaterial whether the intention was formed at the time of leaving the ship or station or at a subsequent date. (C. M. O. 30, 1910, p. 10; 5, 1912, p. 4). C. M. O. 29, 1914, 9. *See also* DESERTION, 72.
60. **Same**—Escape and unauthorized absence as affecting the specific intent. C. M. O. 61, 1894, 2. *See also* ESCAPE, 2.
61. **Same**—File 26251-4200, Sec. Navy, Jan. 25, 1911.
62. **Same**—The specific intent may be inferred, and generally must be, from the acts of the accused—circumstances and duration of unauthorized absence, or fact he was apprehended and forcibly returned, or other circumstances of the case. C. M. O. 42, 1909, 5; 28, 1910, 6; 30, 1910, 10; 14, 1913, 3, 4; 16, 1913, 3, 5; 22, 1913, 3-4; 29, 1914, 9; 41, 1914, 3.
63. **Same**—Long period of absence raises a presumption of specific intent permanently to abandon the naval service, which presumption can only be dispelled by a reasonable explanation thereof. C. M. O. 39, 1901, 2; 29, 1914, 9; 76, 1901. *See also* DESERTION, 67.
64. **Same**—The specific intent is to be inferred from the accused's acts and not from what he may state on the witness stand. C. M. O. 42, 1909, 5.
65. **Same**—Intent permanently to abandon the naval service or terminate pending contract of enlistment must be proved as well as the unauthorized absence. C. M. O. 93, 1893; 96, 1893; 51, 1894, 2; 14, 1895, 2; 121, 1896, 1-2; 140, 1896; 55, 1897, 2; 158, 1897, 2; 38, 1892.
66. **Same**—In a case where the accused was found "guilty" of "desertion," the department stated in part: "Owing to the insufficiency of the evidence adduced at the trial to establish an intent to abandon the service, the proceedings, finding, and sentence" are disapproved. C. M. O. 126, 1902; 166, 1902.
67. **Same**—"Duration of the absence" of accused is especially material, but time of absence alone is not conclusive proof of such intent. C. M. O. 158, 1897, 1. *See also* DESERTION, 63.
68. **Same**—The record in the case contained no *direct* evidence showing the intent essential to the offense of desertion. The circumstances attending the offense, however, as developed on the record, were such as to establish that intent, by necessary implication, beyond a reasonable doubt. The accused left a liberty party, while on shore at Nagasaki, Japan, and made his way to the United States, surrendering himself finally at San Francisco. If he had not intended to abandon the naval service he could, under ordinary circumstances, have surrendered himself on board some United States vessel on the Asiatic Station. His coming home was in itself, being unexplained an incriminating circumstance.
The period of absence in his case was about eleven months. Such a long absence remaining unexplained necessarily tends to establish the intention to desert.

Digitized by Google

The terms of the statement offered by the accused were guarded, and contained no explanation whatsoever of his long absence, or of the occasion of his return to the United States.

While the greatest care is always necessary in dealing with a charge of "Desertion" supported only by circumstantial evidence, the present case appeared to be one in which a number of separate facts, none of which would necessarily be conclusive when considered alone, unite in relieving the case from uncertainty, and taken together established the offense as charged. C. M. O. 76, 1901, 1.

69. **Same**—The department stated that in order to establish the commission of the specific offense of "Desertion," both the fact of unauthorized absence and the intent permanently to abandon the service must be proved. Also: "It is presumed that the judge advocate introduced all the evidence which was available in order to establish the intent of the accused permanently to abandon the service. The fact of his having left the ship without permission, the duration of his absence, and his reporting in civilian's clothes furnish presumptive evidence of such intent, but this presumptive evidence is negatived by the testimony of the accused himself in which he denies that he at any time intended to desert, by the fact that he placed himself in communication with the Bureau of Navigation during his absence, and that he voluntarily delivered himself up.

"From a careful consideration of the entire evidence in the case," "the department is of opinion that the intention of" the accused "permanently to abandon the service has not been shown beyond a reasonable doubt, and that, therefore, the benefit of such doubt should be given to him." C. M. O. 14, 1895, 2.

70. **Same**—It appeared "from an examination of the record of the general court-martial in the case of 'the accused' that he was granted five days' leave of absence" in August; remained absent about five months; "that he went to Chicago and obtained work on the lakes and railroad, and that he did not communicate with the naval authorities relative to his whereabouts, which facts would seem to establish the intent of the accused at the time permanently to abandon the service, and would therefore sustain the charge of 'desertion,' upon which he was tried. The court, however, dealt 'leniently with the case and' gave the accused the benefit of the doubt and found him guilty of 'absence without leave.'" C. M. O. 33, 1901, 1.

71. **Same**—In order to establish the commission of the specific offense of "Desertion," both the fact of unauthorized absence and the intent permanently to abandon the service or, at least, to terminate the pending contract of enlistment, must be proved. (Navy Regulations, 1913, R–746.) C. M. O. 49, 1910, 8–9, 11; 23, 1910, 6; 30, 1910, 10; 10, 1911, 6; 5, 1912, 4; 16, 1913, 5; 22, 1913, 3; 41, 1914, 3.

72. **Same**—The accused, charged with "Desertion," was found guilty of "Absence without leave." The court was reconvened to reconsider, respectfully adhered to its original finding and stated in part that the accused left his ship *while drunk*, which precluded any fixed intent *at that time* permanently to abandon the service. The department held that "it is immaterial whether the intent permanently to abandon the service exists at the time of the leaving or at some subsequent date. The law judges a man's intentions from his actions, and the fact that" the accused, "although drunk at the time of leaving, failed to communicate with and remained absent from the service for a period of nearly two months is good presumptive evidence as to his intentions to desert." C. M. O. 30, 1910, 10. *See also* DESERTION, 59.

73. **Same**—In reconvening a court to reconsider its finding the department held in part: "From the testimony introduced in this case it appears that the court had before it the following facts: That the accused deliberately absented himself from his station and duty without authority; that his unauthorized absence covered a period of more than five months; and that he surrendered in civilian clothing." The "voluntary return of a deserter, even within a reasonable time, does not in itself rebut the presumption of guilt arising from his previous act. In the absence of a reasonable excuse in the case of *unauthorized voluntary* withdrawal from the service, the intent permanently to abandon it must be inferred, and it would be more reasonable to so infer than to presume that an unauthorized voluntary lengthy absence indicated a return at some future date. C. M. O. 16, 1913, 5.

74. **Same**—The specification on a charge of "Desertion" alleged an absence of more than three years. The court found the accused guilty of absence without leave. In returning the record to the court for revision the department stated: "From his own testimony it would seem that the circumstances attending the movements of the accused during his unauthorized absence indicate his purpose to separate permanently from the service, which is not overcome by the fact that, after an unauthorized absence of more than three years, he surrendered himself.

Digitized by Google

"A man who separates himself from the service with the intent to desert might, subsequently, find it more desirable, for various reasons, to return, and the mere fact that an absentee surrenders himself is not in itself sufficient evidence that he did not intend to desert, but it is a fact to be considered with all of the evidence available in the case.

"It does not appear that, during more than three years, the accused made any attempt to communicate with the naval authorities; on the contrary it does appear that, although he visited or traveled near to many places where he could have surrendered himself, he carefully avoided the places where he was well known for the reason that he though he might get 'caught.'" The court in revision revoked its former findings and, in lieu thereof, found the specification proved and the accused guilty of the charge. C. M. O 16, 1913, 3.

75. **Same**—The specification alleged an unauthorized absence of about eight and one-half months.

The accused left the service at San Francisco, Cal., on June 13, 1912, and testified that he left after brooding over the fact that he could not make the "promotion which I had hoped at the time of my enlistment." He further testified as follows: "I realized that I had made a serious mistake—in fact played the fool—and desired to come back and, if possible, secure reinstatement in the service in order that I might redeem myself."

"The foregoing testimony appears to be a tacit admission by the accused of his guilt and the mere fact that he eventually surrendered himself is not in itself sufficient evidence that he did not intend at some period of his unauthorized absence to desert."

"The offenses of absence over leave and absence without leave are offenses that often spring out of the improvidence and thoughtlessness which were formerly considered incident to the habits and character of sailors. The accused in this case testified that the reason he did not return at the expiration of his liberty was because he had been brooding over the fact that he could not make the promotion he had hoped for at the time of enlistment It therefore appears that he left the service because of resentment, and his testimony in this respect appears to be conclusive evidence that his unauthorized absence was not caused by thoughtlessness.

"The elements of desertion are unauthorized absence and intent to permanently abandon the service. The intent may be inferred, not alone from the unauthorized absence, but from the circumstances of the absence and the duration of same.

"The accused admitted a reason for his abandonment of the service, and by his long unauthorized absence, by which he avoided serving nearly one-fifth of his total term of enlistment, he showed a contempt for the obligation of his sworn contract and willful intention of avoiding his duties. With these circumstances before it the court should have required, to rebut the presumption of desertion, a plausible reason, thoroughly corroborated, for the long absence of the accused."

In this case the court first found guilty of absence without leave, but in revision revoked its former finding and found the accused guilty of the charge. C. M. O. 22, 1913, 4–5.

76. **Same**—The department in one case stated: "If, in the opinion of the court, the accused did not at any time during his unauthorized absence intend permanently to abandon the service, it becomes its duty to find the accused guilty in a less degree than charged, guilty of" "Absence from station and duty after leave had expired;" or "Absence from station and duty without leave." C. M. O. 5, 1912, 4.

77. **Same**—The general court-martial before which a private, United States Marine Corps, was tried on the charges of "Desertion" and "Fraudulent enlistment," found the specifications of the charges "proved, but without criminality," and acquitted him of said charges.

A finding of "proved, but without criminality," while not to be encouraged in any case, is particularly inappropriate upon such a charge as that of desertion, in which a specific intent forms an essential ingredient of the offense and must be proved. Upon a charge like that of absence without leave, where it is not necessary to allege or prove any specific intent, it may very well happen that all the facts alleged in the specification may be found proved and yet the accused be wholly free from blame, the absence, for example, being entirely involuntary on his part. But this does not apply to the case of desertion, in which a specific intent to abandon the service is impliedly alleged and must be proved.

There was no conflict in the evidence as to the facts in this case, from which it appeared that he had been regularly enlisted in the United States Marine Corps, and

Digitized by Google

executed the required oath; that he was fully cognizant of what was occurring, raising his right hand while the oath was read to him, and understanding that he "was sworn into the Marine Corps"; that when sent home by the recruiting officer he was told "to come back the next day," and that instead of returning he "received an offer of a good job and went to work."

The allegation that the accused did "*desert* from the marine recruiting office" and "from the United States Marine Corps," involves an allegation of the two elements necessary to constitute desertion, i. e., (*a*) an absence without authority, and (*b*) an intention to abandon the naval service; and in finding the specification of the first charge (desertion) proved the court accordingly found that the accused was absent from the Marine Corps without authority during the period specified, with the intention of not returning.

Upon the question of criminal intent, it is stated in Clark's Criminal Law, page 50, that "Intent does not necessarily involve intention to do a criminal act; but intention to do a criminal act is ordinarily sufficient to constitute criminal intent. In other words, where an act is prohibited on pain of punishment, criminal intent is nothing more than the intent to do the act, provided the wrongdoer is a person capable of entertaining a criminal intent, and acts without justification or excuse."

Where, therefore, as in this case, it appears that the accused "was fully conscious of what he was doing, in the full possession of his reason, and not acting ignorantly or by mistake" of fact, the *general* criminal intent necessary to conviction is clearly established. (File 26251-3252, J. A. G., April 28, 1910.) However, in the case of desertion, a *specific* intent is an essential ingredient of the offense. "When, by the common law or by statute, a specific intent is essential to a crime, the specific intent must exist and must be proved." (Clark's Cr. L., p. 51.) The intent necessary to constitute desertion is merely "the intention of not returning;" in other words, "a deliberate purpose not to rejoin the military service, but to abandon the same altogether, or at least to terminate or dissolve the existing military status or obligation, i. e., the pending contract of enlistment." (Winth, Mil. Law, p. 985.) The accused in this case admitted that he had a "deliberate purpose not to rejoin the military service, but to abandon the same altogether." His only defense was that he did not consider that the oath taken by him was "binding;" that he did not think that his time had started until he "was sent away, got into uniform, and was on duty;" and "that he thought it was like getting a job somewhere and leaving it for a better one if it offered itself." Even though these statements of the accused be accepted, they indicate rather an ignorance on his part of the legal consequences of the transaction in which he had just engaged, and not an ignorance or mistake of fact. "It is the settled rule that everyone is presumed to know the law, and that ignorance thereof furnishes no exemption from criminal responsibility. This rule was even applied in the extreme case of violation of a statute by a person who was at sea when it was enacted, and when he violated it, and who could not have learned of it. Even foreigners coming into a country, and ignorantly violating its laws, are liable, though the act may not be a crime in their own country. *Nor is positive belief that an act is lawful an excuse.*" (Clark's Cr. L., p. 80.)

Certain exceptions exist to this principle which do not, however, apply to this case. The wisdom and necessity of the rule, which has existed since the earliest days of our system of law, have been too often demonstrated for a departure therefrom to be sanctioned by the department.

The department returned the record of proceedings in this case to the court with the direction that the court reconvene for the purpose of reconsidering its findings. C. M. O. 10, 1911, 6-7. *See also* DESERTION, 110.

78. **Same**—Accused charged with "Desertion" was found guilty of absence without leave The department in reconvening the court stated as follows:

"By the accused's own testimony it appears that he was absent from May 13, 1909, until October 27, 1909—a period of over five months; that he took passage to a distant point; discarded his uniform, and procured plain clothes; obtained employment while absent; that he was arrested, and his return to the service forced; and that he did not communicate with the naval authorities during his absence.

"The testimony of the accused as to his intentions to return is wholly unsupported by other corroborative evidence, and should, according to authorities, under such conditions not be accorded entire credit. (Winthrop's Military Law, 2d ed., pp. 544 and 545, under 'Testimony of the accused.')

Digitized by Google

"The truthfulness of the most important part of the evidence given by him on the stand is, because of subsequent events, much to be doubted.

"It is but a reasonable supposition that, had he retained his uniform, as testified to, and started from home intending to return to the service, he would certainly have brought it back with him.

"Again, a man's intentions are to be inferred from his acts.

"There are no means of estimating one's intentions by the declaration of an interested party in a suit, unless the act done and the means used by the party are such as one would naturally use in accomplishing the declared intention; and it does not appear from the evidence adduced that the accused ever used any means to communicate with the naval authorities, or that he ever performed one act that might lead to the supposition that he ever intended to return to the naval service.

"He was absent a period of five months and fourteen days, during which time he failed to communicate in any way with the naval authorities; he took passage to a distant point, discarded his uniform for civilian clothes, obtained employment while absent, and finally was apprehended and forcibly returned to the service by the civil authorities—all of which, in the opinion of the department, conclusively disproves his statement as to his intentions." C. M. O. 42, 1909, 5.

79. **Intent to desert**—Public statement of an intent to desert in the presence of other enlisted men is an offense. G. C. M. Rec. 23280.

80. **Same**—A mere declaration made by an enlisted man to another that he intends to desert, unaccompanied by any actual attempt to desert, or an attempt to entice, influence, or procure another to desert, does not constitute an offense. G. C. M. Rec. 23280.

81. **Letter and indorsements**—From Bureau of Navigation as evidence to prove "Desertion." *See* INDORSEMENTS, 2; LETTERS, 7.

82. **Limitation of punishment**—The increased limitation to punishment for "Desertion," as set forth in G. O. No. 77, October 5, 1908, is to govern only in those cases where the original desertion occurred subsequently to that date. C. M. O. 47, 1910, 10; 14, 1910, 7; 15, 1910, 7; 17, 1910, 6.

"If a man left his station and duty *before* October 5, 1908, then one year will be considered as the limit for confinement, if after October 5, 1908, the increased limit will apply." File 26504-29a, Sec. Navy, Nov. 7, 1908.

Limitation for deserters in case of voluntary surrender. C. M. O. 23, 1910, 4; 30, 1910, 8.

Limitation for deserters (in case of apprehension) who have been in service *less* than 18 months. C. M. O. 19, 1911, 4.

The graded limitation to punishment should always be observed. C. M. O. 2 1912, 4.

See NAVY REGULATIONS, 1913, R-900, for the present limitation of punishment.

83. **"Marine Recruiting Office"**—Desertion from. *See* DESERTION, 77.

84. **"Mark of Desertion."** *See* MARK OF DESERTION.

85. **Medals of Honor**—When forfeited by desertion. *See* MEDALS OF HONOR, 5.

86. **Midshipmen**—Charged with. C. M. O. 28, 1905.

87. **Minor.** *See* MINORS, 6.

88. **Money**—Release may not be secured through payment of—"Desertion," being a statutory offense, this department knows of no way by which persons guilty thereof may secure their release by payment of money. File 26516-180., J. A. G., July 27, 1915.

89. **Officers**—Charged with. C. M. O. 27, 1887, 13; 74, 1897; File 26251-6278; 26251-7233: 1; 26283-153: 1, Sec Navy, Jan. 5, 1911. *See also* DESERTION, 90, 91.

90. **Same**—If the department should conclude that the evidence is sufficient to support a reasonable inference of desertion, the officer may be entered on the rolls as a deserter. If the department concludes that the evidence indicates death instead of desertion, appropriate notation to that effect may be made on the records and his name entered in the Navy Register under the heading of "Deaths," with the explanation "(disappeared)," date, and "supposed to be dead." If the department does not wish to decide upon the evidence in its possession, whether the officer is dead or in desertion, it would be sufficient to enter upon the records after his name merely the word "disappeared." In any event, a successor to such officer could be nominated by the President and confirmed by the Senate. There is nothing in the law which requires the Secretary of the Navy to declare the officer a deserter, and, even should he take such action, the officer could not legally be dropped from the rolls without sentence of

Digitized by Google

court-martial, unless he be superseded by the appointment of a successor and the number of officers in his grade thereby filled. (File 26283-153: 1, J. A. G., Dec. 16, 1910.)

In accordance with the foregoing opinion, the department directed, January 5, 1911, that the name of this officer be entered on the records of the Bureau of Navigation and in the Navy Register, as "disappeared," with the following explanation: "Absent without authority since June 6, 1910. Whereabouts unknown," and directed that the nomination of a successor be prepared. File 26283-153: 1, Sec. Navy, Jan. 5, 1911.

91. **Same**—Declaring an officer a deserter from the Navy does not separate him from the service. An officer nominated and confirmed to fill his position does, however. Charges and specifications were preferred against an officer who deserted, at the time of desertion, and sent to a permanent general court-martial for trial where they are at present awaiting developments. The filling of his place does not divest the jurisdiction of a naval court-martial to try him upon the charge which had previously been preferred, and if the officer is at any time apprehended he may be tried for desertion. When apprehended the officer should be immediately served with a copy of the charge and specification against him, and notified that he is to be tried by general court-martial at the navy yard where the permanent general court-martial is sitting. It is desirable that he be tried by this general court martial and should be transferred there when apprehended. The statute of limitations is not involved in this case, inasmuch as the charge and specification were preferred by the department, and sent to the general court-martial in ample time to assure his trial whenever he may be apprehended. An officer who deserts should be apprehended, if possible, in order to obtain a judicial decision of value upon the question of naval jurisdiction which would serve as definite guide in future cases, and as a deterrent to others who might be inclined to follow such a course. File 26251-6278, J. A. G., Aug. 17, 1915. *See also* DISMISSAL, 24.

92. **"Official records"**—As evidence in proving "Desertion." C. M. O. 28, 1904, 3-4. *See also* CERTIFICATES, 3-5; DESCRIPTIVE LISTS, 1, 3, 4; OFFICIAL RECORDS, 1; REPORTS OF DESERTERS RECEIVED ON BOARD; SERVICE RECORDS.

93. **Pardon.** *See* DESERTERS, 17-20; DESERTION, 41; PARDONS, 2, 11, 37, 40, 52, 54.

94. **Pay**—Sentence approved under I-4893 and G. O. 110. C. M. O. 6, 1915, 15. *See also* NAVAL INSTRUCTIONS, 1913, I-4893.

95. **Same**—If accused is acquitted of desertion and such acquittal is approved, he is entitled to pay during period of unauthorized absence. C. M. O. 14, 1914, 4. *See also* PAY, 1, 2.

96. **Same**—Forfeiture of pay and allowances by desertion follows from the conditions of the contract of enlistment, which is for faithful service and does not, therefore, extend to benefits earned under prior enlistments unless so provided by law. File 26291-23, Sec. Navy, Nov. 13, 1909.

97. **Paymaster**—Charged with. C. M. O. 27, 1887, 13.

98. **Paymaster's clerk**—Charged with. G. O. 143, Oct. 28, 1869; C. M. O. 27, 1887, 13; 39, 1905, 1; 26, 1912; File 26251-7233:1.

99. **Period of unauthorized absence**—The following specification was held to be valid by the department: "In this, that on or about the fourteenth day of October, eighteen hundred and eighty-eight, the said ——— alias ———, a private in the United States Marine Corps, did, while attached to and serving as such at the marine barracks, navy yard, Brooklyn, New York, desert from the said barracks and from the United States Marine Corps." C. M. O. 89, 1890. *See also* C. M. O. 22, 1915, 4; ABSENCE, 10, 11. ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 29.

The following specification under a charge of "Desertion" was approved: "In that he, the said * * *, did on or about the 2d of July, 1821, desert from the U. S. S. *Peacock* while lying at Washington." This trial took place on board the U. S. frigate *Guerriere*. G. C. M. Rec. 384.

100. **Plea of guilty in a less degree than charged**—Save in exceptional cases, a court-martial should try the accused for the offense as charged, and a court very properly disregards the advice of the judge advocate recommending the acceptance of an accused's plea of guilty in a less degree than charged. C. M. O. 29, 1914, 6-7. *See also* JUDGE ADVOCATE, 123, 124; GUILTY IN A LESS DEGREE THAN CHARGED, 11.

101. **Plea, irregular**—Accused was charged with "Desertion." To the specification of the charge and the charge the accused in the first instance pleaded "guilty in a less degree than charged, guilty of absence without leave." The court having decided not to accept this plea it was subsequently modified so far as related to the charge, to that of "not guilty, but guilty of absence without leave." This action was proper, but the accused should, further, have excepted from his plea such words in the specification as characterize the offense of desertion, substituting where necessary "words describing the offense actually committed." C. M. O. 10 ,1897, 3.

Digitized by Google

102. **Prima facie case**—Defined—When the prosecution proves the unauthorized absence and the facts of apprehension and delivery of the accused, this is all that is required to sustain the charge of "Desertion" in the absence of evidence to the contrary. Or if the absence is of such duration or there are such other circumstances as to justify an inference that the accused intended permanently to abandon the service or terminate his pending contract of enlistment, this is sufficient even though he may have surrendered. In all these instances the evidence for the prosecution constitutes a prima facie case of guilt. C. M. O. 41, 1914, 3.
103. **Same**—Prima facie case established, the burden shifts to the accused. C. M. O. 30, 1910, 10; 10, 1912, 8; 16, 1913, 5; 41, 1914, 3. *See also* SERVICE RECORDS, 16.
104. **Same**—When conclusive—Where a prima facie case of "Desertion" has been established, if no defense is offered by the accused, or his defense is not sufficient to rebut the evidence of the prosecution and the natural inference to be drawn therefrom, the prima facie case established by the prosecution becomes conclusive and the accused should be found guilty of "Desertion." (C. M. O. 30, 1910, 10; 10, 1912, 8; 14, 1913, 4; 16, 1913, 5; 34, 1913, 7; 29, 1914, 8.) C. M. O. 41, 1914, 4. *See also* SERVICE RECORDS, 16.
105. **Prima facie evidence.** *See* C. M. O. 31, 1915, 14–16. *See also* SERVICE RECORDS, 16.
106. **Procuring another to desert**—Is an offense. G. C. M. Rec. 2328O.
107. **Proof of**—In order to establish the commission of the specific offense of "Desertion," both the fact of unauthorized absence and the specific intent permanently to abandon the naval service or, at least, to terminate the pending contract of enlistment, must be proved. C. M. O. 49, 1910, 8–9; 10, 1911, 6; 16, 1913, 5; 22, 1913, 3; 41, 1914, 3.
108. **Same**—Intent. *See* DESERTION, 58–78.
109. **Same**—By documentary evidence. *See* CERTIFICATES 3–5; DESCRIPTIVE LISTS, 1, 3, 4. OFFICIAL RECORDS; REPORTS OF DESERTERS RECEIVED ON BOARD; SERVICE RECORDS.
110. **Same**—Where it appears that a recruit, after having been duly enlisted and executed the required oath, was sent home with instructions to return the next day, but instead of returning he "received an offer of a good job and went to work," and subsequently enlisted in the Marine Corps, concealing his previous enlistment, it was held that, as a matter of law, the accused was guilty both of "Desertion" and "Fraudulent enlistment." The testimony of the accused that he did not understand he was bound until he had been put in uniform and ordered to duty indicate an ignorance of law and not of fact. Such statements may be made the basis of a recommendation to clemency, but do not constitute a legal defense, as ignorance of the law furnishes no exemption from criminal responsibility. File 26251–4200, Sec. Navy, Jan. 25, 1911; DESERTION, 77.
111. **Same**—A fireman, second class, U. S. Navy, was tried before a general court-martial on the charge of "Desertion" and found not guilty.

The prosecution introduced evidence to prove that the accused received leave of absence while his ship, the U. S. S. *Arkansas*, was at Newport, R. I., for forty-eight hours which expired August 11, 1913, and that the accused failed to return at the expiration of this liberty and remained absent without leave until he was returned on board the receiving ship at New York by the civil authorities on February 11, 1914, after an unauthorized absence of six months.

The prosecution thus made out a clear prima facie case of "Desertion" against the accused, and it is established that a prima facie case is conclusive in the absence of evidence satisfactorily rebutting same. (C. M. O. 10, 1912, 8; 16, 1913, 5; 34, 1913, 7.)

The accused testified that he was too sick to return to his ship when his leave expired; that his doctor sent a telegram to his commanding officer so stating, and that thereafter he attempted to report on the U. S. S. *Washington*, at the navy yard, New York, N. Y., and was told to go to the Naval Hospital, New York, which he did; that the medical officer at the hospital stated he was not in need of treatment and that he returned to the U. S. S. *Washington*, but was not taken up; and that about September 8, 1913, tiring of attempting to report without success he left the navy yard, discarded his uniform, obtained employment, and remained away until arrested by the civil authorities in civilian clothing, and returned to the Navy as a prisoner on February 11, 1914.

His story was corroborated by a letter received by him from the commanding officer of the U. S. S. *Arkansas*, and an indorsement thereon by the medical officer of the hospital, which were introduced in evidence, and by one witness who testified that the accused was at the navy yard, New York, N. Y., and on board the U. S. S. *Washington* at the time claimed by him.

In addition the sister of the accused testified that he told her "he had reported and they said they didn't know what to do with him." This latter testimony was objectionable, not only as being clearly hearsay, but also as falling under the rule excluding self-serving declarations. (12 Cyc. 426.)

Digitized by Google

Even if the court was convinced that the absence of the accused was excusable and satisfactorily explained up to the time he left the navy yard, about September 8, 1913, after making his two unsuccessful efforts to report, nevertheless there are still five months of unauthorized and unexplained absence, aggravated by other acts. The accused on the stand stated that he made no efforts during this period to communicate with the naval authorities, and that he changed his address without notifying them, that after having twice unsuccessfully attempted to report on the U. S. S. *Washington*, he left the navy yard without permission from anyone in authority, laid aside his uniform, and obtained employment; that for five months he made no attempt to return to his ship despite the fact that the ship was at the navy yard, New York, for a greater portion of the period he was absent without authority; and he does not claim that he ever replied to his commanding officer's letter.

If the accused at any time during his unauthorized absence had the intent permanently to abandon the service, that was all that was necessary to establish his guilt, and it is immaterial whether the intention was formed at the time of leaving the ship or at a subsequent date. (C. M. O. 30, 1910, 10.) The law judges a man's intention by his actions, and the fact that the accused, even admitting that he made a *bona fide* attempt to rejoin the naval service prior to September 8, 1913, thereafter failed to communicate with, and remained absent from, the service without authority for five months, changing his address without notice during that period, and finally being arrested and returned by the civil authorities, is sufficient evidence of his intention to desert. All the actions of the accused during this period clearly indicate that he intended to remain permanently absent and that he never would have returned if he had not been apprehended and brought back by the civil authorities.

An intent to desert is inferred from the circumstances and duration of unauthorized absence (C. M. O. 22, 1913, 3), and the court in this case should have found the accused guilty of "Desertion" as charged.

While, as thus stated, the department considers that the court should have found the accused guilty of "Desertion," certainly he was beyond cavil, guilty of absence over leave, yet the court even acquitted him of this offense.

The department disapproved the findings and acquittal. C. M. O. 29, 1914, 8–10.

112. **Record**—Complete records are necessary in desertion cases. C. M. O. 2, 1912, 4.

113. **Records of post**—"Desertion" proved by. C. M. O. 37, 1909, 4. *See also* EVIDENCE, DOCUMENTARY, 19.

114. **Reenlistment of deserters**—Sections 1420, 1996, 1998, and 1624, as amended by act of August 22, 1912 (37 Stat. 356), permits the Secretary of the Navy to enlist in naval service men who have deserted from military or naval service in time of peace, irrespective of a pardon restoring the rights of citizenship heretofore forfeited by reason of desertion in time of peace, since it only prohibits the enlistment of men who have deserted *in time of war*.

Therefore the law as it now exists authorizes the reenlistment of men who have deserted the military or naval service of the United States in time of peace in the discretion of the department, without issuance by the President of an executive pardon restoring the rights of citizenship to such men, and, since the question of enlistment comes within the province of the Bureau of Navigation, the request of a man for reenlistment under these conditions is subject to the action of that bureau. File 26507–102, J. A. G., Oct. 12, 1912. *See also* File 14535–1088, J. A. G., Nov. 4, 1911; DESERTERS, 13.

It is "contrary to the practice of the War Department to grant permission to reenlist in the cases of persons who have forfeited their rights of citizenship by reason of their conviction by a general court-martial of desertion until after the rights thus forfeited have been restored." File 26282–241, Sec. Navy, Nov. 9, 1915.

115. **Reports of Deserters Received on Board.** *See* REPORTS OF DESERTERS RECEIVED ON BOARD.

116. **Restoration to duty**—Effect of. *See* DESERTERS, 24.

117. **Retention in service prior to act of August 22, 1912** (37 Stat. 356)—Where the members of a general court-martial recommended an accused, who deserted prior to August 22, 1912, to the clemency of the revising power, the department stated in part:

In view of the fact that the records of the department show that the accused was duly tried and convicted of "Desertion" and was dishonorably discharged from the Army therefor, which conviction according to section 1996, Revised Statutes prohibits such a person from "holding any office of trust or profit under the United States," the department can not exercise such clemency as would permit the retention of this man in the service, but in consideration of the unanimous recommendation of the members of the court to clemency based upon the accused's previous service in the Marine Corps,

Digitized by Google

and the evidence as to character given by witnesses, the confinement, with corresponding forfeiture of pay and allowances, were remitted, and it was directed that the accused be released from arrest and discharged from the service in conformity with the remaining terms of his sentence. C. M. O. 26, 1910, 5. *See also* DESERTION, 24.

118. **Rewards.** *See* REWARDS.

119. **Sentence**—Should include dishonorable discharge. *See* DISHONORABLE DISCHARGE, 9.

On May 30, 1821, the following sentence was adjudged by a general court-martial on "desertion": "To be punished with twenty-five lashes with the Cat o' Nine Tails on his bare back at such time and place as may be ordered." G. C. M. Rec. 378.

Also this sentence on July 19, 1821: "Receive fifty lashes at the gangway of the Peacock," etc. G. C. M. Rec. 3 3.

120. **Service record.** *See* SERVICE RECORDS.

121. **Ship, desertion from**—A charge alleging the "Desertion from a ship about to sail on an extended cruise," is insufficient as it is essential that the charge alleged desertion from the United States naval service. C. M. O. 49, 1910, 8–9.

122. **Specific intent.** *See* DESERTION, 58–78.

123. **Statement of accused to commanding officer**—A statement of an accused, charged with "Desertion," made by him before his commanding officer when his offense is being investigated at the mast, is uniformly admitted in evidence when he is tried for the offense. C. M. O. 43, 1906, 2. *See also* CONFESSIONS, 9, 24; DESERTION, 125.

124. **Same**—The commanding officer of an accused charged with "Desertion," was the only witness for the prosecution and testified as follows:

"The accused was brought into my office on the twenty-seventh day of September last by a detective, charged with having deserted from the Marine Corps in August, nineteen hundred and one; he was in Army uniform, infantry, and stated or admitted that he had enlisted in the Army, in Philadelphia, four or five days before, I think September second. He admitted desertion from the Marine Corps, and stated in effect that he had been afraid to return on account of the penalty."

The specification supporting the charge preferred against the accused alleges that while serving at the League Island Barracks, he deserted therefrom, and from the Marine Corps, on or about August 19, 1901, and continued in desertion until he was apprehended by the civil authorities, and delivered at said barracks September 27, 1902.

No further testimony or evidence of any kind was introduced by either the prosecution or the defense, and the accused had no statement to make before the court.

The court, after deliberating upon the evidence adduced, found the specification of the charge "proved" and that the accused was of the charge "guilty," and sentenced him to the punishment usually awarded in such cases, viz, confinement for one year with the customary penalties and forfeitures, and dishonorable discharge at the expiration of said period.

While it is true that the testimony of the commanding officer above quoted shows that the accused was delivered to him by the civil authorities "charged with having deserted from the Marine Corps in August, nineteen hundred and one," and that the accused "admitted desertion from the Marine Corps," it nowhere appears in said testimony when or from what station this man deserted. It would seem that these facts might have been established by further questioning of the witness, supplemented if necessary, by other evidence usually obtainable in such cases.

The finding of "proved" without qualification is clearly not justified by the evidence before the court; and although the accused was shown to have admitted that he did desert from the Marine Corps, the terms of such admission as testified to by the commanding officer are too general and indefinite to establish the particular offense described in the specification, for the commission of which this man was brought to trial.

The proceedings, finding, and sentence in the foregoing case were disapproved. C. M. O. 212, 1902.

125. **Statement by third party in presence of accused**—Where a witness testifies "the police officer stated that the accused gave himself up," and it is proved that such statement was made in the presence of the accused, it is admissible in evidence not being hearsay. C. M. O. 214, 1902. *See also* CONFESSIONS 24; DESERTION 123.

126. **Statute of limitations**—Defense of. *See* STATUTE OF LIMITATIONS.

127. **Statutory offense**—Desertion is a statutory offense.

128. **Surrender**—As rebutting the inference of specific intent to desert. C. M. O. 16, 1913, 5; 34, 1913, 7. *See also* DESERTION, 68, 69, 73, 74, 102.

Digitized by Google

129. **Same**—The dishonorable discharge included in the sentence of an accused convicted of "Desertion" was remitted by the department in view of the fact that he voluntarily surrendered himself. C. M. O. 49, 1892.
130. **Same**—It is not true that the voluntary surrender of an absentee is sufficient in itself to make it impossible to prove "Desertion;" for although the fact that a person surrenders himself as a deserter after but a brief absence may properly be regarded as an extenuating circumstance, such fact is not conclusive as against "Desertion." C. M. O. 20, 1899, 1. *See also* C. M. O. 6, 1894; MARK OF DESERTION, 2.
131. **Uniform, discarding**—As an inference of specific intent to desert. C. M. O. 42, 1909, 5; 47, 1910, 9. *See also* DESERTION, 73, 78, 111.
132. **War**—Desertion in time of war—An accused was found guilty, by plea, of "Desertion in Time of War" and subsequent fraudulent enlistment. The offense was charged as desertion in time of war because such was the fact, and for the further reason that otherwise the case would have fallen within the provisions of the statute of limitations (Article 62 of the Articles for the Government of the Navy). The punishment awarded, imprisonment "for a period of ten (10) years at hard labor," with corresponding penalties and forfeitures, is severe; but inasmuch as the offense was committed in time of war, a much graver penalty, even that of death, might have been imposed, and the court has by such sentence, therefore, not exceeded its powers. It appears, however, that, while technically desertion in time of war, the offense was committed at the navy yard, New York, and accordingly it was not a case of desertion in the face of the enemy.

    The sentence was approved, but in view of the fact that, while the accused deserted in time of war and thus became subject to the extreme penalties, he actually deserted from a vessel at the navy yard, New York, under circumstances which warrant the department in mitigating the punishment imposed by the court, the same was mitigated. C. M. O. 185, 1902, 1-2. *See also* DESERTION, 28, 29.
133. **Same**—Desertion after the conclusion of the protocol with Spain of August 12, 1898, but prior to the signing of the treaty of peace or ratification thereof is "Desertion in Time of War." The date of the signing of the treaty is the earliest on which the War with Spain may be considered as to have terminated. File 14535-719, Sec. Navy, May 24, 1909. *See also* TREATY OF PEACE WITH SPAIN, 2.
134. **Same**—Desertion after December 10, 1898, was not "Desertion in Time of War." The treaty of peace signed December 10, 1898, while not ratified until April 11. 1899, was effective from date of signing as far as exercise of sovereign powers was concerned. File 6642-03, Sept. 1, 1903. *See also* File 8693-01, Nov. 23, 1901; 6652, Jan. 24, 1907.
135. **Same**—Persons convicted of "Desertion" in time of war can not have their citizenship rights restored except by pardon. *See* DESERTION, 29.
136. **Same**—Penalty of death. *See* CHARGES AND SPECIFICATIONS, 47; DESERTION, 132, 137.
137. **Same**—"Desertion in time of war" is one of the most serious offenses which can be committed by a person in the naval service. It involves a total disregard by the offender of his sworn contract of enlistment, and has in all times and countries aroused the indignation and animadversion of patriotic citizens, and which in the United States Navy may be tried by general court-martial and punished by death and is not protected by the statute of limitations. File 19974-5, Sec. Navy, Nov. 17, 1915. *See also* WAR, 22.
138. **Warrant officers**—Charged with. C. M. O. 15, 1903; 94, 1906; 96, 1906; 80, 1907; 17, 1911. *See also* File 28478-37, September, 1916.

DESIGNATION.

1. **Officers**—All official communications intended for officers holding positions with recognized titles shall be addressed to them by title and not by name, as "The Secretary of the Navy," "Bureau of Navigation," "The Commandant," "The Commander in Chief, —— Fleet (or Squadron)," "The Commander, —— Squadron (or Division)," "The Commanding Officer," "Major General Commandant." (I-5322(2).) File 9160-5990, Sec. Navy, Nov. 15, 1915. *See also* OFFICIAL COMMUNICATIONS.

DESIGNATION OF ACCUSED.

1. **Arraignment**—Should include name and designation of accused. C. M. O. 49, 1910, 4.
2. **Sentence**—Must include name and designation of accused. C. M. O. 37, 1909, 3; 42, 1909, 6; 55, 1910, 8; 30, 1910, 7; 1, 1913, 5; 20, 1913, 3; 42, 1914, 4; 14, 1915, 2; 38, 1916.
3. **Same**—Forms of sentence published in court-martial orders indicate that sentence should include. C. M. O. 42, 1909, 3; 55, 1910, 7; 14, 1910, 7; 15, 1910, 8; 29, 1914, 7; 42, 1914, 5.
4. **Same**—Name and designation of accused in sentence must be in handwriting of judge advocate. C. M. O. 42, 1914, 4.

Digitized by Google

DETECTIVES.
1. **Arresting deserters.** *See* CIVIL OFFICERS, 2; DESERTERS, 2–6.
2. **Employment**—By Government. *See* CIVIL OFFICERS, 2; DESERTERS, 2; REWARDS, 11, 12.
3. **Rewards**—Payment of rewards for arrest of deserters. *See* REWARDS, 11, 12.

DETENTION BARRACKS.
1. **Established.** *See* File 26285-64:3, J. A. G., July 19, 1911.

DENTENTIONERS.
1. **Status of**—Detentioners in confinement are "in confinement under sentence" of court-martial. They are actually confined or under guard, and all time spent under these conditions is credited on the term of confinement specified in the sentence and action of the convening authority. They have been held by the Comptroller of the Treasury to be naval prisoners, and entitled to the allowances on discharge provided by law for such prisoners. [*See* 178 S. & A. Memo., 3845.]
   After a detentioner or naval prisoner is restored to duty on probation he is not any longer "in confinement under sentence," but is on duty, receives full pay and allowances, and execution of the sentence is specifically suspended during the probationary period. File 26251-6297:9, Sec. Navy, Dec. 28, 1914; C. M. O. 6, 1915, 11. *See also* File 26287-128, Mar. 28, 1912.
2. **Same**—Enlisted men under detention are undergoing a modified form of imprisonment, being deprived of their liberty in accordance with the terms of general court-martial sentences.
   The detention barracks is a "prison," and the detentioners are "prisoners" within the meaning of the appropriation "Pay, miscellaneous."
   Detentioners are restored to duty on probation if their enlistments expire before expiration of full term of confinement to which sentenced.
   The uniform prescribed for the detentioner is the regular service uniform, in accordance with the spirit and purpose of the detention system. The Secretary of the Navy may prescribe such uniform as he desires for prisoners.
   The necessary clothing, etc., for detentioners is paid for by them from the remittance of the required amount therefor, from the forfeiture of pay adjudged by the sentence; if not sufficient pay due, then the appropriation "Pay, miscellaneous," is chargeable therewith.
   Clothing furnished a detentioner from "Pay, miscellaneous," is returned in the barracks for reissue. But the discharged detentioner is furnished suitable civilian clothing; if discharged to duty, he is required to obtain necessary clothing and small stores and pay for it from his pay; if his pay is insufficient therefor, the cost of such overissue while on probation should be treated as authorized by Navy Regulations, 1909, R-678(2) [Navy Regulations, 1913, I-1923(2)]. File 26278-128, Mar. 28, 1912.

DICTAPHONE.
1. **Office of Judge Advocate General**—Use of, in. File 23275-15, J. A. G., Feb. 3, 1916.

DIPLOMATIC OFFICERS.
1. **Naval officers**—If any officer of the Navy accepts or holds an appointment in the Diplomatic or Consular Service of the Government, he will be considered as having resigned his place in the Navy, and it shall be filled as a vacancy. (Sec. 1440, R. S.) (R-1533.) *See* RETIRED OFFICERS, 26.
2. **Orders to commanding officers.** *See* File 5542-00.
3. **Retired naval officers**—By section 1440 of the Revised Statutes, officers of the Navy are forbidden to hold office in the Diplomatic or Consular Service, and this includes retired officers of the Navy. File 12-4, Nov. 5, 1906, quoted in File 27231-3, J. A. G., Nov. 1, 1909. *See also* RETIRED OFFICERS, 26.
4. **Statements of a foreign ambassador**—As to the construction of the laws of his country. *See* ATTORNEY GENERAL, 11.

DIRECTORY REGULATIONS. *See* REGULATIONS, NAVY, 29.

DIRECTORY STATUTES. *See* ADVISORY STATUTES, 1; STATUTORY CONSTRUCTION AND INTERPRETATION, 32.

DIRIGIBLE HANGAR. *See* File 26842-8:14, J. A. G., July 15, 1916.

DISABILITIES.
1. **Citizenship.** *See* DESERTION, 23–29; DISHONORABLE DISCHARGE, 5, 6.
2. **Civil disabilities**—Resulting from conviction of "Desertion." C. M. O. 36, 1901, 2. *See also* DESERTION, 23–29; DISHONORABLE DISCHARGE, 5, 6.
3. **Retirement**—For physical disability. *See* RETIREMENT OF OFFICERS, 40.

Digitized by Google

DISAPPEARANCE.
1. **Enlisted men.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 18–21.
2. **Officers.** *See* DESERTION, 89–91.

DISAPPROVAL.
1. **Convening authority disapproves**—No sentence can be carried into effect after disapproval of convening authority. *See* CONVENING AUTHORITY, 21; CRITICISM OF COURTS-MARTIAL, 35; REVIEWING AUTHORITY, 19; SECRETARY OF THE NAVY, 25; SENTENCES, 35.

DISBARMENTS.
1. **Civilian attorney**—Threatened by department—Claims of a civilian attorney against certain officers for services rendered in securing legislation in their behalf. File 17789–12:1, J. A. G., Feb. 25, 1910. *See also* DEBTS, 18.

DISBURSING OFFICERS. *See also* EMBEZZLEMENT; PAY OFFICERS.
1. **Auditor for the Navy Department**—Authority of, to order payments made. *See* DEATH GRATUITY, 1.
2. **Death Gratuity.** *See* DEATH GRATUITY, 1.
3. **Designation of.** *See* File 9160–5990, Sec. Navy, Nov. 15, 1915.
4. **Hospital Ship.** *See* HOSPITAL SHIPS, 3.
5. **Liability of.**—A class of cases exists in which disbursing officers have, from necessity, felt compelled to trust unbonded clerks with Government funds notwithstanding the absence of any law or regulation authorizing such action. Even in such cases the pay officer has been held responsible. (*See* C. M. O. 6, 1911.) File 26251–11756:4, Sec. Navy, Apr. 24, 1916.
6. **Negligence of**—Constitutes embezzlement. *See* EMBEZZLEMENT, 7, 18.
7. **Repeated travel.** File 9160–5990, Sec. Navy, Nov. 15, 1915.
8. **Responsibility of regarding payments**—A disbursing officer is not responsible for illegal payments made by him in good faith and in accordance with the certificate of another officer as to the facts. An appropriation being under the control of the head of a department, it is within the latter's power to prescribe rules to govern the disbursing agent in making disbursements therefrom. (9 Comp. Dec., 545; *see also* Smith *v.* U. S., 23 Ct. Cls., 452; 21 Comp. Dec., 314; Comp. Dec. Nov. 21, 1914, File 26254–1672; 21 Comp. Dec., 357; File 26254–1451:5, Oct. 31, 1914; File 26254–1451:11, Apr. 12, 1915; 30 Op. Atty. Gen., —.)
9. **Shortage of public funds**—Where a shortage of public funds occurs through the apparent fault of a disbursing officer, he should be brought to trial therefor by general court-martial with a view to having his responsibility established and the Government protected against subsequent claims by the officer for reimbursement. File 26251–11756:4, Sec. Navy, Apr. 24, 1916.
10. **Superior officer**—The power to require a disbursing officer to make a payment is possessed only by the officer's superior. File 26543–66, Sept. 8, 1911. *See also* R. S. 285; Smith *v.* U. S., 24 Ct. Cls., 215; 10 Comp. Dec. 635.
11. **Unbonded subordinate**—A disbursing officer of the United States could not justify his conduct in voluntarily placing unlimited trust in an unbonded subordinate, when the safety of Government money is concerned, and he is confessedly ignorant of the character of that subordinate's private life, particularly when the subordinate was in fact living a life of dissipation and immorality at the very places where he was on duty with the disbursing officer. File 26251–11756:4, Sec. Navy, Apr. 24, 1916.

DISCHARGE.
1. **Bad-conduct discharge.** *See* BAD-CONDUCT DISCHARGE.
2. **"Certificate of discharge."** *See* CIVIL WAR SERVICE, 1.
3. **Character of**—A discharge, other than dishonorable or bad-conduct, is not considered as a punishment, and it is objectionable for a naval court-martial to adjudge a discharge other than one of the aforementioned as part of the sentence. C. M. O. 30, 1910, 10.
4. **Citizenship rights**—Desertion. *See* DESERTION, 23–29; DISHONORABLE DISCHARGE, 5, 6.
5. **Same**—Offenses other than desertion. *See* DISHONORABLE DISCHARGES, 5, 6.
6. **Conditional discharge.** *See* DISCHARGE OBTAINED BY FRAUD.
7. **Continental limits of United States**—Bad-conduct discharge within. *See* BAD-CONDUCT DISCHARGE, 4.
8. **Convenience of enlisted man**—Receives an ordinary discharge. *See* ORDINARY DISCHARGES, 1, 2.

Digitized by Google

9. **Convict**—And fugitive from justice discharged as undesirable. *See* CIVIL AUTHORITIES, 12; CONVICTS, 2; FUGITIVE FROM JUSTICE.
10. **Debt**—Enlisted men discharged in debt. *See* BAD-CONDUCT DISCHARGE, 3; DEBTS, 7; PAY, 87.
11. **"Discharged," "Dismissed," "Wholly retired"**—Defined and compared. File 26260-697, 1392, J. A. G., June 29, 1911, p. 26. *See also* OFFICERS, 38.
"The word 'discharged' is properly limited in its application to those who have enlisted for definite periods.' (Emory *v.* U. S., 19 Ct. Cls., 254, 262), and unless qualified by other words, as, for example, 'dishonorable' discharge, 'bad-conduct' discharge, discharge 'without honor,' it does not carry with it any stigma of disgrace or punishment." File 26260-1392,697, J. A. G., June 29, 1911, pp. 25-25½.
12. **Dishonorable discharge.** *See* DISHONORABLE DISCHARGE.
13. **Foreign countries.** *See* BAD-CONDUCT DISCHARGE, 4.
14. **Fraud**—Discharge obtained by fraud. *See* DISCHARGE OBTAINED BY FRAUD.
15. **Fugitive from justice**—And convict discharged as undesirable. *See* CIVIL AUTHORITIES, 12; CONVICTS, 2; FUGITIVE FROM JUSTICE.
16. **Honorable discharge.** *See* HONORABLE DISCHARGE.
17. **Man**—An enlisted man can not, by his own act, discharge himself. File 22724-18, J. A. G., Dec. 4, 1911.
18. **Ordinary discharge.** *See* ORDINARY DISCHARGES.
19. **Pay**—Discharge operates as remission of unexecuted loss of pay adjudged by court-martial sentence. *See* BAD-CONDUCT DISCHARGE, 3; DEBT, 7; PAY, 87.
20. **Purchase**—Discharge by purchase. *See* PURCHASE, DISCHARGE BY.
21. **Remission of unexecuted portion of loss of pay by discharge.** *See* BAD-CONDUCT DISCHARGE, 3; DEBTS, 7; PAY, 87; SET OFF.
22. **Request**—Discharge by request. *See* ORDINARY DISCHARGES, 2.
23. **Revocation of**—Discharge obtained by fraud. *See* DISCHARGE OBTAINED BY FRAUD.
24. **Same**—And substitution of another, after issuance. File 1561, J. A. G., Apr. 27, 1905; 7657-214, J. A. G., Feb. 17, 1914. *See also* REVOCATION, 7.
25. **Same**—Action on the general court-martial case of an enlisted man was withheld pending his incarceration in the Government Hospital for the Insane. The proceedings were subsequently set aside in view of the recommendation of medical survey, account insanity. Discharge ordered by department, and subsequently the discharge order was revoked by the department. G. C. M. Rec. 23312.
26. **Undesirable discharge.** *See* UNDESIRABLE DISCHARGE.
27. **"Without honor."** *See* DESERTION, 24; DISCHARGE, 11.

DISCHARGE OBTAINED BY FRAUD.

1. **False confession of murder**—A general court-martial prisoner made a false confession of murder. The department, on the request of the civil authorities, remitted the unexecuted period of confinement and dishonorably discharged the man from the service. This man later repudiated his confession, and an investigation proved that he had lied. The civil authorities requested that the Navy Department resume jurisdiction over the man. The question was referred to the Attorney General, who, in an opinion rendered Feb. 8, 1910 (File 26251-2798:8), held that the discharge fraudulently obtained might be revoked by the department, that the man was still an enlisted man in the Navy, his status not having been changed by the discharge issued to him in the manner stated. File 26251-2798:8. *See also* Com. *v.* Halloway, 44 Penna., 210, 219; 16 Op. Atty. Gen., 349; 28 Op. Atty. Gen., 170; File 7657-159, J. A. G., Aug. 10, 1912.
2. **Promise to reenlist**—Where an enlisted man extends his enlistment, but before such extension takes effect he obtains a cancellation thereof upon condition that he would reenlist immediately upon discharge from his current enlistment, but fails to so reenlist, the discharge may be canceled and the man declared a deserter. If apprehended he may be tried by court-martial both for "desertion" and "conduct to the prejudice of good order and discipline." (*See* File 7657-159.) The canceling of the extension of enlistment in this case was conditional, the condition being express, and the failure to comply therewith operated to restore his former status as fully as though the extension of his enlistment had never been canceled and the discharge issued. C. M. O. 6, 1915, 9-10. *See also* File 7657-159, J. A. G., Aug. 10, 1912; 7657-324; 7657-174; 26251-11394, Sec. Navy, Jan. 11, 1916; G. C. M. Rec. 31501; 28 Op. Atty. Gen., 170.
3. **Revocation of.** *See* DISCHARGE OBTAINED BY FRAUD, 1, 2.

Digitized by Google

DISCIPLINE.

1. **Adversely affected.** C. M. O. 25, 1915, 1, 2.
2. **Definition**—In a Congressional committee report of January 22, 1819, the word "discipline" is repeatedly used in the sense of instruction and training. For example, references are made to "discipline or military instruction"; to "the adoption of a system of military discipline for the militia, which would produce the effect contemplated by the first proposition," viz, "that the whole male population of the United States of the proper age should be trained to the use of arms"; to "discipline evolutions"; to the necessity that "our militia be instructed"; to "an improvement in tactics" on the part of the professed soldier, and the necessity that the citizen "perfect himself in the same arts and discipline"; to the fact that "military discipline consists in the observance of a number of minute particulars, which to the novitiate in arms have no apparent object, but which forms the links of a beautiful and connected system"; to the necessity of "a course of discipline during the period of non-age" in order to diffuse "an adequate knowledge of the art of war." File 8124-55, J. A. G., Oct. 17, 1916, p. 5.
3. **Same**—Defining the word "discipline" as used in a certain statute a civil court stated: "The word 'discipline' as there used means 'system of drill,' 'systematic training,' 'training to act in accordance with established rules, accustoming to systematic and regular action.' *See* Webster's New International Dictionary, and *also* 27 Cyc. 496." (State *v.* Peake, 22 N. D. 457, 40 L. R. A. (N. S.) 354, 135 N. W. 197.) File 8124-55 J. A. G., Oct. 17, 1916, p. 6.
4. **Same**—"By the term 'discipline' as used in the Constitution of the United States, article 1, section 8, is meant 'system of drill.'" (27 Cyc. 496.) File 8124-55, J. A. G., Oct. 17, 1916, p. 6.
5. **Disappears**—"All discipline in the American Navy disappears where such offenses [using abusive language toward his commanding officer] as the accused has been found guilty of are not met with condign punishment." C. M. O. 26, 1913.
6. **Disobedience of orders**—As affecting discipline. *See* DISOBEDIENCE OF ORDERS, 4.
7. **Disrespect to superior officer**—Strikes at root of military discipline. C. M. O. 13, 1915, 2.
8. **General court-martial and court of inquiry records and questions of discipline**—Referred to Bureau of Navigation. *See* BUREAU OF NAVIGATION, 7.
9. **Ignorance of military discipline**—Disaster caused by. C. M. O. 37, 1915, 9.
10. **Obedience**—It has been repeatedly recognized by the courts that the first duty of a military man is obedience and that without this there can be neither discipline nor efficiency. C. M. O. 37, 1915, 7.
11. **"Pernicious influence upon."** C. M. O. 22, 1915, 9.
12. **Prompt punishment**—Certainty of prompt punishment is more conducive to discipline than punishment deferred long after the offense. C. M. O. 10, 1915, 6. *See also* COURT, 117.
13. **Respect and confidence**—Of subordinates in the integrity, ability, and responsibility of their superiors is the highest incentive to discipline. C. M. O. 36, 1915, 2.
14. **Severity**—Should not be mistaken for discipline. G. O. 168, Jan. 6, 1872.
15. **Ship**—C. M. O. 14, 1879, 3.
16. **Strict**—The discipline of the naval service must be strict, the tribunals for its enforcement must be summary, and their legal sentences should be carried into execution without regard to technicalities which do not affect the substantial rights of persons or the precedents of the service. G. O. 162, Mar. 25, 1871.
17. **Subversive of**—An unbecoming attitude of senior officers toward subordinate officers is subversive of good discipline. C. M. O. 41, 1915, 9–10. *See also* DISOBEDIENCE OF ORDERS, 4.
18. **Suffers**—Where guilty go unpunished. C. M. O. 49, 1915, 8. *See also* C. M. O. 44, 1915, 2.
19. **Summary court-martial**—Because the summary court-martial sentencing an accused to extra police duties was considered illegal by the commander in chief and set aside by the Secretary of the Navy does not relieve the accused from responsibility when he refuses to obey the order of his superior officer. C. M. O. 87, 1896.
20. **"System of discipline"**—The naval appropriation act of August 29, 1916, provides that the Naval Militia " will be subject to the *'system of discipline'* prescribed for the United States Navy and Marine Corps." *Held*: That under this clause of the statute the laws and regulations of the Navy which provide for the enforcement of discipline by means of punishment do not apply to the Naval Militia. File 8124-55, J. A. G., Oct. 17, 1916, p. 1. *See also* SYSTEM OF DISCIPLINE; C. M. O. 37, 1916.
21. **Same**—"Rules and Discipline of Baron de Steuben"—Were adopted by Congress March 29, 1779, made applicable to the militia by act of May 8, 1792, continued in force

Digitized by Google

until the latter act was repealed by Congress May 12, 1890. They did not contain any provisions with reference to punishments, but related merely to the formation, equipment, maneuvers, and general training and instruction of troops. File 8124-55, J. A. G., Oct. 17, 1916, p. 3.

22. **Undue leniency**—"Undue leniency is as hurtful to the proper conduct of a military command as undue severity and should be carefully avoided." File 20971-19, Sec. Navy, Aug. 20, 1909.
23. **Same**—Commissioned officers hold in "light estimation the discipline of the Navy" when as members of a naval court-martial they adjudge a mild and inadequate sentence for a very serious offense. *See* ADEQUATE SENTENCES, 13.

DISCIPLINARY BARRACKS. *See* DETENTIONERS; SENTINELS, 13.

DISCONTINUANCE. *See* NOLLE PROSEQUI.

DISCREDITING NAVAL SERVICE.

1. **Officer.** C. M. O. 8, 1909.

DISCREDITING UNIFORM.

1. **Officer.** C. M. O. 4, 1909.

DISCRIMINATION AGAINST UNIFORM.

1. **State laws**—As a result of representations made by the department to the officials of the State of Virginia in connection with various complaints of discrimination against enlisted men of the naval service in public places of amusement in the vicinity of Norfolk, Va., there has been recently passed by the legislature of that State an act, which will be effective after June 18, 1916, providing:

"(1) That it shall be unlawful for any common carrier, innkeeper, or proprietor or lessee of any place of public amusement or entertainment, or any agent, servant, or representative of any such common carrier, innkeeper, proprietor or lessee as aforesaid, to debar from the full and equal enjoyment of the accommodations, advantages, facilities, or privileges of any public conveyance on land or water or any inn or of any place of public amusement or entertainment, any person in the Army, Navy, Marine Corps, or Revenue-Cutter Service of the United States, or of the National Guard or naval service of this State, or otherwise in the military or naval service of the United States, or of this State, wearing the uniform prescribed for him at that time or place by law, regulation of the service, or custom, on account of his wearing such uniforms or of his being in such service.

"(2) Any person who is debarred from such enjoyment contrary to the provisions of section 1 of this act shall be entitled to recover in an action on the case from any corporation, association, or person guilty of such violation, his actual damages and $100 in addition thereto; and evidence that such person debarred was at the time sober, orderly, and willing to pay for such enjoyment in accordance with rates fixed therefor for civilians, shall be prima facie evidence that he was debarred on account of his wearing such uniform or of his being in such service.

"(3) Any person violating any provision of this act shall be guilty of a misdemeanor."

(*See* File 23243-77: 5; *see also* File 23243-50 for copy of laws of United States, Massachusetts, New Hampshire, Minnesota, New Jersey, New York, Pennsylvania, and Rhode Island on this subject.) C. M. O. 9, 1916, 9.

In a case which arose in Rhode Island and in which the Navy was officially concerned a civil action for damages was brought by a chief petty officer against private parties, and at the request of the Navy Department the Attorney General instructed the United States attorney to assist in said proceedings, which grew out of a discrimination against the naval uniform. (File 5421-3. *See also* File 7657-330.) File 20392-612, J. A. G., Aug. 30, 1916. *See also* File 23243-78, Sec. Navy, Dec. 7, 1915; 5421-6, Jan. 22, 1907; 5763; 5012-55, J. A. G., July 5, 1915; 23243-79, July 29, 1916; 5012-63 (N. Y.); 21355-33; 2 (N. Y.); 5012-58:1, Sec. Navy, Nov. 3, 1916; C. M. O. 46, 1916.

2. **Uniformed enlisted men**—Not allowed on the dancing floor. File 23243-79, July, 1916.
3. **"White list"**—Of reputable places willing to serve men in uniform proposed as an effective means of preventing discrimination against uniform regardless of existing or prospective statutes. File 23243-78:3, J. A. G., Mar. 18, 1916.

DISEASES.

1. **Absence, unauthorized**—Diseases contracted during—G. O. 100, construed. *See* GENERAL ORDER No. 100, June 15, 1914; C. M. O. 3, 1917, 6.
2. **Immoral habits**—Diseases contracted by an officer in consequence of immoral habits. C. M. O. 40, 1889.

Digitized by Google

DISGRACE.

1. **Naval service**—By officer. C. M. O. 4, 1909; 8, 1909.
2. **Questions**—The answers to which might disgrace. *See* SELF-INCRIMINATION, 11, 12.

DISHONORABLE DISCHARGE.

1. **Allowances of marines**—If dishonorable discharge is adjudged in general court-martial sentence, loss of allowances should be adjudged. *See* ALLOWANCES, 3.
2. **Same**—Should be remitted if the dishonorable discharge is remitted. *See* ALLOWANCES, 4.
3. **Ambiguous**—Since there are several forms of discharge known to the naval service, courts-martial should designate in their sentences the character of the discharge adjudged. C. M. O. 49, 1910, 14-15. *See also* DISCHARGE, 3.
4. **Army**—If a man has been dishonorably discharged from the Army, he should be dishonorably discharged from the naval service when tried by general court-martial. *See* ARMY, 10.
5. **Citizenship**—Dishonorable discharge from the naval service does not cause forfeiture of citizenship under any law of the United States. What effect, if any, such discharge may have upon rights such as voting, under the laws of the State where the man resides, is a question within the jurisdiction of the local State authorities and not of the Navy Department. File 9212-37, Sec. Navy, May 19, 1913; C. M. O. 22, 1915, 6. *See also* File 9212-65, Oct. 14, 1915.
6. **Same**—In proceedings in revision in a certain general court-martial case, the court stated: "In this case the sentence provides for dishonorable discharge, which carries with it the loss of the rights of citizenship." The court appeared to have been under some misapprehension as to the Federal statutes, which make no reference to dishonorable discharge. C. M. O. 2, 1912, 3.
7. **Deck courts**—Not to adjudge. *See* DECK COURTS, 20
8. **Desertion**—Where the court did not include dishonorable discharge in the sentence of a convicted deserter, the department stated: "Inasmuch as the court has not sentenced the accused to be dishonorably discharged upon the expiration of his term of confinement, he will, upon his final discharge from the service, so far as his punishment for desertion is concerned, leave the naval service in a status of honor, it having been held by the Supreme Court of the United States that the 'honorable discharge' of a deserter was a formal final judgment passed by the Government upon the entire military record of the soldier, and an authoritative declaration by it that he had left the service in a *status of honor*." (U. S. *v.* Kelly, 15 Wall., 34.) C. M. O. 36, 1896; 38, 1896. *See also* U. S. *v.* Landers (92 U. S., 77).
9. **Same**—Should include dishonorable discharge. C. M. O. 118, 1894, 2; 116, 1896; 117, 1896; 36, 1896, 2; 38, 1896, 2; 146, 1900; 126, 1901.
10. **Same**—Sentence in case of desertion should include dishonorable discharge—Uniformity in sentences imposed by general courts-martial is obviously desirable, and the department does not countenance a departure from the general rule requiring that the court should adjudge an adequate sentence in all cases. *Especially in the case of desertion should the sentence include a provision for the discharge of the prisoner.* In revision the court revoked its former sentence, and in lieu thereof adjudged a sentence which included dishonorable discharge. C. M. O. 16, 1913, 3-4. *See also* C. M. O. 5, 1911, 6.
11. **Same**—Where convening authority has remitted dishonorable discharge from sentence of a deserter the department discharged the accused at expiration of confinement "by reason of his conviction as a deserter." *See* DESERTION, 24.
12. **Same**—Convening authority should not remit dishonorable discharge in desertion, as such action is against spirit of R-816 (7), which states that dishonorable discharge should be included in sentence adjudged for desertion. C. M. O. 5, 1911, 6.
13. **Same**—In a case where the accused was convicted of desertion and the court did not include dishonorable discharge in its sentence, the department, in consideration of the recommendation to clemency of the members, permitted the accused to stay in the service. C. M. O. 118, 1894, 2. *See also* C. M. O. 122, 1894.
14. **Fraudulent enlistment**—Where accused has enlistments in both Navy and Marine Corps, discharge in sentence should read from "United States naval service." C. M. O. 29, 1914, 7. *See also* FRAUDULENT ENLISTMENT, 83; G. O. 110, p. 5; Navy Regulations, 1913, R-816, as amended.
15. **Same**—Man found guilty of, is not a suitable person to be retained in the naval service. C. M. O. 102, 1893, 2.
16. **General courts-martial**—Dishonorable discharge can only be adjudged by general courts-martial. C. M. O. 36, 1914, 4.

Digitized by Google

17. **Same**—Bad-conduct and dishonorable discharges are the only discharges looked upon as punishments, and they are the only discharges a general court-martial should adjudge. *See* BAD-CONDUCT DISCHARGE, 7; DISCHARGE, 3.
18. **Marines.** *See* ALLOWANCES, 1, 3, 4, 8–10; DISHONORABLE DISCHARGE, 1–2.
19. **Remission of**—If the convening authority remits the dishonorable discharge in the sentence of a marine, he should remit the forfeiture of allowances adjudged. *See* ALLOWANCES, 4.
20. **Revocation of**—When sentence of dishonorable discharge is executed, it can not be revoked. (Op. Atty. Gen., May 28, 1909. *See also* 11 Op. Atty. Gen., 19; 17 Op. Atty. Gen., 297; 10 Op. Atty. Gen., 64.) Proceedings when approved and executed are final. File 26516–19, J. A. G., May 28, 1909. *See also* REVOCATION, 7.

DISLOYALTY.

1. **Officer**—Charged with. G. O. 52, Apr. 15, 1865.

DISMISSAL.

1. **Acquittal**—C. M. O. 160, 1901, stated that a pay clerk was acquitted. This acquittal was approved by the department, but also stated that he "will accordingly be *dismissed* from the naval service." In C. M. O. 15, 1902, the department stated:

"The attention of the service is called to departmental 'General Court-Martia Order No. 160,' dated September 26, 1901, in the case of * * *, United States Navy, wherein it was stated that he 'will accordingly be dismissed from the naval service.'

"The department is of opinion that dismissal is not the logical sequence of acquittal, and that the proper course was to revoke the accused's appointment. The action in this case under date of September 26, 1901, has accordingly to-day been set aside, and the Bureau of Navigation has been directed to revoke his appointment of September 11, 1899, as a pay clerk in the Navy, to take effect as of September 26 last, the date of the department's former action." C. M. O. 15, 1902.

2. **Acting boatswain**—Sentence of dismissal confirmed by President. C. M. O. 102, 1905.
3. **Confinement**—In case of an officer sentenced to dismissal and confinement, the department, instead of reducing the period of confinement, recommended to the President that such reduction be made at the same time that it was recommended to the President that the sentence of dismissal be confirmed; accordingly the President, in confirming the sentence of dismissal, reduced the period of confinement as recommended by the department. G. C. M. Rec., 6245 (1881); 27526 (1913).
4. **Confirmed**—Sentence of dismissal confirmed by President—No sentence of a court-martial, extending to the loss of life or to the dismissal of a commissioned or warrant officer, shall be carried into execution until confirmed by the President. All other sentences of a general court-martial may be carried into execution on confirmation of the commander of the fleet or officer ordering the court. (A. G. N. 63.) *See* 16 Op. J. A. G., 74, Nov. 2, 1911.
5. **Debts**—Officer dismissed by sentence of court-martial for failure to pay just debts. *See* DEBTS, 4, 21.
6. **"Dismissal," "Discharge," "Wholly retired"**—Defined and compared. File 26260–607, 1392, J. A. G., June 29, 1911, p. 26. *See also* DISCHARGE, 11.
7. **Dismissal**—From "United States Marine Corps, and from the service of the United States." C. M. O. 1, 1905. *See* DISMISSAL, 32, for correct phraseology of sentences.
8. **Same**—"From the naval service of the United States." C. M. O. 1, 1879, 6; 3, 1905, 2. *See* DISMISSAL, 32, for correct phraseology of sentences.
9. **Drunkenness on duty**—Every officer, especially medical officers, who is convicted of "Drunkenness on duty" should be dismissed. *See* DRUNKENNESS, 30.
10. **Form**—A general court-martial case involving dismissal of an officer was sent to the President for confirmation without mentioning expressly A. G. N. 53. C. M. O. 29, 1881, 3.
11. **Form letter**—For dismissing midshipmen. *See* DISMISSAL, 15.
12. **Mate**—Sentence of dismissal—Executed on approval of convening authority—Unnecessary for President to confirm. G. C. M. Rec. 15970; 16 J. A. G., Nov. 2, 1911.
13. **Midshipmen**—It is unnecessary for the convening authority to refer a general court-martial record to the Secretary of the Navy for transmittal to the President in the case of a midshipman. (C. M. O. 36, 1909, 2; File 26262–198.) While it is not necessary that the President confirm the sentence of dismissal in the case of a midshipman, he did so in the following cases. C. M. O. 28, 1905; 67, 1906; 9, 1909; 10, 1909.
14. **Same**—Advisable that sentences of dismissal of midshipmen be confirmed by President. *See* HAZING, 6.
15. **Same**—Form letter for dismissing midshipmen. File 26283–925, Sept. 18, 1915.

Digitized by Google

16. **Same**—Reappointment of dismissed midshipmen improper. *See* MIDSHIPMEN, 70-73.
17. **Same**—Power of Secretary of the Navy to dismiss. *See* MIDSHIPMEN, 80.
18. **Mitigation**—The President has the power to mitigate a sentence of dismissal to loss of numbers. File 26262-198, J. A. G., Nov. 12, 1908; G. C. M. Rec. 9079; 9427. *See also* PROBATION, 10, 11; C. M. O. 2, 1917.
19. **Same**—Sentence of dismissal may be mitigated by the Secretary of the Navy to suspension or loss of numbers. C. M. O. 31, 1914; 39, 1914; 48, 1914, 11; C. M. O. 2, 1917.
20. **Same**—Sentence of dismissal was mitigated by the President to restriction to limits of ship or station and loss of pay. C. M. O. 32, 1905. *See also* C. M. O. 82, 1892, 18-19.
21. **Not confirmed**—Case was submitted to the President with the recommendation that the sentence of dismissal be not confirmed, and the President in his action stated that the sentence "is not confirmed." C. M. O. 30, 1903.
22. **Officers**—No officer of the Navy who has been dismissed by the sentence of a court-martial, or suffered to resign in order to escape such dismissal, shall ever again become an officer of the Navy (R. S., 1441). File 13673-3728, J. A. G., Mar. 17, 1916. *See also* File 5252-79, J. A. G., June 19, 1915.
23. **Same**—An officer who has been dismissed can not be restored to the service except by reappointment. (25 Op. Atty. Gen., 579; 11 Op. Atty. Gen., 19, 22; 19 Op. Atty. Gen., 205; 20 A. and E. Enc., 636; McElrath *v.* U. S., 102 U. S., 426; U. S. *v.* Corson 114 U. S., 619; Vanderslice *v.* U. S., 19 Ct. Cls., 484.) *See also* LEGISLATION, 5; File 5252-73, J. A. G., Oct. 1, 1915.
24. **Same**—A warrant machinist deserted; at the time of his desertion 100 warrant machinists was the full number allowed by law, and the vacancy caused by his desertion was filled, thus bringing the number up to that allowed by law and vacating this machinist's number. He was therefore out of the Navy. *See* DESERTION, 90, 91, 138.
25. **Same**—Sentences as confirmed involving dismissals of officers. C. M. O. 11, 1914; 17, 1914; 24, 1914; 27, 1914; 30, 1914; 50, 1914; 19, 1915; 47, 1915; 1, 1916; 15, 1916.
26. **Same**—Officers of the Navy are not subject to dismissal by the President except pursuant to sentence of court-martial. (R. S., 1229, 1624, A. G. N. 36.) *See* G. O. 148, Dec. 31, 1869.
27. **Pay clerks**—Sentences as confirmed involving dismissal. C. M. O. 46, 1915.
28. **Paymaster's clerks**—The sentence of dismissal in the case of a paymaster's clerk may be carried into execution when approved by the convening authority—Confirmation by the President is not necessary. 16 J. A. G., 65, Nov. 2, 1911; C. M. O. 26, 1912, 4. *See also* C. M. O. 24, 1915; 26, 1915, where for certain reasons sentences were so confirmed. *See also* C. M. O. 10, 1916, for dismissal of paymaster's clerk, U. S. M. C.
29. **Same**—*Res judicata*. *See* RES JUDICATA, 5.
30. **Restoration**—Of, officer after dismissal. *See* DISMISSAL, 23; LEGISLATION, 5.
31. **Revocation of**—"The order of December 30, 1865, dismissing * * *, master in the United States Navy * * *, declared void, and Mr. * * * is hereby, under and by virtue of the Revised Statutes of the United States, Title XV, chapter 10, article 37, restored to the retired list as master." G. O. 210, June 5, 1876. *See also* MIDSHIPMEN, 75.
32. **Sentence**—Proper form—The court, therefore, sentences him, Lieut. * * *, United States Navy (United States Marine Corps), to be dismissed from the United States naval service. C. M. O. 27, 1914; 50, 1914; 47, 1915. *See also* DISMISSAL, 25.
In one case the court used the following irregular phraseology: "To be dismissed from the United States Navy as an undesirable person for the naval sevice." C. M. O. 146, 1900, 2.
33. **Suspended**—Sentence of dismissal of a retired officer actually suspended twice by the President and then remitted. C. M. O. 23, 1896.
34. **Warrant officers (commissioned)**—Sentences as confirmed involving dismissal. C. M. O. 18, 1914; 21, 1915; 2, 1916.
35. **Warrant officers (commissioned) retired**—Sentence as confirmed involving dismissal. C. M. O. 15, 1915.
36. **Warrant officers**—Sentence as confirmed involving dismissal. C. M. O. 32, 1914; 20, 1916; 34, 1916.
37. **Same**—Sentences involving dismissal mitigated. C. M. O. 39, 1915; 48, 1915.

DISOBEDIENCE OF ORDERS. *See* DRUNKENNESS, 52; OBEDIENCE; ORDERS.

1. **Enlisted men**—Charged with. C. M. O. 5, 1911, 7.
2. **Mistake of judgment**—Disobedience of orders caused by a mistake of judgment in regard to professional rights and duties, rather than a deliberate intention of wrong, rarely requires a severe, and never a disgraceful, punishment. G. O. 140, Sept. 17, 1869.

Digitized by Google

3. **Most serious offense**—"The offense of refusing to obey the lawful order of a superior officer is one of the most serious known to naval laws." C. M. O. 57, 1895, 3; 58, 1895, 3.
4. **Same**—"Disobedience of orders is, under any circumstances, a serious offense, and when committed deliberately, by an intelligent officer, under a claim of right, must tend greatly to the subversion of discipline." G. O. 140, Sept. 17, 1869.
5. **Officers**—Charged with. C. M. O. 1, 1882; 29, 1881; 24, 1886; 33, 1889; 40, 1889; 61½, 1890; G. C. M. Rec. 6054; 6737.
6. **Same**—General court-martial of an assistant engineer which involved a controversy between the line and staff as to the matter of command. Accused officer was charged with "Disobedience of the lawful order of his superior officer," the specification alleging that the accused refused to obey a lawful order of the officer of the deck. C. M. O. 67, 1892. *See also* COMMAND, 19.
7. **Same**—"Disobedience of orders by an officer is at all times a most grave offense. It becomes the fruitful parent of acts of like disobedience in others. It overturns all discipline and law and substitutes demoralization and disorder in their stead. It destroys all responsibility in the service, subverts the necessary protection of lawful authority, and the subordination essential to the safety, efficiency, and order of a ship, and causes confusion to usurp the place of regular and responsible command. "Unless disobedience, however slight, of orders by officers be checked and punished by adequate penalties, the spirit of disaffection and lawlessness will take courage and is certain to extend itself to subordinates." C. M. O. 1, 1882, 3. *See also* DISOBEDIENCE OF ORDERS, 4.
8. **Specific intent**—A deliberate purpose or peculiar intent is necessary to constitute the offense of disobedience of orders, and drunkenness may be a matter of legal defense in so far as it affects the capacity to entertain such purpose or intent. *See* DRUNKENNESS, 52.
9. **What constitutes.** File 26251-668: a.

DISOBEDIENCE OF A LAWFUL ORDER OF THE CHIEF OF THE BUREAU OF NAVIGATION.

1. **Officer**—Charged with. C. M. O. 39, 1914.

DISOBEDIENCE OF A LAWFUL ORDER OF THE SECRETARY OF THE NAVY.

1. **Officer**—Charged with. C. M. O. 7, 1894; 1, 1916; G. C. M. Rec. 7772.
2. **Warrant officer**—Charged with. C. M. O. 34, 1916.

DISOBEYING THE LAWFUL ORDER OF HIS SUPERIOR OFFICER.

1. **Enlisted man**—Charged with. C. M. O. 28, 1913, 5.
2. **Midshipman**—Charged with. C. M. O. 9, 1909.
3. **Officer**—Charged with. C. M. O. 16, 1910; 16, 1911; 3, 1912; 36, 1912; 4, 1913; 37, 1913.
4. **Warrant officer**—Charged with. C. M. O. 38, 1914.
5. **Warrant officer (commissioned)**—Charged with. C. M. O. 20, 1911.

DISORDERLY CONDUCT.

1. **Definition**—"Disorderly conduct means not merely noisy and boisterous behavior, but includes within its legal signification whatever conduct strikes openly at the organization or interferes with the orderly relations of civil or military society." G. O. 182, Apr. 2, 1873.

DISPOSITION OF BODIES.

1. **Chief pay clerk**—Deceased left a signed statement in which he desired his body, in case of death, to be sent to a certain party, who would notify his parents, and "under no circumstances are my effects to be sent to my wife, * * * as I have not lived with her or written to her for many years." This third party requested that the body be forwarded to the deceased's father and the effects to her. The wife of the deceased requested that the remains be shipped to her. *Held*, That the remains being properly in the custody of the department and it being necessary to come to a prompt decision in the matter without waiting to have the matter determined by judicial procedure, it was directed that the remains be disposed of in accordance with the request of the deceased's father, which, it would appear, would be in compliance with the testamentary disposition made by the deceased. File 26250-860: 1, Sec. Navy, Oct. 26, 1916.

Digitized by Google

DISPOSITION OF EFFECTS.

1. **Deserters.** *See* DESERTERS, 11, 12.
2. **Enlisted men**—The department is legally authorized to deliver the effects of a deceased enlisted man into the care of the public administrator of the county of New York, N. Y., upon said public administrator producing letters of administration or other satisfactory evidence of his authority to receive said effects. In this connection the following is quoted with reference to the authority of public administrators in general, which would be applicable to the present case in the absence of evidence showing a different state of law in New York:

   "A public administrator is not merely as such entitled to take charge of and administer estates, although he may under certain circumstances take charge temporarily; but it is ordinarily necessary that he should be appointed administrator by the court upon his petition being duly filed and due notice being given. In appointing the public administrator to administer any particular estate, the court exercises the same jurisdiction that it does in the grant of letters in ordinary cases, and when he is so appointed he holds the same relation to each individual estate that a private administrator would." (18 Cyc. 117.) File 26250-477:8, J. A. G., Dec. 8, 1914; C. M. O. 6, 1915, 10.
3. **Same**—*See* File 26250-477:6½, J. A. G., Oct. 8, 1914, for rule of department.
4. **Money.** File 7657-183; 7657-231; 7657-253; 26250-477:6½; 26260-587:2; 26250-131:1.
5. **Officers' effects**—Should be delivered only to a duly appointed administrator of said officer's estate, when effects involved are of a value in excess of $500. File 28478-33, J. A. G., Apr. 17, 1916.
6. **Personal effects**—Where no demand is made by a duly appointed legal representative of the estate, the personal effects of deceased persons in the Navy may be disposed of in the order of precedence prescribed by act, May 27, 1908 (35 Stat., 373), with reference to cash accounts of deceased officers and enlisted men of the Navy and Marine Corps "where the amount due the decedent's estate is less than $500." (File 26250-477:6½, J. A. G., Oct. 8, 1914; 28478-33, J. A. G., Apr. 17, 1916.) In a case which involves effects of a value greatly in excess of $500, and includes checks, certificates of stock, etc., the property in which could be transferred only upon the order of a duly appointed representative of the estate, *advised* that the aforesaid effects left by the deceased should be delivered only to a duly appointed administrator of said person's estate. File 28478-33, J. A. G., Apr. 17, 1916. *See also* File 808-1, J. A. G.; 5206-5, J. A. G.; 26250-131:1.
7. **Prisoners**—Enlisted men. File 7657-183, J. A. G., May 26, 1913; 7657-231, May 1, 1914; 7657-253, Sept. 9, 1914; 26250-477:6½, Oct. 8, 1914; 27222-41, Sec. Navy, July 1, 1916.
8. **Same**—Pay clerk. File 28478-33.

DISPUTED FACTS.

1. Court—Findings of, not in general disturbed where facts are in dispute. *See* CRITICISM OF COURTS-MARTIAL, 14.

DISRATING. *See* REDUCTION IN RATING.

DISRESPECT TO THE SECRETARY OF THE NAVY.

1. Officer—Charged with. C. M. O. 40, 1889.

DISRESPECT TOWARD THE ACTING SECRETARY OF THE NAVY.

1. Officer—Charged with. C. M. O. 40, 1889, 5.

DISRESPECTFUL IN LANGUAGE TO HIS SUPERIOR OFFICER WHILE IN THE EXECUTION OF HIS OFFICE.

1. Officer—Charged with. C. M. O. 4, 1911.

DISRESPECTFUL AND INSUBORDINATE TO HIS COMMANDER IN CHIEF.

1. Officer—Charged with. G. C. M. Rec. 6543.

DISRESPECTFUL IN LANGUAGE AND DEPORTMENT TO HIS SUPERIOR OFFICER WHILE IN THE EXECUTION OF THE DUTIES OF HIS OFFICE.

1. Officer—Charged with. C. M. O. 16, 1910, 2.
2. Warrant officer—Charged with. C. M. O. 13, 1915.

Digitized by Google

DISTRICT ATTORNEY.
1. Assistance of—For court of inquiry. *See* ATTORNEY GENERAL, 8; COURTS, of INQUIRY, 16.
2. Assistance to—Appointment of person to assist district attorney made only on request of district attorney. *See* ATTORNEY GENERAL, 9.

DISTRICT COURTS OF THE UNITED STATES.
1. Habeas corpus—Power to issue writs of. *See* JURISDICTION, 28, 35-39.
2. Naturalization—Aliens. *See* CITIZENSHIP, 2.

DISTRICT JUDGE. C. M. O. 31, 1915, 8.

DIVISIONAL OFFICER.
1. Counsel, as—Preferable as counsel for a man in his division. C. M. O. 6, 1909, 3.

DIVORCE.
1. Corespondent. *See* CIVIL AUTHORITIES, 42.
2. Citizenship—Of foreign-born child of alien parents—Mother divorced and married American citizen. File 26252-101, Sec. Navy, Nov. 6, 1915.
3. Enlisted man—Request by civil authorities that an enlisted man appear as corespondent. *See* CIVIL AUTHORITIES, 42.
4. Nonsupport—Wife instituted proceedings against officer. *See* CIVIL COURTS, 7.
5. Officer—Sued for divorce. *See* CIVIL COURTS, 7.

DOCKET.
1. Advancement of case—On docket when United States a party. *See* CIVIL COURTS, 15.

DOCUMENT. *See* CERTIFIED COPIES; EVIDENCE, DOCUMENTARY.

DOCUMENTARY EVIDENCE. *See* EVIDENCE, DOCUMENTARY.

DOMESTIC TROUBLES OF OFFICERS. *See* File 28478-38.

DOMICILE.
1. Midshipmen—As to determining domicile of candidate for midshipman. *See* MIDSHIPMEN, 6.
2. Parental. *See* POLL TAXES, 2.

"DOPE." *See* BLOTTER; GOUGING.

DOUBLE IRONS.
1. Abolished—"The use of irons, single or double, is abolished except for the purpose of safe custody or when part of a sentence imposed by general court-martial." (A. G. N. 24; act Feb. 16, 1909, 35 Stat., 621.)
2. Commanding officer—Tried by general court-martial for cruelty to enlisted men under his command. Among other things he placed them in double irons, etc. C. M. O. 29, 1890. *See also* COMMANDING OFFICERS, 15; DRUNKENNESS, 87.
3. General court-martial—Sentences including. C. M. O. 162, 1902.

DOUBLE JEOPARDY. *See* JEOPARDY, FORMER.

DOUBLE TIME FOR FOREIGN SERVICE.
1. Enlisted men—Extended enlistments. *See* ENLISTMENTS, 13.

DRAFT OR CONSCRIPTION. *See* CONSCRIPTION OR DRAFT.

DRILL BOOKS.
1. Regulations—Force and effect of. *See* REGULATIONS, NAVY, 14.

DROWNING. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 23-42.

DRUG. C. M. O. 42, 1909, 13; 11, 1905, 2.

DRUMHEAD COURT-MARTIAL. *See In re* EAGAN, 8 Fed. Cas., 4, 303.

DRUMMER, U. S. M. C.
1. General court-martial—Tried by. C. M. O. 38, 1883; 9, 1885.

Digitized by Google

DRUNKENNESS.

1. **Absence unauthorized**—"Voluntary drunkenness is never an excuse for an offense such as unauthorized absence, but in many cases is an aggravation." (G. O. 110, p. 7. *See also* C. M. O. 11, 1905, p. 2.) The above statement was made by the department in the case of a chief boatswain who was found guilty of "Absence from station and duty after leave had expired," and "Drunkenness." C. M. O. 25, 1915, 2. *See also* C. M. O. 14, 1910, 10; ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED, 9, 10.
2. **Abstention**—"If he is liable to be overcome in this manner by their moderate use, he must realize the importance for the absolute abstention from their use." C. M. O. 7, 1908, 1–2.
3. **Affidavit of physician**—Regarding effect of intoxicating liquor—Not admissible as evidence. *See* AFFIDAVITS, 5.
4. **Alcoholism.** *See* ALCOHOLISM.
5. **Aggravation**—Voluntary drunkenness is never an excuse for unauthorized absence but in many cases is an aggravation. *See* ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED, 9, 10; DRUNKENNESS, 1.
6. **Arrest of drunken enlisted men**—No officer shall assist personally in the arrest of a drunken man further than may be absolutely necessary, but the arrest shall always be made by persons not above the grade of petty officer, who are to be instructed to use no greater force than that required to restrain or confine the offender. (R–1432.) *See* DRUNKENNESS, 87, 90.
7. **Assault**—Where an accused shot and wounded another while accused was on post and drunk, the court finding the accused guilty thereof, but that the word "maliciously" was not proved, apparently because accused was drunk at the time of the shooting, the department held that the court should not have excepted the word "maliciously" in the finding, since "a drunken man, equally with a sober man, is presumed to intend his acts." C. M. O. 7, 1911, 13. *See also* ASSAULT, 15.
8. **Same**—Drunkenness may be a defense to a charge of "Assaulting and striking his superior officer while in the execution of the duties of his office," the specification alleging a *willful and malicious assault*. C. M. O. 47, 1910, 8.
9. **Assault and battery**—Voluntary drunkenness furnishes no excuse for assault and battery and evidence of it is inadmissible. It is not necessary to allege a specific intent to commit the act, the general criminal intent being presumed. C. M. O. 8, 1911, 4–6. *See also* ASSAULT, 15, 18.
10. **Beer**—Specification under "Drunkenness" alleged that accused was so much under influence of *beer* or some other alcoholic stimulant," etc. C. M. O. 20, 1888. *See also* BEER, 1.
11. **Burden**—Burden is on party claiming drunkenness as a defense. C. M. O. 19, 1912, 7.
12. **Burglary**—Drunkenness as a defense. C. M. O. 42, 1909, 10. *See also* BURGLARY, 3; DRUNKENNESS, 49; INTENT, 2, 10.
13. **Clemency**—Voluntary drunkenness does not afford any reasonable or good ground for the exercise of clemency. C. M. O. 8, 1911, 6. *See also* File 4578–04; CLEMENCY, 18, 19; DRUNKENNESS, 84.
14. **Commanding officer**—"For a commanding officer in the Navy to allow himself to become intoxicated is bad enough, but to be drunk on duty is intolerable." C. M. O. 33, 1899, 3. *See also* COMMANDING OFFICERS, 20, 21, 25.
15. **Confessions**—While drunk. *See* CONFESSIONS, 4.
16. **Confinement of a drunkard**—The state of the accused's health was not good, but his medical record indicated that the sources of his ill health are debauches, from which confinement will free him. C. M. O. 146, 1896, 2.
17. **Same**—Intoxicated man shall not be confined in any place or manner that may be dangerous to them in their condition. (R-1431.)
18. **Danger of excess**—In acting upon a case the department stated: "It is to be hoped that the accused [a midshipman] will be impressed with a wholesome fear of drink by this experience and have always in mind the dangerous possibilities of excess." C. M. O. 3, 1909.
19. **Debauches.** C. M. O. 146, 1896, 2; 132, 197, 1. *See also* DRUNKENNESS, 16, 76.
20. **Defense**—Where specific intent is not necessary, it is a well-established general rule of law that voluntary drunkenness at a time a crime was committed is no defense. If a person voluntarily drinks and becomes intoxicated, and while in that condition commits an act which would be a crime if he were sober, he is fully responsible. It can make no difference, *where no specific intent is necessary*, that the defendant was so drunk as to have no capacity to distinguish between right and wrong. (12 Cyc. 170.) C. M. O. 25, 1914, 3.

Digitized by Google

21. **Same**—Where necessary to prove specific intent. C. M. O. 25, 1914, 3. *See also* ASSAULT, 15-19; BURGLARY, 3; DRUNKENNESS, 12, 20, 22, 49-52, 89; INTENT, 2, 12; STATEMENT OF ACCUSED, 16.

22. **Same**—Weight to be given intoxication as a defense for various offenses.

"Intoxication is now very generally held to be admissible to the jury on trials of indictment for murder, not to excuse but as bearing upon the question of mental capacity to entertain express malice or to exercise deliberation, thus tending to show the quality and degree of the crime; and probably the same rule would be extended to all cases where the actual presence of a deliberate intent in the mind of the prisoner at the time of the act is essential to the crime." (3 Greenleaf, sec. 6, p. 10.) "When a person voluntarily drinks and becomes intoxicated, and while in such a condition commits an act which would be a crime if he were sober, he is nevertheless responsible, the settled rule being that voluntary drunkenness is no excuse. A person may be so drunk when he commits an act that he is incapable, at the time, of knowing what he is doing; but in case of voluntary intoxication a man is not the less responsible for the reasonable exercise of his understanding, memory, and will. A drunken man, equally with a sober man, is presumed to intend his acts, and the natural and ordinary consequences." (Clark's Criminal Law, p. 70.)

It may be considered as an established principle of law that when a person voluntarily drinks that drunkenness furnishes *per se* no excuse or palliation for criminal acts committed during its continuance and no immunity from the penal consequences of such acts. "Where a deliberate purpose or peculiar intent is necessary to constitute the offense, intoxication, is clearly shown in evidence to have been such as to have incapacited the party from entertaining such purpose or intent, will ordinarily be treated as constituting a legal defense to the specific act charged." C. M. O. 14, 1910. 11; 1, 1912, 4.

Drunkenness resulting in insanity. *See* ASSAULT, 17.

23. **Same.** C. M. O. 104, 1896.

24. **Same**—No defense where specific intent not required. C. M. O. 8, 1911, 5.

25. **Same**—Burden is on party claiming. C. M. O. 19, 1912, 7.

26. **Degree necessary to constitute "Drunkenness"**—"One who is under the influence of liquor in any degree, however slight it may be, is unfit to be intrusted with the important duties incident to the naval service." C. M. O. 92, 1905, 3.

27. **Same**—To support a charge of "Drunkenness," it is not necessary for the evidence to show that the degree of intoxication was so great as to occasion a profound stupor on the part of the accused; the universally established practice of the naval service, on the contrary, is such as to warrant a finding of guilty of the charge of "Drunkenness" when it is proved by reliable witnesses that the accused was under the influence of intoxicating liquor; indeed, no other finding would be justifiable. C. M. O. 5, 1913, 3.

28. **Same**—Manifestly there are different degrees of intoxication. However, officers in the naval service should not be guilty of overindulgence which will in any way incapacitate them for any duties which may be required of them. The fact that an officer apparently performs the duties assigned to him at a particular time does not of itself indicate that he is capable of performing any duties which might have been assigned to him. The degree of intoxication goes to the gravity of the offense, but does not relieve an officer of the consequences of his condition if he has been guilty of such overindulgence as will incapacitate him for the full performance of his duties. C. M. O. 5, 1915, 2.

29. **Desertion**—Accused charged with desertion; found guilty of "absence from station and duty without leave," but without criminality, and was acquitted. Only evidence in extenuation was his uncorroborated evidence that he became drunk while on liberty and was taken to sea on the steamship *Bohemia*. *Held*, That voluntary drunkenness furnishes no excuse or palliation for original acts. The department can not admit that a man should be acquitted of desertion who absents himself from his station and duty for nearly seven months, whose only excuse was his own drunkenness at the time of leaving. Proceedings were disapproved and accused discharged as an independent proceeding. C. M. O. 11, 1905. *See also* ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED, 9, 10; C. M. O. 30, 1910, 10.

30. **Dismissal**—"Every naval officer, and especially a medical officer, whose use of intoxicants is carried to such an extent that his superiors cause him to be tried and who is convicted of drunkenness on duty should be sentenced to dismissal from the Navy and such sentence should be inexorably carried into execution. Whatever charity or assistance may be extended to such officers should be given when they reach some

Digitized by Google

other walk in life than the naval service. They are worthless members of their profession, and should, in every case, be forced off the list of officers of the Navy." C. M. O. 34, 1884, 3; 101, 1906, 2. *See also* C. M. O. 22, 1884, 3.

31. **Dissipation.** C. M. O. 22, 1884, 3; 132, 1897, 3. *See also* DRUNKENNESS, 70, 76.
32. **Duty**—Drunkenness on duty. *See* DRUNKENNESS ON DUTY.
33. **Enlisted men**—Charged with. C. M. O. 47, 1910, 8; 23, 1910, 5; 25, 1914, 3. *See also* C. M. O. 5, 1914, 4.
34. **Evidence of**—A medical officer who examined the accused testified: "He was further examined by me at the time, and it was soon evident in my opinion that he was suffering from the excessive use of alcoholic liquor. This was evidenced by his general manner and deportment, his unsteadiness, sluggish reaction of both his pupils, his tremulous tongue, pulse of 112, odor of alcohol on his breath, and his own acknowledgment that he had been out drinking the night before." Also, "10. Q. Doctor, would you say that you considered this accused under the influence of liquor?—A. Yes; and I didn't consider him fit to perform his duty that day, and so reported." C. M. O. 28, 1915, 2.
35. **Excess, danger of.** *See* DRUNKENNESS, 18.
36. **Excuse**—The department can not concede that intoxication forms any excuse for failure to render prompt and implicit obedience to orders from superior officers. C. M. O. 77, 1906.
37. **Expert witness**—A naval surgeon, an expert, stated, in effect, that no other drug than alcohol would account for the condition of the accused. C. M. O. 36, 1898, 2.
38. **Finding**—The word "intoxicated" for the word "drunk." C. M. O. 53, 1905, 1.
39. **Same**—The words "intoxicants or drugs" substituted for the words "intoxicating liquor." C. M. O. 62, 1904.
40. **Fraudulent enlistment.** *See* FRAUDULENT ENLISTMENT, 23, 24.
41. **Functions, official**—Naval officers in the ordinary routine of service are compelled to attend official functions, and the fact that intoxicating drink is offered is no reason for acceptance and no excuse for excess. File 26262-198, J. A. G., Nov. 3, 1906, p. 4. *See also* CLEMENCY, 37, 38; SMOKER.
42. **Gin.** *See* C. M. O. 56, 1880.
43. **Guard**—Drunkenness on guard. *See* DRUNKENNESS ON GUARD.
44. **Guest of club**—Aggravates offense of drunkenness. C. M. O. 9, 1906, 1.
45. **Hang-over.** C. M. O. 22, 1884, 3; 132, 1897, 3. *See also* DRUNKENNESS, 61.
46. **Habitual use of**—"The habitual and excessive use of stimulants, by which the faculties are gradually but surely undermined, is inexcusable in any person in any walk of life; in an officer of the Navy, frequently charged with duties involving the safety of his vessel and all on board, no palliation should be considered or given weight. If he undertakes to discharge such duties, he is liable, at a critical moment, to fail in their performance and to bring about terrible disaster; if he is unable, by reason of his habits, to even attempt their performance, he throws upon others a burden which properly belongs to him. Whether the disability is caused by intoxication at the time or is the result of previous dissipation, is a question of secondary importance. In either case it is the consequence of willful misconduct, and deserving of unqualified censure." C. M. O. 22, 1884, 3.
47. **"Habitually drunk on duty"**—Enlisted man—Charged with. C. M. O. 40, 1888.
48. **"Having liquor in his possession"**—Enlisted men—Charged with. C. M. O. 63, 1892; 64, 1892.
49. **Intent**—"As regards intoxication, it is the established principle of law that voluntary drunkenness furnishes *per se* no excuse or palliation for criminal acts committed during its continuance and no immunity from the penal consequences of such acts.

"But, on the other hand, there are crimes which can be consummated only where a peculiar and distinctive intent, or a conscious deliberation or premeditation, has concurred with the act, which could not well be possessed or entertained by an intoxicated person. Thus in cases of such offenses as larceny, robbery, or burglary, which require for their commission a certain specific intent, evidence of drunkenness is admissible as indicating whether the offender was capable of entertaining this intent, or whether the act was anything more than a mere battery, trespass, or mistake. And so it is held that where a peculiar intent is necessary to constitute the offense, drunkenness, if clearly shown in evidence to have been such as to have incapacitated the party from entertaining such purpose or intent, will ordinarily properly be treated as constituting a legal defense to the specific act charged." C. M. O. 42, 1909, 10. *See also* C. M. O. 86, 1898, 1. *But see* C. M. O. 20, 1913, 4.

Digitized by Google

50. **Same**—An accused was charged with "assault with intent to kill," and "assaulting with a deadly weapon and wounding another person in the service."

While it was shown that the accused, at the time of the stabbing, was under the influence of intoxicating liquor, it was not shown that he was so far intoxicated as to be disabled from entertaining the degree of intent required. The fact that one was drunk at the time of the commission of the act will, in certain cases, constitute a good defense, but such is a matter of defense only, and the burden of proving drunkenness is upon the party claiming such to be the fact. "It is a well-settled general rule that voluntary drunkenness at the time a crime was committed is no defense. If a person voluntarily drinks and becomes intoxicated, and while in that condition commits an act which would be a crime if he were sober, he is fully responsible unless his drunkenness has resulted *in insanity*, or unless it rendered him incapable of entertaining a specific intent which is an essential ingredient of the offense." (12 Cyc., 170 *et seq.*) Drunkenness will be a defense in those crimes in the commission of which a specific intent is requisite, but it must be shown that the accused "was by drink *so entirely deprived of his reason* that he did not have the mental capacity to entertain the necessary specific intent required to constitute the crime" (12 Cyc., 172), and the burden of showing such to have been the case, being a matter of defense merely, rests upon the defendant. A résumé of the evidence as to the drunkenness of the accused at the time of the stabbing will, it is believed, fail to disclose that his drunkenness had resulted "in insanity" or that he was "so entirely deprived of his reason as to be thereby rendered incapable of entertaining the specific intent requisite to constitute the crime." C. M. O. 19, 1912, 7. *See also* ASSAULT, 17.

51. **Same**—"Where the question is whether words have been uttered with a deliberate purpose or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered." (3 Greenleaf, sec. 6, p. 10.) "Intoxication is now very generally held to be admissible, not to excuse a crime but as bearing upon the question of mental capacity to entertain express malice, or to exercise deliberation, or the actual presence of a deliberate intent in the mind of the prisoner at the time of the act." (Greenleaf on Evidence.)

Where, therefore, the actual existence of any particular purpose, motive, or intent is a necessary element to constitute a particular species of crime or degree of criminality the fact that the accused was intoxicated at the time may be taken into consideration in determining the purpose, motive, or intent with which he committed the act. (3 Greenleaf on Evidence, p. 10, note.)

Drunkenness, if clearly shown in evidence to have been such as to have incapacitated the party from entertaining such purpose or intent, will ordinarily be properly treated as constituting a legal defense to the specific act charged. It might be remarked, however, that if the drunken act has involved a disorder or neglect of duty prejudicial to good order and discipline, and such will almost invariably be the fact, the accused may be convicted of an offense under the latter charge. (Winthrop's Military Law, 2d ed., p. 441.) C. M. O. 14, 1910, 15–16. *See also* C. M. O. 47, 1910, 8; 19, 1895, 2–3.

52. **Same**—While it is an established principle of law that voluntary drunkenness furnishes *per se* no excuse or palliation for criminal acts committed during its continuance, yet in military law, where a deliberate purpose or peculiar intent is necessary to constitute the offense, as in the cases of disobedience of orders, drunkenness, if shown in evidence to have been such as to have incapacitated the party from entertaining such purpose or intent, will ordinarily properly be treated as constituting a legal defense, etc. C. M. O. 86, 1898, 1.

53. **Intoxicated**—The word "intoxicated" was substituted for the word "drunk." C. M. O. 53, 1905, 1.

54. **Involuntary.** C. M. O. 14, 1910, 10.

55. **Judge advocate**—Tried by general court-martial for being drunk. C. M. O. 57, 1880; 104, 1896; 2, 1913. *See also* JUDGE ADVOCATE, 83–85.

56. **Larceny**—Drunkenness as a defense. C. M. O. 42, 1909, 10. *See also* DRUNKENNESS, 22, 49, 89.

57. **Medical officers**—Might be called at any time to render professional services of vital importance, and if they are under the influence of an intoxicant they would be incapacitated for such duty. C. M. O. 43, 1915, 2. *See also* DRUNKENNESS, 30.

58. **Same**—Should never become intoxicated. C. M. O. 101, 1906, 2. *See also* DRUNKENNESS, 30.

59. **Midshipmen**—Charged with. C. M. O. 3, 1909; 7, 1912; 8, 1912.

60. **Murder**—Drunkenness as a defense. C. M. O. 1, 1912, 4. *See also* DRUNKENNESS, 22.

Digitized by Google

61. **Night before**—That the accused had been as shown by his testimony, under the influence of liquor the evening before certainly can not be deemed an excuse for being drunk on duty the day after. C. M. O. 39, 1909, 1. *See also* DRUNKENNESS, 45.
62. **Officers**—Charged with. C. M. O. 4, 1909; 56, 1910; 16, 1910; 25, 1911; 4, 1912; 9, 1912; 27, 1912; 38, 1912; 15, 1913; 21, 1913; 31, 1913; 36, 1913; 40, 1913; 6, 1914; 7, 1914; 8, 1914; 11, 1914; 17, 1914; 24, 1914; 31, 1914; 43, 1914; 44, 1914; 14, 1915; 33, 1915; 34, 1915; 40, 1915; 48, 1915; 1, 1916; 18, 1916; 40, 1916; 41, 1916; 1, 1917; 4, 1917; 9, 1917; 11, 1917; 20, 1917.
63. **Officer of the deck, drunk.** *See* DRUNKENNESS, 99.
64. **Orders**—Drunkenness no excuse for not obeying orders promptly. C. M. O. 77, 1906. *See also* DRUNKENNESS, 36.
Orders to attend a smoker. *See* CLEMENCY, 37, 38; DRUNKENNESS, 41.
65. **Paymaster's clerks**—Charged with. C. M. O. 37, 1912.
66. **Petty officer**—Who periodically gets drunk is worse than useless for the service. *See* PETTY OFFICERS, 1.
67. **Plea**—Guilty to "Drunkenness" when charged with "Drunkenness on duty." C. M. O. 23, 1910, 4.
68. **Pledges.** *See* PLEDGES AND PROMISES, 2-7.
69. **Post**—Drunkenness on post. *See* DRUNKENNESS ON POST; SENTINELS, 15, 16.
70. **Previous dissipations.** C. M. O. 132, 1897, 3. *See also* DRUNKENNESS, 31, 76.
71. **Promises to abstain.** *See* PLEDGES AND PROMISES, 2-7.
72. **Proof of.** *See* DRUNKENNESS, 26-28, 100.
73. **Public opinion**—The commander in chief, United States Pacific Fleet, made the following remarks in acting upon a case:
"The general drift of public opinion in the United States to-day shows a marked tendency toward repressing the use of intoxicants, and it behooves the officers of the naval service to take note of this determination. It has been stated by a naval officer of considerable rank, in speaking of this very case, 'If a man can not get drunk in his own quarters, where can he get drunk?' It is possible that the members of the court were actuated by the same sentiment and sought to protect an officer in this imaginary 'right.' On no other hypothesis can the commander in chief reconcile these findings with the established facts laid before it in sworn testimony. The commander in chief can not subscribe to or approve such doctrine. No officer can get drunk in his quarters, enter into a disturbance that brings public scandal, disgrace, and death, drags the good name af the naval service in the dust in the newspapers and in a whole populous community through the publicity of his actions and hope to avoid being held to a strict accountability therefor. The action of the court in this case shows a decided lack of appreciation of the honor and dignity of the Navy, but as the commander in chief has exhausted his power in the premises he can only place the evidence of his disagreement on the record." C. M. O. 5, 1913, 4.
74. **Punishment for**—Should be dismissed. C. M. O. 101, 1906, 2. *See also* DRUNKENNESS, 30.
75. **Quarters, drunk in.** C. M. O. 5, 1913, 4. *See also* DRUNKENNESS, 73.
76. **Reprehensible**—An officer was charged with and found guilty of "Absence from duty without leave" and "Scandalous conduct tending to the destruction of good morals," the specification under the latter charge alleging that the accused was, in consequence of the excessive use of intoxicating liquor, incapacitated for the proper performance of his duty to such a degree as to warrant his being placed on the sick list for exhaustion after debauch.
The department, among other things, stated: "The offense, while laid under the formal charges" as above stated "was essentially intoxication, carried, as set forth in the specification of the second charge, to such an extent as to produce incapacity for the proper performance of duty. Such an offense is a grave one. The excessive use of intoxicating liquor by any person in any walk of life is reprehensible. In the case of an officer of the Navy, frequently charged with duties involving the safety of his vessel and all on board, it is inexcusable. If an officer in such a condition undertakes to discharge his duties he is liable, at a critical moment, to fail in their performance and to bring about disaster; if unable even to attempt their performance he throws upon others a burden which properly belongs to him; and whether such inability is caused by intoxication at the time, or, as appears to have been the case in the present instance, is the result of previous dissipation, is of secondary importance." C. M. O. 132, 1897, 2-3.
77. **Resign, ought to**—In a case where an officer was found guilty of "Drunkenness," being unable to execute his duty as watch and division officer because of debauches and dissipation and was not sentenced to dismissal, the department stated in part:

Digitized by Google

"The Navy Department can never safely again order" the accused "to the performance of sea duty; he will be an encumbrance upon the active list, and ought to resign from a high and honorable profession, the appropriate duties of which he can never be allowed to discharge except by putting in unjustifiable peril the ships and lives of the United States Navy." C. M. O. 22, 1884, 3.

78. **Resisting arrest**—Effect of drunkenness on. C. M. O. 23, 1910, 5–6.
79. **Robbery**—Drunkenness as a defense. C. M. O. 42,1909, 10. *See also* DRUNKENNESS, 49.
80. **Scandalous conduct tending to the destruction of good morals**—Officer tried for being drunk. C. M. O. 23, 1886.
81. **Seditious words, uttering**—Defense of drunkenness. C. M. O. 14, 1910, 14–15. *See also* SEDITION.
82. **Sentinel posted when intoxicated.** *See* SENTINELS, 15, 16.
83. **Serious offense**—In one case the department stated: "He must not think that the department condones in any way the commission by officers in the Navy of offenses such as those of which he acknowledges himself to be guilty. The offense of overindulgence in intoxicants is a most serious one and goes far toward showing that the usefulness to the Navy of one who is guilty of it is approaching its end." C. M. O. 118, 1905, 2.
84. **Sick list**—The department has decided that "if an officer is at any time unfit for duty, due wholly or in part to overindulgence in intoxicants, it is entirely immaterial that he may not at such time have been required to perform any particular duty, or that he placed himself in such condition of unfitness after the customary hours for the performance of usual duties by him. It is axiomatic that an officer in a military service is subject to duty at all times, unless he is wholly incapacited for the performance of any duty. It might indeed be only under very exceptional circumstances that an officer on the sick list would be called upon to perform an act of duty, but such circumstances are not inconceivable. Certainly no officer, because of the fact that he is on the sick list and therefore not required to perform his ordinary duty, is justified in rendering himself altogether unfit for duty by overindulgence in intoxicating liquor." (File 26251-8280; G. C. M. Rec. No. 28798.)

Nor does the department consider that the fact that the incapacity of an accused for the proper performance of duty, which the court finds was due to his being "under the influence of intoxicating liquor," is mitigated by the fact that his incapacity may have been due in part to "his physical condition." The fact being definitely established that an officer was "under the influence of intoxicating liquor, and thereby incapacitated for the proper performance of duty," it must be at best merely a matter of speculation as to what extent, if any, his incapacity may have been caused by the fact that he was sick—though not on the sick list.

Accordingly, the fact that the condition of the accused in this case, as established by the court's findings under charge I, may have been in part due to his physical condition, was not regarded by the department as a sufficient basis for the exercise of clemency. C. M. O. 19, 1915, 8.

85. **"Solitary drinker."** *See* C. M. O. 24, 1914, 15, 17, 19.
86. **Specific intent**—Effect of drunkenness. *See* DRUNKENNESS, 49–52; INTENT, 19.
87. **Subduing a drunk**—The department stated with reference to a case where an enlisted man was found guilty of drunkenness, refusing to obey orders, resisting arrest, threatening to kill his superior officer, and disrespectful in language, etc., "It is observed, in addition to the foregoing, that the officer of the deck whose order was disobeyed, although he says that the accused *plainly showed by his conduct while at the mast that he was under the influence of liquor*, nevertheless was retained there (instead of, under the circumstances, sending him forward in charge of police of the vessel until the arrival of the executive officer) and, further, that the executive officer was personally present after the accused had been taken below to the brig and placed in double irons, and participated in the throwing of salt water on him or pouring it in his mouth as variously stated, for the purpose of pacifying him." In view of the foregoing all of the sentence was remitted except dishonorable discharge. C. M. O. 86, 1898, 1–2. *See also* DRUNKENNESS, 6, 90.
88. **Theft**—Drunkenness as a defense. C. M. O. 42, 1909, 10. *See also* DRUNKENNESS, 20, 22, 24, 49, 51, 52. *But see* C. M. O. 20, 1913, 4.
89. **Same**—Where there was no evidence to show that the accused was sufficiently sober to harbor an intent to permanently deprive the owner of the property taken, which is a necessary ingredient of the offense, the finding of guilty on a charge of "Stealing property of the United States, furnished and intended for the naval service thereof" was disapproved by the department. C. M. O. 25, 1914, 3. *See also* BURGLARY, 3; DRUNKENNESS, 49; INTENT, 2, 5.

Digitized by Google

90. **Treatment of a drunk.** C. M. O. 86, 1898, 1–2. *See also* DRUNKENNESS, 6, 87.
91. **"Unfit for duty"**—"One who is under the influence of liquor in any degree, however slight it may be, is unfit to be intrusted with the important duties incident to the naval service." C. M. O. 92, 1905, 3.
92. **Unfit for the Navy.** C. M. O. 22, 1884, 3; 132, 1897, 3. *See also* DRUNKENNESS, 77.
93. **Using abusive, obscene and threatening language toward his superior officer**—Effect of drunkenness on. C. M. O. 23, 1910, 5–6.
94. **Uttering seditious words**—Effect of drunkenness upon. C. M. O. 14, 1910, 14–15. *See also* SEDITION.
95. **Vermouth.** *See* C. M. O. 56, 1880.
96. **Voluntary drunkenness**—"It is a well-known principle of law that a man who voluntarily puts himself in a condition to have no control of his actions must be held to intend the consequences." C. M. O. 92, 1905, 3.
97. **Warrant officers**—Charged with. C. M. O. 32, 1910; 17, 1912; 18, 1912; 24, 1912; 3, 1913; 5, 1913; 13, 1913; 10, 1914; 40, 1914.
98. **Warrant officers (commissioned)**—Charged with. C. M. O. 20, 1910; 21, 1910, 16; 33, 1910; 1, 1911; 18, 1911; 32, 1912; 12, 1914; 21, 1914; 37, 1914; 48, 1914; 23, 1915; 25, 1915; 28, 1915; 36, 1916; 38, 1916. *See also* C. M. O. 16, 1914.
99. **Watch officer drunk**—"Few men have a greater responsibility of property, life, and national honor immediately resting upon them than a watch officer of a vessel of war while at sea. An officer who is guilty of drunkenness, when liable to be called upon to assume this responsibility, commits a crime of the gravest nature, for the consequences of his crime may be fatal to his ship and to all on board." C. M. O. 22, 1884, 2.
100. **Weight of evidence**—In a case where a pay inspector was acquitted by general court-martial on the charge of "Drunkenness on duty" the convening authority stated: "It is the opinion of the reviewing authority that the court, in arriving at its finding, erred in not assigning sufficient weight to the very positive testimony of the officers who made an examination of the accused with the special object of ascertaining his condition. Undue weight must have been given also to the performance of routine duties, and to the negative testimony of casual observers." C. M. O. 16, 1908.

DRUNKENNESS ON DUTY.

1. **Enlisted men**—Charged with. C. M. O. 23, 1910, 4; 10, 1911, 3; 29, 1913, 5.
2. **Officers**—Charged with. C. M. O. 8, 1909; 39, 1909; 44, 1909; 22, 1911; 11, 1912; 34, 1912; 2, 1913; 19, 1913; 11, 1914; 17, 1914; 19, 1915.
3. **Same**—"For a commanding officer in the Navy to allow himself to become intoxicated is bad enough, but to be drunk on duty is intolerable." C. M. O. 33, 1889, 3.
   Officer tried by general court-martial for being drunk when making a boarding call. C. M. O. 39, 1909.
   An officer who was recommended for trial by general court-martial for "Drunkenness on duty" received a letter of public reprimand from the Secretary of the Navy in lieu of trial. File 26251–8826. (M. C. File 3493–62.)
4. **Specification**—It is essential that the specification under a charge of "Drunkenness on duty" should allege either the nature of the duty or at least contain the words "on duty," as, otherwise, only "Drunkenness" is alleged and not the more serious charge of "Drunkenness on duty." C. M. O. 23, 1910, 4.
5. **Warrant officers**—Charged with. C. M. O. 12, 1909; 3, 1911, 1, 2; 24, 1913.
6. **Warrant officers (commissioned)**—Charged with. C. M. O. 20, 1911; 33, 1911; 17, 1912; 11, 1913; 18, 1914; 21, 1917.

DRUNKENNESS ON GUARD.

1. **Enlisted men**—Charged with. C. M. O. 42, 1909, 3; 16, 1912, 3.

DRUNKENNESS ON POST.

1. **Enlisted men**—Charged with. C. M. O. 5, 1911, 4; 7, 1911, 3.

DRY DOCKS.

1. **Enlisted man**—Fell into dry dock and killed. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 50.
2. **Floating dry docks**—"A floating dry dock, the same as a vessel, is constructed with a view to its removal at such times and to such places as may be deemed necessary or advisable, and, as shown by the general trend of legislation extending through a long period of years, it has not been the policy of the Congress to place restrictions upon the power of the executive as to the one any more than as to the other. File 4670–47, J. A. G., Nov. 23, 1910, p. 4.

Digitized by Google

3. **Olongapo, P. I.**—Floating steel dry dock. File 4670–47, J. A. G., Nov. 23, 1910, p. 4.
4. **Removal**—Of floating dry dock from Algiers to Guantanamo. File 4670–47, J. A. G. Nov. 23, 1910.

DRY TORTUGAS.

1. **Pilotage of vessels**—Entering the naval channel, Dry Tortugas. 13 J. A. G., 371, Oct. 8, 1904.

"DUE FORM AND TECHNICALLY CORRECT." *See* COURT, 14, 73.

DUE PROCESS OF LAW.

1. **Discharge of officer**—For failing morally to qualify for promotion. File 26260-1392, J. A. G., June 29, 1911, p. 31. *See also* NAVAL EXAMINING BOARDS, 10; PROMOTION, 64.
2. **Orders to pay debts**—An order to pay debts is taking money without due process of law. *See* DEBTS, 18.

DUELS. *See also* WORDS AND PHRASES.

1. **General court-martial**—Two officers were tried by general court-martial. One for sending a written message in the nature of a challenge and the other for bearing the same to the party challenged. G. O. 22, Oct. 17, 1863.
2. **Specific intent**—The same principle is set forth by Winthrop (p. 919), in considering the offense of sending or accepting a challenge to fight a duel; as showing that the absence of intent constitutes a defense, he says:

"The sending or accepting of a challenge being prima facie established, the only defense open to the accused, where the facts are not denied, would appear to be that a criminal intent was wanting, as, for example, that a serious act was not proposed, but that the proceeding was by way of banter or joke." C. M. O. 5, 1912, 12.

DUMMY.

1. **Paymaster**—In a certain case the department stated that when the accused was ordered to duty as commissary officer of his ship, it was not the department's intention that he should be a mere figurehead or dummy in that position, leaving the actual discharge of the duties incident thereto entirely in the hands of an enlisted man without any supervision worthy of the name. C. M. O. 23, 1913, 13–14.

DUPLICITY. *See* ABUSIVE LANGUAGE TOWARD OTHER PERSONS IN THE NAVY, 1, 2, CHARGES AND SPECIFICATIONS, 32.

DURESS. *See* CONFESSIONS, 9 (p. 102).

DUTY.

1. **Assignments to duty**—"It is the well-digested policy and intention of the department, in making assignments to duty, to assign the *senior grades* of the service to the higher and more important positions. This is what the law contemplates and reason and propriety demand, and it is most just and fair to all." G. O. 228, Aug. 1, 1887.

DUTY STATUS.

1. **Enlisted man**—On liberty is not on a duty status. C. M. O. 23, 1910, 4. *See also* LINE OF DUTY AND MISCONDUCT CONSTRUED.

DYING DECLARATIONS.

1. **Nature and admissibility of**—"Dying declarations are statements of material facts relating to the cause and attendant circumstances of the declarant's own homicide made by him while *in extremis* and while under the fixed belief and moral certainty that his death is impending and certain to follow almost immediately." (Hughes on Evidence, p. 62, sec. 1.)

Dying declarations are hearsay evidence, but are admitted, as stated by Greenleaf, quoting Lord Chief Baron Eyre, because "motive for falsehood is silenced." The weight given these declarations has lessened materially, as shown by numerous cases. Greenleaf (16th ed., vol. 1, p. 253, sec. 162) states:

"*Weight of declarations.*—Though these declarations, when deliberately made, under a solemn and religious sense of impending dissolution, and concerning circumstances, in respect of which the deceased was not likely to have been mistaken, are entitled to great weight, if precisely identified, yet it is always to be recollected that the accused has not the power of cross-examination—a power quite as essential to the eliciting of all the truth as the obligation of an oath can be; and that where the witness has not a deep and strong sense of accountability to his Maker, and an enlight-

Digitized by Google

ened conscience, the passion of anger and feelings of revenge may, as they have not infrequently been found to do, affect the truth and accuracy of his statements, especially as the salutary and restraining fear of punishment for perjury is in such cases withdrawn. And it is further to be considered that the particulars of the violence to which the deceased has spoken were in general likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed, and leading both to mistakes as to the identity of persons and to the omission of facts essentially important to the completeness and truth of the narrative."

NOTE.—Phil. and Am. on Evid., 305, 306; 1 Phil. Evid., 292; 2 Johns., 35, 36, per Livingston, J.; *see also* Mr. Evans's observations on the great caution to be observed in the use of this kind of evidence; in 2 Poth. Obl., 255 (293); 2 Stark. Evid., 263; *see also* R. *v.* Ashton, 2 Lewin Cr. Cas., 147, per Alderson, B. (People *v.* Kraft, 148 N. Y., 631.)

Wigmore (p. 1800, sec. 1432):

"Rule applicable in certain criminal cases only. (1) The proceeding in which the statements are offered may *not* be a *civil case*.

"(2) It must be a public prosecution for the specific crime of *homicide*.

"(3) It must be a prosecution not merely for an act which has resulted in fact in death but for an offense *involving legally* the resulting *death* as a necessary element. This limitation is a refinement evolved from the earlier and simpler form of statement that 'death must be the subject of the charge.'"

Greenleaf (16th ed., vol. 1, p. 245, sec. 156), quoting numerous cases, states:

"*a. Limitations as to kind of issue, person declaring, and subject of declaration.*—It was at one time held, by respectable authorities, that this general principle warranted the admission of dying declarations in all cases, civil and criminal; but it is now well settled that they are admissible, as such, only in cases of homicide, 'where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations.' [(1) As to the *issue*, (*a*) the declaration is not admissible in a civil case; (*b*) it is admissible *in no other criminal case than a prosecution for homicide;* even where death is incidentally alleged or involved, as in the case of a prosecution for procuring an abortion; (*c*) the death which is the subject of the charge must be the *death of the declarant*. (2) The *subject of the declaration* must be the circumstances attending or leading up to the death for which the prosecution is instituted: for example, the declaration of a husband, killed by the wife's paramour, that he had found them in adultery, has been admitted; while the deceased's declarations as to a prior threat by the defendant have been excluded. (4) On the other hand, the declaration is not excluded by the circumstance that there are eyewitnesses to the deed, or other testimony; or that the fact of the killing is conceded by the accused.] The reasons for thus restricting it may be that the credit is not in all cases due to the declarations of a dying person; for his body may have survived the powers of his mind; or his recollection, if his senses are not impaired, may not be perfect; or, for the sake of ease, and to be rid of the importunity and annoyance of those around him, he may say, or seem to say, whatever they may choose to suggest. These, or the like considerations, have been regarded as counterbalancing the force of the general principle above stated; leaving this exception to stand only upon the ground of the public necessity of preserving the lives of the community by bringing manslayers to justice. For it often happens that there is no third person present to be an eyewitness to the fact; and the usual witness in other cases of felony, namely, the party injured, is himself destroyed. But, in thus restricting the evidence of dying declarations to cases of trial for homicide of the declarant, it should be observed that this applies only to declarations offered on the sole ground that they were made *in extremis;* for where they constitute part of the *res gestæ*, or come within the exception of declarations against interest, or the like, they are admissible as in other cases, irrespective of the fact that the declarant was under apprehension of death."

Wigmore (p. 1811, sec. 1455) states, citing a large number of cases:

"*Testimonial qualifications (infancy, insanity, interest, recollection, leading questions, written declarations, etc.).*—In general, for testimonial qualifications, the rules to be applied are no more and no less than the ordinary ones, already examined (secs. 483–812), for the qualifications of other witnesses:

"1857, *Ogden, J.*, in Donnelly *v.* State (26 N. J. L., 620): 'Whatever would disqualify a witness would make such [dying] declarations incompetent testimony.'

Digitized by Google

"1864, *Sanderson*, C. J., in People *v.* Sanches (24 Cal., 26): 'They stand upon the same footing as the testimony of a witness sworn in the case, and are governed by the same rules, except as to * * * leading questions.'

"1874, *Campbell*, J., in People *v.* Olmstead (30 Mich., 434): 'They [the declarations] are substitutes for sworn testimony, and must be such narrative statements as a witness might properly give on the stand if living.'

"1885, *Elliott*, C. J., in Boyle *v.* State (97 Ind., 322; 105 Ind., 470): 'Dying declarations are admissible in a case where the evidence would be competent if the declarant were on the witness stand. * * * The question here is * * * whether the declarant's statement was one that a witness on the stand would have been allowed to make.'

"(1) *Insanity, infancy, interest.*—If the declarant would have been disqualified to take the stand, by reason of infancy, insanity, or interest, his extrajudicial declarations must also be inadmissible.

"(2) *Knowledge.*—The declarant must have had actual observation or opportunity for observation of the fact which he relates.

"(3) *Recollection.*—The declarant's capacity of recollection, and his actual recollection, must have been sufficiently unimpaired to be trustworthy. The allowance of *leading questions* to stimulate recollection is sometimes here said to be by way of exception to the general rule against leading questions (*ante*, sec. 769). But in truth there seems to be no exception. The situation is not that of a presumably partisan witness offered in court, and questions leading in form will often have to be asked in order to obtain the information from a dying person unable to express himself except by a brief 'yes' of 'no.' The mere fact, then, that questions leading in form are asked does not infringe the principle which forbids the supplying of a false memory (*ante*, sec. 778). There is thus no general rule here against leading questions. Nevertheless where, in a particular case, the interrogators might seem to be really supplying a false memory, the answers should be excluded.

"(3) *Communication.*—(*a*) Any adequate method of communication, whether by words or by signs or otherwise, will suffice, provided the indication is positive and definite, and seems to proceed from an intelligence of its meaning:

"1880, *Hines*, J., in Mockabee *v.* Com. (78 Ky., 382): 'Dying declarations are not necessarily either written or spoken. Any method of communication between mind and mind may be adopted that will develop the thought, as the pressure of the hand, a nod of the head, or a glance of the eye.'

"(*b*) When the declaration is in *writing*, the question may arise whether it is his narration at all (*ante*, sec. 799). If the declarant has written it, or has signed or otherwise approved it after reading it, or hearing it read aloud to him, it may be offered as his declaration. Otherwise it is not the declaration; and it can not in such a case be put in as being itself the dying person's declaration; though it may of course be used to refresh the writer's recollection, or may be put in as embodying the writer's recollection (under the principles of secs. 744–764, *ante*. Whether this writing *must* be offered, instead of an auditor's testimony by recollection, is a different question (examined *post*, sec. 1450)."

It will be observed from the foregoing authorities quoted that a dying declaration should not be admitted except in cases where the prosecution is for the crime of some form of homicide, and only in such cases where the death of the deceased is the subject of the charge. As stated by Greenleaf, "it is admissible in no other criminal case than a prosecution for homicide, even where death is incidentally alleged or involved." C. M. O. 26, 1911, 3–6. *See also* C. M. O. 49, 1915, 14.

EFFECTS, DISPOSITION OF. *See* DESERTERS, 11, 12; DISPOSITION OF EFFECTS.

EFFICIENCY REPORTS ON OFFICERS. *See* REPORTS ON FITNESS.

EJUSDEM GENERIS, DOCTRINE OF.

1. **Definition**—The doctrine of *ejusdem generis* is that where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase is to be held to refer to things of the same kind. (Spalding *v.* People, 172 Ill., 40, 49; 49 N. E., 993, 995.)

Where general words follow particular ones, the rule is to construe the former as applicable to persons or things *ejusdem generis*. This rule has been stated, as applied to the word "other" as follows: Where a statute, or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces "other" persons or things, the word "other" will

Digitized by Google

generally be read as "other such like," so that persons or things therein comprised may be read as *ejusdem generis* with and not of a quality superior to or different from those specifically enumerated. C. M. O. 21, 1910, 10.

2. **Same**—It is a familiar principle of construction that where words of special and restricted meaning or application are followed by words of general import, the latter words are intended to embrace only such things or matters as are similar to those specifically mentioned. But this rule is not inflexible and is subject to some qualifications. For example, it has been held that this principle, i. e., that of *ejusdem generis*, does not apply when the particular or specific words or terms exhaust the whole class covered thereby, and that in such a case the general words or expression may be held to refer to some larger or different class. (26 A. & E. Enc., 610.)

   As the rule is elsewhere stated: The words "other" or "any other" following an enumeration of particular classes are therefore to be read as "other such like" and to include only others of like kind or character. (36 Cyc., 1120.) But it is also said that the principle does not apply "where the specific words embrace all objects of their class, so that the general words must bear a different meaning from the specific words *or be meaningless.*" (36 Cyc., 1122.) File 27231–34, J. A. G., Apr. 25, 1911, 5. *See also* File 24432–34, J. A. G., May 1, 1911, 14; STATUTORY CONSTRUCTION AND INTERPRETATION, 85.

3. **Limitation**—"The rule is subject to the limitation that where the particular word by which the general word is preceded was inserted, not to give a coloring to the general word but for a distinct object, the general word ought to govern." (State *v.* Broderick, 7 Mo. App., 19, 20.) File 26254–78, J. A. G., July 24, 1908, p. 2.

ELOPERS. *See* ENLISTMENTS, 18; MARINE CORPS, 29.

ELOPING.

1. **Enlisted men**—Of Marine Corps before final enlistment. *See* MARINE CORPS, 29.
2. **Officer**—A married officer charged with enticing a young girl to elope with him, under "Scandalous conduct tending to the destruction of good morals." C. M. O. 55, 1894.

EMBEZZLEMENT.

1. **Acquittal**—Effect on financial responsibility of accused. C. M. O. 39, 1913, 11–12. *See also* EMBEZZLEMENT, 25 (p. 210).
2. **Same**—Evidence necessary—Government to prove misappropriation or negligence—Necessity of rule. C. M. O. 39, 1913, 9. *See also* EMBEZZLEMENT, 25.
3. **Burden of proof**—Authorities hold that accused must satisfactorily explain shortage. C. M. O. 39, 1913, 5. *See also* BURDEN OF PROOF, 4, 5; EMBEZZLEMENT, 25.
4. **Common law**—Embezzlement is unknown to the common law. *See* EMBEZZLEMENT, 7.
5. **Constitutionality of embezzlement laws**—Is unquestioned since there are numerous other laws making certain acts crimes regardless of the intent of the person committing the act. For a recital of such laws, *see* File 26251–3252, J. A. G., Apr. 26, 1910, p. 13. As concerns the constitutionality of the embezzlement laws, it is the duty of the Executive to enforce all acts of Congress until such acts have been held unconstitutional by the only tribunal which is authorized to pass final judgment thereon. File 26251–3252, J. A. G., Apr. 26, 1910.
6. **Convert**—Immaterial whether the money be converted by the accused to his own use. EMBEZZLEMENT, 7; 25.
7. **Definitions**—Embezzlement is a purely statutory offense, unknown to the common law. It is defined (as to public officers) in sections 87–92, act March 4, 1909 (35 Stat., 1088, 1105), which superseded sections 5488–5492, R. S., on January 1, 1910. File 26251–3252, J. A. G., Apr. 26, 1910.

   Congress has included in the definition of embezzlement many acts and omissions by disbursing officers of the Government which were not included in the popular understanding of that crime. C. M. O. 4, 1913, 6.

   Section 87 of the Criminal Code, forbids the withdrawal of public money "for any purpose not prescribed by law," and also forbids any disbursing officer of the United States to convert such money in any manner to his own use. C. M. O. 4, 1913, 8.

   Embezzlement is defined by Bouvier to be "the fraudulent appropriation to one's own use of the money or goods intrusted to one's care by another." This definition, generally accepted by the authorities, is applicable to ordinary cases of embezzlement by bank officials, treasurers of corporations, and the like, and holds good *wherever the statutes do not intervene to modify it.* Bouvier adds, however: "Embezzlement being a statutory offense, reference must be had *to the statutes of the jurisdiction for*

Digitized by Google

the classes of persons and property affected by them." In the American and English Encyclopedia of Law (vol. 5, p. 496), it is said that "an indictment for embezzlement charging the crime substantially in the terms of the statute is sufficient." C. M. O. 4, 1913, 21.

Where a pay officer fails to render his accounts as required by law, and is negligent in the care of public money, in consequence of which such money is lost, it is not necessary to prove that the money was converted by the officer to his own use, or that he entertained an intent to defraud the United States; the mere failure safely to keep and account for public money being embezzlement under the law. (Criminal Code, secs. 87-92, 35 Stat., 1088, 1105.) File 26251-3252, J. A. G., Apr. 26, 1910.

Article 14 of the Articles for the Government of the Navy provides that—

"Fine and imprisonment, or such other punishment as a court-martial may adjudge, shall be inflicted upon any person in the naval service of the United States * * * who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully and knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or intended for the military or naval service thereof * * *."

It will be noted that this article merely uses the word "embezzles" without giving any definition thereof, so that for the circumstances which will constitute the offense under the article in question information must be sought in other statutes of the United States, embezzlement being a purely statutory offense unknown at common law. Recourse is accordingly had to section 87-92 of the act of Congress approved March 4, 1909 (35 Stat., 1088, 1105), which define embezzlement by public officers. These sections, which on January 1, 1910, superseded sections 5488-5492 of the Revised Statutes, read as follows:

"SEC. 87. Whoever, being a disbursing officer of the United States or a person acting as such, shall in any manner convert to his own use, or loan with or without interest, or deposit in any place or in any manner, except as authorized by law, any public money intrusted to him; or shall, for any purpose not prescribed by law, withdraw from the Treasurer or any assistant treasurer, or any authorized depositary, or transfer, or apply, any portion of the public money intrusted to him, shall be deemed guilty of an embezzlement of the money so converted, loaned, deposited, withdrawn, transferred, or applied, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both.

"SEC. 88. If the Treasurer of the United States, or any assistant treasurer, or any public depositary, fails safely to keep all moneys deposited by any disbursing officer or disbursing agent, as well as all moneys deposited by any receiver, collector, or other person having money of the United States, he shall be deemed guilty of embezzlement of the moneys not so safely kept, and shall be fined in a sum equal to the amount of money so embezzled and imprisoned not more than ten years.

"SEC. 89. Every officer or other person charged by any Act of Congress with the safekeeping of the public moneys, who shall loan, use, or convert to his own use, or shall deposit in any bank or exchange for other funds, except as specially allowed by law, any portion of the public moneys intrusted to him for safekeeping, shall be guilty of embezzlement of the moneys so loaned, used, converted, deposited, or exchanged, and shall be fined in a sum equal to the amount of money so embezzled and imprisoned not more than ten years.

"SEC. 90. Every officer or agent of the United States who, having received public money which he is not authorized to retain as salary, pay, or emolument, fails to render his accounts for the same as provided by law shall be deemed guilty of embezzlement, and shall be fined in a sum equal to the amount of the money embezzled and imprisoned not more than ten years.

"SEC. 91. Whoever, having money of the United States in his possession or under his control, shall fail to deposit it with the Treasurer, or some assistant treasurer, or some public depositary of the United States, when required so to do by the Secretary of the Treasury, or the head of any other proper department, or by the accounting officers of the Treasury, shall be deemed guilty of embezzlement thereof, and shall be fined in a sum equal to the amount of money embezzled and imprisoned not more than ten years.

"SEC. 92. The provisions of the five preceding sections shall be construed to apply to all persons charged with the safekeeping, transfer, or disbursement of the public money, whether such persons be indicted as receivers or depositaries of the same." C. M. O. 4, 1913, 15-17.

Digitized by Google

The foregoing sections, it will be noted, do not prescribe that the acts specified must have been done "knowingly" or "intentionally," or "willfully" or "fraudulently"; nor do they contain any other words of similar import. C. M. O. 4, 1913, 17.

8. **Delay in depositing**—A mere delay in depositing is embezzlement. File 26251-3252, J. A. G., Apr. 26, 1910. *See also* EMBEZZLEMENT, 18.

9. **Disbursing officers.** *See* DISBURSING OFFICERS; PAY OFFICERS.

10. **Exchange for other funds**—It appears in connection with the facts stated in specification 1 of the first (*sic*) charge that the accused willfully withdrew from the assistant treasurer of the United States at New York Government funds for the purpose of cashing a certificate of deposit as an accommodation to a personal friend, this being for a purpose not prescribed by law, and therefore covered by the second clause of section 87 of the code. Such transaction also appears to be in violation of the provision of section 89 against the "exchange for other funds, except as specially allowed by law," of a portion of the public moneys intrusted to such an officer for safe-keeping. C. M. O. 4, 1913, 51-52.

11. **Failing "safely to keep"**—A finding of the *facts* alleged in the specification proved will justify a finding of the entire specification proved. Therefore, if the facts in the specification are proved it would be improper for the court to find the words of description added to the specification *not proved*. A disbursing officer, therefore, who fails "safely to keep" funds intrusted to his care is guilty of embezzlement. File 2651-3252, J. A. G., Apr. 26, 1910.

12. **Same**—The contention of the accused was that he had left his safe unlocked and that Government funds contained therein were stolen by some party unknown. Nevertheless, under the broad provisions of section 88 of the Criminal Code the pay officer was convicted of embezzlement for failing "safely to keep" said funds, although evidence was not available to show misappropriation by the accused himself. Subsequently, after the trial had been completed, additional evidence was secured, resulting in a confession by the accused that the funds had been used by himself for private purposes and the defense above mentioned concocted to evade criminal responsibility. Had it not been for the statutory provisions covering his case, the accused might have escaped all punishment or received a light sentence for "Neglect of duty." C. M. O. 4, 1913, 6.

13. **Same**—By the express terms of the law, any of the officers named who "fails safely to keep" public money, intrusted to him for safe-keeping, transfer, or disbursement, "or who fails to render his accounts for the same as provided by law," is guilty of embezzlement. C. M. O. 4, 1913, 18.

14. **Felonious**—It is error in a finding that the accused did not *feloniously* embezzle, but did embezzle, since if the facts proved establish a felony, then the crime was committed feloniously. But the court might take into consideration in the *sentence* the difference between technical embezzlement and embezzlement with intent to defraud. C. M. O. 30, 1910, 7. *See also* G. C. M. Rec. 22271; 23082; 23461; 24017; 24221; 24222. *But see* ADEQUATE SENTENCES, 3; CLEMENCY, 13.

15. **Intent**—The intent of the officer, whether innocent or fraudulent, enters in no manner into the statutory offense. If his act of withdrawal, application, etc., of the funds is simply one not authorized by existing law, he is guilty of the crime here defined by Congress. His intent, if innocent, may perhaps be considered in mitigation of punishment, but can not be relied upon as a legal bar against conviction. The offense created by this act belongs to the class known as *mala prohibita*, but it is upon the repression of this class of offenses that the safety of the public treasury largely depends. C. M. O. 4, 1913, 8.

All that appears to be required to constitute a violation of a statute of this kind is that the defendant should have intended to do the prohibited act. C. M. O. 4, 1913.

16. **Same**—Implied by negligence—Criminal intent to commit embezzlement is implied by the negligence of the pay officer safely to keep the funds intrusted to his care. The offense may be complete without any actual embezzlement of money, but in the failure to comply with the direction of deposit of regulations of the head of the proper department.

But a pay officer would not be considered as civilly liable where the loss of public money under his care occurs in any way while the officer was in line of duty and free from fault, such as loss by breaking a safe in the daytime, loss from a train while in motion, failure of a bank, loss by fire; while relief has been granted in several cases for loss by robbery. Such officer can bring his action for said relief before the Court of Claims, pursuant to R. S., 1059 and 1062.

Any negligence, however slight, on the part of the disbursing officer makes him guilty of embezzlement. File 26251-3252, J. A. G., Apr. 26, 1910; C. M. O. 4, 1913.

Digitized by Google

17. **Marking checks as exchanged for cash**—So also the ease with which disbursing officers could evade substantial punishment for misappropriation of Government funds by marking checks as exchanged for cash, and contending upon discovery that it was intended to replace said funds at some later date, renders it absolutely imperative that all laxity and irregularity in dealing with public money intrusted to their care should be severely dealt with. C. M. O. 4, 1913, 6.
18. **Negligence**—Any negligence, however slight, on the part of the disbursing officer makes him guilty of embezzlement. It is immaterial whether the money be converted by him to his own use, or stolen by others as the result of his negligence, or whether it is still in his possession but deposited in a bank or other place not specified by law, or retained in his actual custody when it should be deposited in some public depositary, or in his possession but not accounted for as required by law. A mere delay in depositing money is embezzlement. File 2651-3252, J. A. G., Apr. 26, 1910, 8-9.
19. **Officers**—Charged with. C. M. O. 18, 1907; 38, 1907; 39, 1908; 17, 1915.
20. **Overpayment made by disbursing officer to himself**—Does an overpayment made to himself from public funds by a pay officer in the Navy constitute embezzlement where it appears that there have been no criminal intent involved, but the pay officer was at least guilty of negligence or indifference as to the status of his account.

This question appears to be answered by what was said in the opinion of the Attorney General, dated May 9, 1910 (28 Op. A. G., 286), assuming that the negligence or indifference attributed to the officer was such as to indicate a willful disregard of the duties imposed upon him by law with respect to the safe-keeping of the moneys in his charge. This would appear to be in violation of the provisions of sections 87 and 89 with respect to public officers converting public moneys to their own use except as authorized by law. C. M. O. 4, 1913, 52.
21. **Pay officer**—Guilty of "Embezzlement," even though funds actually taken by another, unless himself free from negligence or blame. C. M. O. 39, 1913, 9. *See also* EMBEZZLEMENT, 25.
22. **Paymaster's clerk—Charged with.** C. M. O. 26, 1902; 4, 1907; 26, 1912.
23. **Personal use—The action of a pay officer of the Navy in willfully drawing public funds** for his personal use while absent from his station and duty clearly amounts to a violation of the provisions of section 87 and 89 of the Criminal Code against converting public funds to his own use except as authorized by law, although there be no intention on his part to defraud the United States, and the funds withdrawn are subsequently replaced. C. M. O. 4, 1913, 52.
24. **Prima facie**—When shortage is proved the disbursing officer is prima facie guilty and must show what has become of the missing funds. G. C. M. Rec. 27899.

For example of case where "burden of proof" devolves upon accused and where he must prove his case "beyond any reasonable doubt," *see* opinion of Mr. Justice Story in U. S. *v.* Hunt, 26 Fed. Cas. No. 15423, p. 435. *See also* G. C. M. Rec. 27899; C. M. O. 39, 1913, 1; EMBEZZLEMENT, 25.
25. **Proof of**—The department returned a record of proceedings to the court with the following remarks:

1. The accused in the above-named case was charged with I, "Embezzlement in violation of article 14 of the Articles for the Government of the Navy;" II, "Rendering a false and fraudulent return;" III, "Neglect of duty;" and IV, "Violation of a lawful regulation issued by the Secretary of the Navy" (three specifications).

2. The court found the specifications of the first three charges not proved and acquitted the accused of those charges, and found proved two specifications of the fourth charge, which alleged that the accused unlawfully allowed certain enlisted men to sleep in the pay office, and found the accused guilty of said fourth charge.

3. The judge advocate definitely proved an existing shortage in the accounts of the accused, amounting to $1,370.55; thus it was shown that the accused should have had on hand June 30, 1913, $17,348.48, whereas in fact he was able to produce only the sum of $15,977.93, and was unable to account for the difference. There is no conflict whatever as to this evidence, as the record (p. 22) contains the following entry:

"COUNSEL FOR THE ACCUSED. We admit that the board found cash on hand $15,977.93; and we admit that the cash as per account current should have been $17,348.48."

The shortage thus shown to exist in the accounts of the accused was in no manner explained by the accused or the witnesses in his behalf. The question is therefore directly presented whether in this state of the case the court should have found the accused guilty of "Embezzlement" as charged.

Digitized by Google

Article 14 of the Articles for the Government of the Navy (sec. 1624, R. S.) provides for the punishment of any person in the naval service who "embezzles * * * any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military or naval service thereof." As held by the Attorney General (C. M. O. 4, 1913, 28):

"The word 'embezzlement' is not here defined, and consequently it is necessary to look to the offense as defined in the penal statutes relating to United States officials who are charged with the duty of holding and disbursing funds belonging to the Government in order to determine of what elements the offense consists."

It was further held by the Attorney General (C. M. O. 4, 1913, 45) that—

"No resort can be had to the definitions of embezzlement given in the laws of the several States, as there is no uniformity in the State statutes upon the subject. In many States a fraudulent intent is an essential ingredient of the crime, while in others it is not."

4. The penal statutes relating to embezzlement by United States officials, so far as applicable to the present case, are contained in sections 88 and 92 of the Federal Criminal Code, which sections read as follows:

"SEC. 88. If the Treasurer of the United States or any assistant treasurer, or any public depositary, fails safely to keep all moneys deposited by any disbursing officer or disbursing agent, as well as all moneys deposited by any receiver, collector, or other person having money of the United States, he shall be deemed guilty of embezzlement of the moneys not so safely kept, and shall be fined in a sum equal to the amount of money so embezzled and imprisoned not more than 10 years.

"SEC. 92. The provisions of the five preceding sections shall be construed to apply to all persons charged with the safekeeping transfer, or disbursement of the public money, whether such persons be indicted as receivers or depositaries of the same."

5. In the present case there can be no question upon the evidence before the court that the accused failed safely to keep the sum of $1,370.55 of the moneys of the United States which were intrusted to him in his official capacity as pay officer of the *Buffalo;* and such failure on his part, as already stated, is entirely unexplained by the defense. What further evidence is required under these circumstances to support a finding that the accused was guilty of "Embezzlement" as charged. For more than half a century it has been held, under statutes substantially identical with those now in effect, that the mere failure of a disbursing officer of the United States to produce or account for the public moneys in his hands when required so to do constitutes embezzlement, unless such officer is able satisfactorily to explain such failure or to show that the funds which he could not produce were, without fault on his part, lost or stolen. Thus, under date of January 3, 1867, it was held by the Judge Advocate General of the Army that—

"Section 5495, R. S., provides that the refusal of any person charged with the disbursement of public moneys promptly to transfer or disburse the funds in his hands, 'upon the legal requirement of an authorized officer, shall be deemed, upon the trial of any indictment against such person for embezzlement, as prima facie evidence of such embezzlement.' Applying this rule to a military case, it is clear that in the event of such a refusal by a disbursing officer of the Army *the burden of proof would be upon him to show that his proceeding was justified*, and that *it would not be for the prosecution to show what had become of the funds*. So, where an acting commissary of subsistence, on being relieved, failed to turn over the public moneys in his hands to his successor, or to his post commander when ordered to do so, or to produce such moneys, exhibit vouchers for the same, or otherwise account for their use, when so required by his department commander: *Held*, That he was properly charged with and convicted of embezzlement (the embezzlement now prohibited by this article). R. 22, 548, January, 1867." (Dig. J. A. G., Army, 1912, p. 138, A 4.)

In the case cited, the Judge Advocate General of the Army said:

"The burden of proof is by this act thrown upon the defendant to show that his retention and nonproduction of the public money is not an embezzlement. If he fails to do this the court is warranted in finding, and indeed *must find*, him guilty of the charge.

"The accused in the present case makes no effort to show his innocence, but rest simply on the omission on the part of the prosecution to show what has become of the funds which he confesses freely having received as alleged. He is therefore properly and legally convicted."

Digitized by Google

6. The foregoing was in accordance with an earlier opinion of the Judge Advocate General of the Army, rendered November 22, 1862, in which it was held:

"If upon formal demand made this officer should fail or refuse to pay over or account for the public moneys in his hands, a prima facie case of embezzlement would be made out against him; but it would be only a prima facie case were *he* to show *in his defense* that the money had been lost or fraudulently or feloniously abstracted from him, the animus of the embezzlement would be wanting and he would be acquitted."

7. The opinion last quoted is still in force, as shown by the following paragraph in the Digest of Opinions of the Judge Advocates General of the Army, 1912 (p. 541, A 12 b):

"It is a *defense* to a charge under article 62 of the embezzlement defined in section 5490, R. S., as consisting in a failure to safely keep public moneys by an officer charged with the safe-keeping of the same, that the funds alleged to have been embezzled were, *without fault on the part of the accused*, lost in transportation or fraudulently or feloniously abstracted. R. 1, 435, Nov., 1862."

8. Decisions of the civil courts are in accord with the opinions of the Judge Advocate General of the Army, as shown by the following cases:

(*a*) In State *v.* Leonard, Supreme Court of Tennessee, decided 1869 (46 Tenn. (6 Colds.), 308), it was held:

"The objection is that the failure and refusing to pay over to his successor is not a conversion or evidence of a conversion by the defendant to his own use in the sense of the code, section 4706, which defines the offense.

"The objection is without merit. The code, section 4706, enacts that if any person charged with the safe-keeping, collection, and disbursement of money or property belonging to the State or any county use any part of said money or property, by loan, investment, or otherwise, without authority of law, or convert any part thereof to his own use in any way whatever, he is guilty of embezzlement.

"Failing and refusing to pay over the money to his successor in office is, *unexplained*, evidence of a conversion of the money to his own use, and if proved *will establish* the allegation of the indictment that he did *embezzle and convert the money to his own use*. Failing and refusing to deliver a chattel, upon demand of the person entitled to possession, is evidence of conversion, in the civil action of trover.

"Of course, *proof may be made by the defendant, of facts, relieving the failure and refusal to pay of its felonious character.* * * *

"The duty of the court is to enforce the criminal law, and not to search for unnatural circumstances for pretexts or means to screen offenders from the punishment due to their crimes."

(*b*) This case was cited and followed by the same court in 1871 in the case of State *v.* Cameron (50 Tenn. (3 Heisk.), 84).

(*c*) In Commonwealth *v.* Levi, Superior Court of Pennsylvania, decided in 1910 (44 Pa. Super. Ct., 253), it was held, quoting syllabus:

"On the trial of an indictment of an executor for embezzlement, the inventory and appraisement of the decedent's estate filed by the defendant in the office of the register of wills, is admissible in evidence; as is also proceedings in the orphans' court and supreme court as proof of what property of the estate the defendant had in hands and which he should legally be required to pay to the distributees.

"Such evidence does not prevent the *defendant* from showing, if he can, that he had *lost the money in any manner which did not involve malfeasance on his part*, or that he had through an honest mistake paid the money to parties who were not legally entitled to receive it."

In the course of its opinion in this case the court said:

"Conversion, by the trustee, of a trust fund to any other use than that of the cestui que trust is prima facie fraudulent, *and the failure of the trustee to pay on settlement of his account is evidence of conversion.* Commonwealth *v.* Kaufman, 9 Pa. Superior Ct., 310; Commonwealth *v.* Beale, 19 Pa. Superior Ct., 434; Commonwealth *v.* King, 35 Pa. Superior Ct., 454."

9. In other words, in the case last cited, the court holds that when evidence is admitted establishing the amount of funds which an executor had in his hands and is required to pay to the beneficaries of a will, his failure to pay such amount on settlement of his account is evidence of conversion; and that the burden devolves upon the executor to show, if he can, that he had lost the money in some manner which did not involve fault on his part, or otherwise to explain his failure to pay over the amount due. [In this connection, see opinion of Mr. Justice Story, in U. S. *v.* Hunt, 26 Fed. Cas., p. 435.]

Digitized by Google

10. The Attorney General's opinion of May 9, 1910, in the case above cited (C. M. O. 4, 1913, 28) is entirely in consonance with the earlier decisions to which reference has been made. Thus, in his opinion, the Attorney General said (C. M. O. No. 4, 1913, 31):

"Without here undertaking to pass upon the necessity of a fraudulent or criminal intent or knowledge upon the part of the accused, it is sufficient to say that if such intent or knowledge were necessary, their absence, under the positive provisions of this statute, would be a *matter of defense.*"

Here it will be seen the Attorney General holds it is for the accused to prove as a "matter of defense" that the money was lost without fault on his part. Continuing, the Attorney General in the same opinion points out what would constitute such a "matter of defense" as to entitle the accused to acquittal after a deficit has been proved by the Government (C. M. O. 4, 1913, 35):

"It was clearly the intention of Congress, in enacting the provisions heretofore quoted, requiring the safe-keeping of money by officials intrusted therewith, that the greatest diligence and care should be exercised by them, and that every precaution should be taken to safely keep and account for the same. *If money should be lost by robbery*, or fire, or by any accidental means, *after every precaution had been exercised by the official having it in his possession*, it would indeed be a harsh rule that would not only hold him and his securities liable for the same, but would confine him in the penitentiary for its loss."

11. Thus the Attorney General's opinion, in substance, holds that if Government funds are lost without fault on the part of the officer intrusted therewith such officer is not guilty of embezzlement under the statutes; but that it is for the accused to show, as "a matter of defense," that the money was so lost without fault on his part, as, for example, "by robbery, or fire, or by any accidental means." Some of the other decisions above cited, it will be noted, hold that mere evidence of an existing shortage, unless satisfactorily explained by the defendant, justifies a finding that he is guilty of actual conversion of the funds so unaccounted for. In the present case it is not necessary for the court to find that the accused actually converted the funds to his own use, as the Federal statute is broad and makes mere failure safely to keep public funds embezzlement, regardless of what has become of such funds. Thus it is settled by C. M. O. 4, 1913, that, even though the evidence should apparently establish that the missing funds had actually been stolen by another, the pay officer would nevertheless be guilty of embezzlement under the statute if he had been negligent in safeguarding the money in his charge; and the same thing applies where there is no evidence whatever as to what has become of the missing funds even though there should be no evidence of negligence on the part of the accused. In other words, the accused in order to rebut the prosecution's evidence that the money is missing, which is prima facie evidence of embezzlement, must show not only that the funds were stolen or misappropriated by another, but, furthermore, must affirmatively show that such theft or misappropriation by another was not due to fault on the part of himself, the accused.

12. In the present case the accused has failed absolutely to show what became of the $1,370.55 of Government funds for which he was responsible, and accordingly there is no evidence upon which the court can base a finding, first, that the money was stolen by a person other than the accused or accidentally lost; and, secondly, that such theft or accidental loss of the funds was without negligence on the part of the accused. And the court, according to the above authorities, must find both of these facts before it can properly render a verdict of not guilty. The accused has had his "day in court" and has failed to make any defense which is legally sufficient to the charge of embezzlement. It is not enough for him to say to the Government, as it were, "It is true that I have failed safely to keep $1,370.55 of Government funds which were intrusted to me, but it is not necessary for *me* to explain what has become of this money; *you* must prove that I misappropriated the money or was guilty of such negligence or indifference in its care as to indicate a willful disregard of the duties imposed upon me by law with respect to the safe-keeping of the moneys in my charge." Yet this is precisely the attitude of the accused in the present case, as shown by the following extracts from the argument of his counsel:

"He is charged between the dates of April 1 and June 30. There is no evidence before this court to show that this safe was found open between these dates, or that he didn't do everything in his power to protect his combination between those dates." (Rec., p. 98.)

Digitized by Google

"There is nothing in the testimony that shows during the period from April 1 to July 1 that there was any failure, any neglect, or any other circumstance that would indicate that the accused has not safely kept this money as well as he could with the means at his disposal." (Rec., p. 124.)

It may be that the Government has not shown in the present case what became of the missing funds or that the accused left the safe open during the dates in question or was otherwise guilty of negligence during such period. But, as already shown, it was not necessary for the Government to introduce evidence establishing such facts. The judge advocate proved that the accused was intrusted with certain funds by the Government; that $1,370.55 of such funds were missing and unaccounted for by the accused. This is all that the Government could reasonably be expected to prove in the average case of embezzlement and is all that the law requires. It is the duty of the accused to account for every cent of the Government money in his charge or to explain satisfactorily to the court what has become of such funds and definitely establish that their loss was not due to fault on his part. The logic underlying this principle is apparent. Thus, if the law were in accordance with the attitude of the accused in this case, it would be possible for any officer charged with the safe-keeping of Government funds to enter his office, lock the door, open the safe, abstract the contents, lock the safe, and proceed to conceal the money thus feloniously taken without being found guilty of embezzlement, as in the case so supposed it would be impossible for the Government to prove what had become of the funds or that the accused had been guilty of negligence in their safe-keeping. Accordingly, the findings of the court, if allowed to stand, would become a most pernicious precedent, placing a premium upon the ingenuity of disbursing officers who might succeed in systematically misappropriating Government funds without leaving even a modicum of telltale evidence in their wake. As was stated by the Judge Advocate General with reference to the laws defining embezzlement by Federal officials (C. M. O. No. 4, 1913, 6):

"Upon consideration the necessity of such statutes will be readily understood as a safeguard to public funds. This is strongly demonstrated by a case in the records of this department, where the contention of the accused was that he had left his safe unlocked and that Government funds contained therein were stolen by some party unknown. Nevertheless, under the broad provisions of section 88 of the Criminal Code the pay officer was convicted of embezzlement for failing 'safely to keep' said funds, although evidence was not available to show misappropriation by the accused himself. Subsequently, after the trial had been completed, additional evidence was secured, resulting in a confession by the accused that the funds had been used by himself for private purposes and the defense above mentioned concocted to evade criminal responsibility. Had it not been for the statutory provisions covering his case, the accused might have escaped all punishment or received a light sentence for neglect of duty."

* * * * *

14. The department of course does not want to suggest that the court in this case may have been influenced in its finding by sympathy for the accused, based on the consideration that he would be sufficiently punished for his failure to safeguard Government funds by being required to make good the amount of his shortage; as the members of the court are, by their oath, bound to try the case without "partiality" and "according to the evidence which shall come before the court." It may, however, be remarked that the accused, according to his own testimony, has not made good the amount of his shortage (Rec., p. 90); the reason for which, according to the record, is that he had been "advised" not to do so (Rec., p. 11). Accordingly, the present case differs from those of the two cases published in C. M. O. 4, 1913, above referred to, in that the Government has actually sustained a loss, whereas in those cases the amount of the funds embezzled was in each instance replaced. Should the accused in this case be finally acquitted in this case of "embezzlement" as charged, this would also necessarily acquit him of negligence in connection with the loss of the funds in question, because, as already explained, such negligence by a public officer is made embezzlement by law. Therefore, if so acquitted, the accused would have a strong basis for applying to the Court of Claims to be relieved from financial responsibility for this loss under sections 145 and 147 of the United States Judicial Code, approved March 3, 1911 (36 Stat., 1136), which sections provide as follows:

"SEC. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters: * * * The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of loss by capture or otherwise,

Digitized by Google

while in the line of his duty, of Government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible.

"SEC. 147. Whenever the Court of Claims ascertains the facts of any loss by any paymaster, quartermaster, commissary of subsistence, or other disbursing officer, in the cases hereinbefore provided, to have been without fault or negligence on the part of such officer, it shall make a decree setting forth the amount thereof, and upon such decree the proper accounting officers of the Treasury shall allow to such officer the amount so decreed as a credit in the settlement of his accounts."

(*a*) From this it will be seen that if the law were otherwise than has been hereinbefore stated, it would be possible in the supposititious case referred to in paragraph 12 (p. 10) for a pay officer actually to embezzle Government funds in his possession and to be acquitted because the Government was unable to prove either that he had taken the money himself, or been guilty of negligence in safeguarding it; and such officer who had so actually embezzled Government funds could go to the Court of Claims and apply for relief from financial responsibility for the amount embezzled on the ground that his acquittal by the court-martial of embezzlement necessarily involved an acquittal of such negligence as the law makes embezzlement. While the question of the financial responsibility of the accused does not enter into the case now pending before the court of which you are president, except in so far as the fact that he has or has not made good the amount of his shortage may affect the sentence to be adjudged if he is convicted, at the same time the department is required to consider the effect of the court's finding in this case should it be allowed to stand, not only with reference to the criminal and financial responsibility of the accused but also its effect as a precedent, giving assurance to pay officers who may be so inclined that they are at liberty to make such use of Government funds as they please, and so long as the department is unable to prove that they actually converted such funds or were guilty of gross negligence in connection therewith, they will be acquitted by court-martial of embezzlement, and may then carry the record of the court-martial into the Court of Claims in support of an application to be relieved from financial responsibility for the amount embezzled or not safely kept.

15. Counsel for the accused in concluding his argument (Rec., p. 105) stated:

"Is there any doubt at all whether some person, then, as inexperienced as Mr. * * * could have worked that combination and gotten into the safe and in a hurry grabbed different denominations of money and escaped without being noticed, especially if the ship were at sea, when most of the officers are on watch and not around the decks in the vicinity of the pay department."

In this connection it will be remembered Ensign * * * [referred to by counsel above] testified that although he made repeated attempts, he did not succeed in opening the safe in his experiments; and another witness testified that "the combination had to be worked *exactly* or the safe would not open"; that he did not know what an "expert" could do, but that "the average person would have a great deal of trouble in getting into the safe without knowing the combination." It it not much more reasonable to conclude, instead of accepting the hypothesis suggested by counsel for the accused, that the accused may have left the safe unlocked, and that some person had thus been enabled to get into the safe and in a hurry grab different denominations of money, lock the safe, and escape without being noticed? In such a case, how could it be expected that the Government would be able to prove that the safe had been left unlocked? Had the accused introduced evidence showing that there were "experts" on board ship able to open the safe without knowing the combination, the situation might be different. Or had he shown that he discovered evidences that the safe or his money had been tampered with and immediately reported the matter to his commanding officer, a reasonable doubt might possibly have existed in the minds of the court concerning his guilt. But the court must know that ordinarily safe experts are not to be found on board vessels of the Navy and that it would be going entirely too far without evidence of any kind in support thereof to conclude that the safe in question had been rifled by an expert. Knowing that the accused had, on at least one occasion while pay officer of the *Buffalo*, left his safe unlocked; that his conduct in general was such as to convince his commanding officer of the advisability of investigating his official accounts; that confessedly he did not inform his commanding officer immediately upon discovering the shortage, nor until the afternoon of the next day; and that he does not attempt to show that at any time he discovered anything suspicious in the condition of his safes or the funds kept therein, certainly the only reasonable conclusion is, granting that the accused did not himself misappropriate the

Digitized by Google

missing funds, that he was guilty of negligence which enabled some other person to take the funds in question. But the court is not required to indulge in hypotheses; the main fact is that the funds are missing and that the accused does not explain in any manner whatever what has become of them, but seeks to obtain an acquittal on the ground that the Government has not introduced evidence which it was *his* duty and not the Government's to present to the court. And the authorities above quoted all wisely concur in the conclusion that under such circumstances a public officer is not entitled to acquittal.

The court in revision revoked its former finding and found the accused "guilty" of the first charge. C. M. O. 39, 1913. *See also* C. M. O. 4, 1913; 25, 1916; File 26256-193:3, J. A. G., Mar. 2, 1915.

A pay officer when a shortage is proved is guilty of embezzlement, even though the funds were taken by another, unless he is free from neglect, and for an acquittal evidence showing absence of such neglect is necessary, and the accused can not require the Government to prove misappropriation or negligence nor can he require the court to indulge in hypothesis to supply evidence which it is the duty of the accused to introduce. C. M. O. 25, 1916.

26. **Replacing funds**—The fact that the accused intended to replace the money withdrawn, and did subsequently replace it, can not remove his guilt of a crime which had been completed some days before the money was replaced. The remarks of the court in United States *v.* Gilbert (25 Fed. Cas. No.15, 205) apply with equal force to the present case. That was an indictment under a statute relating to postmasters, but of similar import to section 87 of the Criminal Code. The evidence showed that the accused at the time of using money-order funds for private purposes intended to replace them, and that he did in fact subsequently deposit an amount equal to that which was charged as having been embezzled. Nevertheless he was found guilty of embezzlement, the court saying:

"It is obvious that the enforcement of this section in all its strictness is essential to this class of Government funds, and to the discouragement of postmasters from even temporarily using them for private purposes. The intention of replacing them, however honestly entertained, can not be accepted as an excuse or apology for violating the law, as one may be disappointed by unexpected circumstances, and thus not only endanger the moneys of the Government, but involve himself in difficulty and criminal prosecution. The law intends that funds of this character should be kept absolutely separate and sacred, as the best method not only of keeping the funds themselves secure, but of guarding the officers themselves from temptation and delinquency. The diversion of money-order funds in any way whatever prohibited by this section, or for any time however short, constitutes embezzlement under this act, and is punishable as such." C. M. O. 4, 1913, 7-8. *See also* File 5208:1, J. A. G., July 2, 1906.

27. **Shortage**—When shortage is proved, pay officer is prima facie guilty, and must show, as a matter of defense, absence of negligence or culpability on his part. Not necessary for the Government to prove what has become of the missing funds. C. M. O. 39, 1913, 1.

28. **State laws**—Not applicable. C. M. O. 4, 1913, 28; 39, 1913, 5. *See also* EMBEZZLEMENT, 25 (p. 207, line 11).

29. **Statutory offense**—Embezzlement is in all cases a statutory offense. C. M. O. 4, 1913, 60. *See also* EMBEZZLEMENT, 7.

30. **Technical**—Difference between technical embezzlement and embezzlement with intent to defraud may be taken into consideration in adjudging sentence. C. M. O. 30, 1910, 7. *See also* EMBEZZLEMENT, 14. *But see* ADEQUATE SENTENCES, 3; CLEMENCY, 13.

31. **Theft and embezzlement**—Distinguished. G. O. 143, Oct. 28, 1869.

EMBEZZLEMENT OF PRIVATE MONEY.

1. **Paymaster's clerk**—Charged with. C. M. O. 28, 1887. *See also* G. C. M. Rec. 32006.

EMBEZZLEMENT OF PUBLIC MONEY.

1. **Paymaster's clerk**—Charged with. C. M. O. 28, 1887.

EMBEZZLEMENT IN VIOLATION OF ARTICLE FOURTEEN OF THE ARTICLES FOR THE GOVERNMENT OF THE NAVY.

1. **Officers**—Charged with. C. M. O. 27, 1887; 82, 1892; 7, 1894; 88, 1895; 74, 1897; 203, 1902; 92, 1903; 53, 1905; 11, 1908; 22, 1910; 27, 1911; 4, 1913; 7, 1913; 39, 1913; 25, 1916; G. C. M. Rec. 16956; 13670; 6359.

2. **Paymaster's clerks**—Charged with. C. M. O. 102, 1894; 173, 1902; 38, 1913; G. C. M. Rec. 23461. *See also* PAY CLERKS AND CHIEF PAY CLERKS, 6.

Digitized by Google

EMERGENCY.
1. **Boilers.** *See* C. M. O. 37, 1915.
2. **Commanding officer**—Orders in case of. *See* COLLISION, 19.
3. **Officer of the deck**—Action in case of. C. M. O. 44, 1883. *See also* OFFICER-OF-THE-DECK, 7, 10.
4. **Repairs to vessels.** File 1052-97. *See also* File 5177-96.
5. **Senior officer actually present on spot**—Has duty of taking necessary action upon his own initiative to prevent injury to lives and property under his charge; and where the emergency is immediate and urgent he is not justified in delaying the necessary action because of an order issued by his superior officer before the emergency occurred and under a materially different state of facts. C. M. O. 37, 1915, 1, 3-7.

EMINENT DOMAIN. *See* File 6769-21, J. A. G., July 19, 1911, p. 9.

EMOLUMENT. *See also* PAY; SALARIES.
1. **Definition**—"Emolument is the profit arising from office or employment; that which is received as compensation for services, or which is annexed to the possession of office, as salary, fees, and perquisites." (3 W. & P. 2367.) File 4924-35, J. A. G., June 20, 1916.

EMPLOYED.
1. **Definition and use of word.** File 26516-38, J. A. G., Dec. 3, 1910, 2.

EMPLOYEES. *See* CIVIL EMPLOYEES.

EMPLOYMENT.
Retired officer—Employment of. *See* RETIRED OFFICERS, 1, 9, 18, 26, 28, 31, 34-40, 42, 44, 50, 52, 54-58, 72.

ENGINEER OFFICER.
1. **General court-martial**—Tried by. C. M. O. 9, 1915.

ENLISTED MEN.
1. **Marine corps**—Appointment as officers in. *See* APPOINTMENTS, 22.
2. **Dental work.** *See* DENTAL SERVICES.
3. **Treatment of**—Enlisted men in the Navy, the same as Members of Congress, members of the bar, and others in civil life, are not to be treated as criminals until their guilt has been established by due process of law. File 26524-259: 3, Sec. Navy, May 2, 1916.
4. **Office**—Does an enlisted man hold office? *See* "OFFICE," 10, 12; DECORATIONS, 2.
5. **Debt.** *See* DEBTS.
6. **Retired**—Not part of Navy. *See* RETIRED ENLISTED MEN, 9.

ENLISTMENTS.
1. **Aliens.** *See* ALIENS, 3; CITIZENSHIP, 12.
2. **Antedating of**—Where a sergeant of marines made application for reenlistment on September 28, 1905, the day following his discharge, and was not enlisted until the following day, *held*, that in view of the fact that he made application the day following his discharge, that his physical disqualification was properly waived, that he was held to service during the time his physical condition was under consideration, actually performing his customary duties, and submitted himself to naval authority in all respects until the completion of his reenlistment on October 4, 1905, as though his reenlistment had been perfected on the date of his application, he may be given credit for service from September 28, 1905, to October 3, 1905, both dates being inclusive. File 7657-111, J. A. G., September, 1911.
3. **Citizenship**—Necessity of citizenship for enlistment. *See* CITIZENSHIP, 12, 13.
4. **Convicts, of.** *See* CONVICTS, 2.
5. **Criminals**—To escape punishment by civil courts. File 7657-178:1, Sec. Navy, Apr. 19, 1913; Congressional Record, Feb. 24, 1913, 3939-3940. *See also* File 7657-396, Sec. Navy, Sept. 15, 1916; CONVICTS, 2, 3.
6. **Deserter**—Unconvicted—Enlistment of unconvicted deserters not advised. *See* DESERTERS, 13.
7. **"Escaped convicts."** *See* CONVICTS, 3.
8. **Expiration of**—The department has authority to retain a general court-martial prisoner to serve out his sentence after his enlistment has expired and he has been given a discharge from the service. File 26504-102, J. A. G., Mar. 1, 1910.

Digitized by Google

A general court-martial prisoner may be tried by summary court-martial or deck court prior to the expiration of his period of enlistment and may afterwards be held to serve out the sentence imposed by such courts irrespective of whether or not his sentence by general court-martial or his enlistment expires in the meantime. File 26504-100, Sec. Navy, Dec. 21. 1910. *See also* Walker's Case, American Jurist, 1830; 7 East, 376; Com. *v.* Fox, 7 Penna. 337; BREAKING ARREST, 3; JURISDICTION, 52, 97.

9. **Same**—Unauthorized absence after. *See* ENLISTMENTS, 8; 16 J. A. G. 109. *See also* IN RE GRIMLEY, 137 U. S., 147.
10. **Same**—Jurisdiction attaches for offenses committed prior to actual discharge. *See* JURISDICTION, 97.
11. **Same**—Retention in service. *See* File 7657-167, J. A. G., Jan. 17, 1913; 26251-6297: 2, Sec. Navy, July 10, 1913.

A sergeant of marines was "retained in service beyond term of enlistment to make good 118 days lost by absence without leave." C. M. O. 28, 1910, 7.

An enlisted man shall be required to "make good" any time lost during current enlistment in excess of one day "on account of sickness or disease resulting from his own intemperate use of drugs or alcoholic liquors, or other misconduct" only where such sickness or disease was contracted on or subsequent to August 29, 1916. (*See* act of Aug. 29, 1916, 39 Stat. 580.) In other words, where the sickness or disease which results in loss of time was contracted prior to August 29, 1916, enlisted men will not be required to "make good" such time. File 7657-394: 1, Sec. Navy, Sept. 20, 1916; C. M. O. 33, 1916, 5-6; *See also* MARINE CORPS, 30.

12. **Extension of**—The act of August 22, 1912 (37 Stat. 331), authorizes extension of enlistment only in the case of men enlisted for a term of four years. Therefore, *held*, that a man enlisted for minority can not extend his enlistment under the provisions of said act. File 7657-182, J. A. G., Apr. 14, 1913; C. M. O. 29, 1915, 6.
13. **Same**—Credit for double time—A marine serving in a regular four-year term of enlistment entered that enlistment prior to August 24, 1912, and is receiving credit for double time toward retirement for foreign service; should he extend his enlistment in accordance with the act of August 22, 1912 (37 Stat. 575), for a period of one, two, three, or four years, and continue on foreign service, he would continue to be entitled to credit for double time while serving in the extension of his present enlistment. File 26507-233, J. A. G., Sept. 29, 1915; Sec. Navy, Sept. 30, 1915; C. M. O. 31, 1915, 6.
14. **Same**—Good-conduct medals. *See* GOOD-CONDUCT MEDALS.
15. **Same**—I-4893. *See* NAVAL INSTRUCTIONS, 1913, I-4893.
16. **Minors.** *See* APPRENTICES, 2; MINORS, 9-14.
17. **Minority**—Error in—Where a minor signed a contract of enlistment, reading "I oblige and subject myself to serve during minority, until January 1, 1915," the legal effect of the contract was to bind him to serve until he arrived at the age of 21 years, which the evidence in this case shows would be January 1, 1916. The date on which he would attain his majority, given in the contract of enlistment and consent of parent as January 1, 1915, must be rejected as an error in computation. Since the man stated that he was informed by the recruiting officer that his enlistment would expire January 1, 1915, which statement is confirmed by the date given in the shipping articles, it would be proper to give the man his discharge at once, but if he desires the benefits of a discharge by reason of expiration of enlistment he would have to serve until January 1, 1916. File 7657-273, J. A. G., Jan. 16, 1915; C. M. O. 6, 1915, 11.
18. **Prosecution of applicants fraudulently obtaining transportation**—The Secretary of the Navy will not request the Attorney General to instruct United States attorneys to institute criminal proceedings against applicants for enlistment in the Marine Corps alleged to have fraudulently obtained Government transportation. File 7657-180.
19. **Termination of**—An enlisted man can not terminate his enlistment by an act of his own. An enlistment is terminated by death or discharge only. Any offense committed by the enlisted man before death or actual discharge is within the jurisdiction of a naval court-martial and he may be tried therefor *after* the date of expiration of enlistment. File 26251-5447, J. A. G., Dec. 8, 1911. *See also* BREAKING ARREST, 3.
20. **Trial by summary court-martial**—Absence from station and duty without leave extending over expiration of enlistment. File 26287-548, J. A. G., July 2, 1910.
21. **Violating agreement**—To reenlist on same ship after discharge—Tried for "conduct to the prejudice of good order and discipline." *See* DISCHARGE OBTAINED BY FRAUD.
22. **War with Spain.** *See* WAR WITH SPAIN, 2.

ENLISTMENT PAPERS. *See* SERVICE RECORDS.

Digitized by Google

ENLISTMENT RECORDS. *See* SERVICE RECORDS.

ENTICING A PRISONER TO ESCAPE.

1. **Enlisted man**—Charged with. C. M. O. 48, 1889.

"ENTIRELY ACQUIT." *See* ACQUITTAL, 13.

EPILEPSY.

1. **Confinement**—Of an epileptic is not injurious to his health—With reference to the possible effect of confinement at hard labor on an epileptic, it will be seen from the following that such would be of benefit rather than detrimental to the health of an accused supposedly suffering from epilepsy: An expert witness for the accused at a recent trial testified, "I do not know how irksome life would be in a jail. I believe jails vary. I think the confinement and the monotony of it would tend to make him worse. The regular habit of life and the simple food that he would get there would be of the *greatest assistance* in curing his epilepsy." This expert also testified that if the accused epileptic were his patient he would place him "somewhere where his habits could be regulated. I think that is of *first importance* in curing epileptics. The medical treatment of it is secondary to that. There is a variety of places where such a result could be obtained. I suppose any hospital or sanitarium could furnish the proper environment and the proper restraint on his food and habits." In this connection the Surgeon General of the Navy reported that "there is no reason to believe that the punishment imposed on him by general court-martial will be deleterious to his health, but, with the regular life, careful diet, good hygiene, and medical supervision which he will have at the" prison, "his general state of health should be improved." (File 26251-9280: 40, Sec. Navy, Mar. 27, 1915.) A report made by the warden of the prison in which this accused was confined, about four months after his confinement began, reads in part: "As to his physical and mental condition will say he is getting along fine. * * * Works every day, no sign of epilpetic as yet."

   From the foregoing it will readily be seen that the confinement of an epileptic does not appear to be detrimental either to his mental or physical well being. File 26250-9280: 41, Sec. Navy, Apr. 17, 1915: C. M. O. 51, 1914, 4-5.

2. **Defense of**—Where an accused knows the difference between right and wrong, was conscious of having done wrong, and was competent to conduct his defense when tried by general court-martial, it is not a good defense for him to prove that he was afflicted with epilepsy, which it was claimed had so far affected his moral sense and weakened his will as to render him not fully responsible for the offenses committed by him. G. C. M. Rec. No. 29422; File 26251-9280; C. M. O. 51, 1914, 4.

3. **Same**—An accused was charged with "Fraudulent enlistment," pleaded "guilty," and no evidence was introduced by the prosecution. On the part of the defense a naval medical officer was introduced, presumably to show extenuating circumstances, and entirely upon his evidence the court acquitted the accused on the ground that at the time he committed the offense he was insane. The department returned the case for revision, with proper remarks, but the court respectfully adhered to its findings and acquittal, stating: "In view of the testimony of the medical officer, as noted on page 4 of the record, to the effect that the accused was subject to epileptic fits, as shown by his (the doctor's) medical journal, and further, that the testimony of the doctor who examined him for reenlistment, as noted on page 7 of the record, shows that he was unable to determine any mental deficiency at the time of enlistment, but that it was possible that an epileptic might pass, no matter how rigid the examination, and appear mentally sound yet have an attack later, the court decides respectfully to adhere to its former finding and acquittal."

   The department in its action stated in part: The only evidence given by the doctor who testified as to the irresponsibility of the accused which touches in any way upon epileptic fits is to the effect that, in looking over the man's record, he found that he had been entered on his medical journal with epilepsy, having had one convulsion on board.

   That on this single occasion just mentioned, and the two instances when the accused was markedly under the influence of alcohol, morphine, or cocaine, were the only times on which the accused came under the doctor's observation.

   The court gives as a further reason for adhering to its former finding, the testimony of the examining surgeon, who testified that he was unable to determine any mental deficiency at the time of enlistment, but that it was possible that an epileptic might pass, no matter how rigid the examination.

   In the opinion of the department the idea conveyed in the first part of this reference is to a certain extent misleading.

Digitized by Google

What the doctor did state, according to the record, was that there was nothing in his, the accused's, appearance at the time (referring to the time of his examination for enlistment, on Sept. 30, 1909) to indicate to him that he was other than sound physically and mentally.

In answer to the question, "Was your examination of the accused on September 30, 1909, sufficiently minute to determine any mental deficiencies that might have existed in the accused," he answered, "Strictly speaking, no;" and further states in the same answer that it is possible that an epileptic may pass a physical examination no matter how rigid, and appear mentally sound yet have an attack later.

The court failed to further observe that the doctor later stated that he thought an epileptic would be responsible for statements made, except during a paroxysm.

It can be assumed that, at the time of the doctor's examination, or when the accused was enlisted, he was not in an epileptic paroxysm, and therefore so far as epilepsy and the resultant mental condition is concerned the accused was responsible at the time of this fraudulent enlistment.

The department in its letter returning the case to the court very carefully set forth the only condition upon which an accused might be acquitted by the court because of insanity, and that it must be conclusively shown that he was insane at the time of his committing the offense charged.

Notwithstanding these instructions the court apparently gave no heed whatever to the direct injunction of the department, as is shown by their finding on revision, in which the court goes on record that it adhered to its former finding in view of the fact that the accused was subject to epileptic fits, as shown by the doctor's medical journal. The one fit referred to, and not fits, occurred some time prior to May, 1909, and the accused enlisted in October of the same year.

It is thus shown from the finding of the court that the department's letter was entirely ignored, and by the court obstinately adhering to their opinion rendered a finding wholly inconsistent with the evidence, thereby occasioning a miscarriage of justice. The court thus signally failed in its duty, and its conduct is subject for censure.

The medical record shows that the accused was admitted to the sick list on the *Nebraska* on November 4, 1908, and discharged therefrom the next day, epilepsy being assigned as the disease.

The accused's enlistment record shows that he was 515 days serving on the *Nebraska*, and was but for one day during that period on the sick list, and evidently this occasion is the one of November 4, above referred to; he having been discharged from the *Nebraska* on May 10, 1909. Considering these facts, together with the doctor's testimony, it shows that he was over six months on board the *Nebraska* after his one attack, and had no other attack throughout this latter period; and the records fail to show any recommendation made by the doctor as the result of this one attack, even though the man continued on board six months thereafter.

The department is aware that these facts just referred to were not brought out in evidence, but they were all available at the time of the trial, and could and should have been brought forward before the court took the action it did.

The court, by adhering to its original finding, causes a miscarriage of justice, permits the accused to escape merited punishment, and by neglecting their duty becomes responsible for the injurious effect thus caused to the discipline of the naval service.

The proceedings, finding, and sentence in this case were disapproved by the department, and it was ordered that the accused be released from arrest, and, as an entirely separate and independent proceeding, discharged from the service as undesirable. C. M. O. 42, 1909, 13–15.

4. **Ensign**—Retired on furlough pay. File 26253–445.
5. **Memorandum on.** File 26251–9280:43.

EPITHETS.

1. **Officer, by**—The use of a vile epithet by an officer indicates an inexcusably unclean habit of thought and speech. C. N. O. 18, 1910, 2. *See also* OFFICERS, 122.

EPSOM SALTS.

1. **Bichloride of mercury**—Administered by mistake instead of. C. M. O. 6, 1915, 12. *See also* LINE OF DUTY AND MISCONDUCT CONSTRUED, 75.

"EQUIPAGE."

1. **Definition**—The word "equipage" refers to the "outfit of a ship" and supplies of all kinds *for the ship*, and not to provisions and other consumable articles for those who navigate or are transported in her. File 24482–31, J. A. G., Feb. 17, 1911; 24482–34, J. A. G., May 1, 1911.

Digitized by Google

ERASURES.

1. **Findings**—Must be free from. C. M. O. 55, 1910, 8–9.
2. **Sentence**—Must be free from. G. C. M. Rec. 23760.
3. **Same**—Although an erasure in the body of the record of proceedings of a summary court-martial is not deemed an error of sufficient gravity to warrant the disapproval of the sentence, such an error in the sentence itself is a grave defect and in some cases the department has disapproved on that account. S. C. M. Rec. 22726, Sept. 20, 1897.

ERRORS IN COURT-MARTIAL ORDERS. *See also* COURT-MARTIAL ORDERS.

1. **Date of**—Should be dated as of final action. *See* COURT-MARTIAL ORDERS, 6.
2. **Same**—C. M. O. 22, 1896, is dated "February 19, 1895," instead of "February 19, *1896*." *See* COURT-MARTIAL ORDERS, 7.
3. **Same**—C. M. O. 15, 1916, erroneously dated C. M. O. 15, *1915*.

ERRORS OF COURT IN FAVOR OF ACCUSED. C. M. O. 12, 1904; 20, 1905.

ERROR WHICH DID NOT INVALIDATE. C. M. O. 22, 1915, 6.

ERROR WITHOUT INJURY. *See* C. M. O. 120, 1898; 50, 1899; 50, 1900; 155, 1900; 181, 1901; 19, 1919, 5; 48, 1915. *See also* ADJOURNMENT OF COURTS-MARTIAL, 2, 3.

ESCAPE.

1. **Breaking arrest**—Was designated as escape at common law. File 26262–1065, J. A. G. *See also* BREAKING ARREST, 6.
2. **Definition**—The evidence here, so far as it goes, tends to indicate that the accused did not understand that he was placed under arrest. He "seemed to give no heed" to the action and words of the master-at-arms, and while it appears that he ran away and could not afterwards be found, this may very naturally have been due to his desire to escape from a hostile crowd rather than an intention to break arrest. "It would seem that there must be a criminal intent to evade the due course of justice" (16 Cyc., 541) in order to render one guilty of "escape," which is the common-law designation of the offense specified against the accused in this case. "An intent to escape is necessary to constitute the offense of escape." (2 Arch. Crim. Pr. and Pl., 1074.) The fact that the accused voluntarily returned to his ship the next day further tends to indicate that he was not conscious that he was placed under arrest, and intended merely to escape from the vicinity of the crowd. The evidence is not sufficient, in the department's opinion, to show beyond a reasonable doubt that the accused was conscious that he was placed under arrest by the master-at-arms, and that, in leaving the place where he had been left by the master-at-arms without being guarded, he had a criminal intent to evade the course of justice, particularly in view of the fact that he voluntarily returned to his ship within a short time. The department feels less reluctance in arriving at this conclusion because of the circumstances, which plainly show that, even had the offense charged against the accused in this regard been proved, it would constitute at most a technical breaking of arrest rather than the offense of forcibly and willfully escaping from duly constituted authority after having been regularly placed under arrest in the usual manner, which is the offense commonly implied by this charge. C. M. O. 7, 1911, 12. *See also* BREAKING ARREST, 14.
3. **Desertion**—Escape and unauthorized absence as proof of specific intent to desert. C. M. O. 61, 1894, 2.
4. **"Enticing a prisoner to escape"**—Enlisted man charged with. C. M. O. 48, 1889.
5. **"Escaped convict."** *See* CONVICTS, 3.
6. **Prisoners**—Duty of guard. *See* MANSLAUGHTER, 9.
7. **Same**—Accidental killing of innocent third party by member of guard when shooting at escaping prisoner. *See* MANSLAUGHTER, 9.

ESTOPPEL.

1. **Accused**—Failing to object at proper time. C. M. O. 6, 1915, 6. *See also* EVIDENCE, 79–84; JUDGE ADVOCATE, 105.
2. **Challenges**—Where the judge advocate challenges a member and counsel for the accused objected, the accused is *estopped* to complain of the court's ruling which did not sustain the challenge. C. M. O. 128, 1905, 4. *See also* CHALLENGES, 9.
3. **Definition.** *See* WORDS AND PHRASES.
4. **Fraudulent enlistment**—Accused estopped to deny fraudulent enlistment when he is being tried for offense, etc. File 7657–132, Jan. 9, 1911.
5. **General court-martial**—Doctrine of estoppel as applied to. *See* G. C. M. Rec. 23368.

Digitized by Google

6. **Irregular proceedings**—A prisoner on trial under our laws has no right to stand by and suffer irregular proceedings to take place, and then ask to have the proceedings reversed on error on account of such irregularities. The law, by furnishing him with counsel to defend him, has placed him on the same platform with all other defendants, and if he neglects in proper time to insist on his rights, he waives them. (McKinney *v.* People, 17 Ill., 556; 3 Rice on Evidence, 259.) C. M. O. 31, 1911, 5.
7. **Timely objections**—Where the accused or his counsel failed to make timely objection to the presence of a judge advocate during "closed court" the department stated: "The accused, who was represented by able counsel at his trial, not having objected to the alleged incompleteness of the record at the proper time, is now *estopped* to urge that the record is incorrect." C. M. O. 6, 1915, 6. *See also* JUDGE ADVOCATE, 105.
8. **Waiver of allowances by enlisted men**—An enlisted man is estopped by virtue of a waiver signed to claim reimbursement for transportation and subsistence denied him. File 13673-1442, J. A. G., Nov. 22, 1911, pp. 10, 14. *See also* ALLOWANCES, 14.
9. **Witnesses sworn by judge advocate**—In the case of Commodore Barron in 1807, the witnesses were sworn by the *judge advocate*, although the statute then in force provided that the oath should be administered by the *president* of the court. (Harwood on Naval Courts-Martial, 1867, p. 94.) In commenting upon this fact De Hart, in his work on Military Law (1861), states at page 149, in a note, "Of course there was no judicial oath taken, and consequently no valid evidence heard."

The Barron case was referred to the Attorney General in 1843, and an opinion was asked upon the following questions:

"First. Does the fact that the witnesses were sworn by the judge advocate, and not by the president, there being no objection at the time, vitiate the proceedings?

"Second. If yes, what relief can now be given?"

The Attorney General, in holding that there was "no remedy which the executive department can afford in the premises," said significantly (4 Op. A. G., 171):

"It is a vain conceit that because the proceedings are irregular, and fatally irregular (*if the exception be taken in proper time*), therefore the judgment once suffered to be entered up is void. Thus there are many things * * * in the conduct of a trial that make the verdict void; yet, if advantage be not taken of them by motion in arrest of judgment, no writ of error lies, even where there is a competent court of errors (Rob. Abr., 783; 4, Cro. Eliz., 616), and it is very proper it should be so; * * * and the repose of society, and the putting an end to controversy and litigation, are more desirable than mere accuracy of procedure, or even the justice of a particular case—*not to mention that acquiescence implies consent, and consent cures error.*" *See* EVIDENCE, 84.

EVADING DUTY.

1. **How charged**—*See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 12.

EVIDENCE.

1. **Accused, of.** *See* WITNESSES, 1-11.
2. **Same**—Absence of during taking of testimony. *See* ACCUSED, 1-9.
3. **Acquittal**—Because of lack of evidence. C. M. O. 25, 1909, 1; 26, 1909, 1.
4. **Additional**—Warranting exercise of, clemency. *See* CLEMENCY, 2.
5. **Admissions.** *See* ADMISSIONS.
6. **Arresting accused, person**—Whenever practicable, the evidence of a person making an arrest should be corroborated by other evidence, particularly when there are numerous witnesses thereto. C. M. O. 7, 1911, 10. *See also* ARREST, 17; EVIDENCE, 33-34.
7. **"Best evidence."** *See* C. M. O. 28, 1909, 3; 37, 1909, 4; 47, 1910, 4, 6; 49, 1910, 10; 52, 1910, 3.
8. **"Best evidence" rule.** *See* CARBON COPIES; WORDS AND PHRASES.
9. **"Better evidence"**—Court should call for it if it is available. C. M. O. 23, 1909, 3; 37, 1909, 5, 9.
10. **Board of Investigation**—As evidence. *See* BOARDS OF INVESTIGATION, 5-8.
11. **Burden of Proof.** *See* BURDEN OF PROOF.
12. **Character**—The department has repeatedly held that witnesses will not be subpœnaed from other stations at Government expense where it does not appear that any such witness "has personal knowledge of the facts at issue before the court," but merely that their testimony is desired either as experts or as to character. These principles were stated in the department's letter of July 5, 1913, to the judge advocate of a general court-martial at the navy yard, Norfolk, Va., convened for the trial of certain special cases (file 26251-7777:3). In said letter it is stated in part:

"Under no circumstances will the department subpœna from other stations, at Government expense, officers to give expert testimony, either for the prosecution

Digitized by Google

or the defense, when there are other officers on duty at the place of the trial whose service should render them fully competent to give such testimony. Furthermore, in accordance with the Navy Regulations [1913, R–702(2)], when a staff officer is tried by general court-martial, at least one-third of the court is composed of officers of the same corps as the accused, and this practice has been followed in the present case. Such members of the court may themselves qualify as experts concerning matters pertaining to the duties of their corps, and testify accordingly as witnesses either for the prosecution or the defense.

"If the testimony of particular officers is desired as to the character of the accused you are informed that the best evidence on this point is the official record of the accused, which has been forwarded to you in connection with this case." C. M. O. 1, 1914, 5, 7.

The recital of a conversation in which the character of the accused is assailed is, besides being hearsay, directly in conflict with the well-known rule of evidence that the prosecution has no right to attack the character of the accused or to introduce evidence showing bad character unless the accused himself has put his character in issue. C. M. O. 57, 1897, 2.

In one case the department stated: It appears that in testifying for the prosecution an officer referred incidentally to the fact that the accused had been tried by summary court-martial. Strictly speaking, this testimony was not proper, but it was evidently given inadvertently, and is not of such a character as to affect the proceedings. C. M. O. 33, 1899, 1.

13. **Same**—The accused pleaded not guilty to the charge of "Desertion" preferred against him and the specification thereunder. The evidence adduced to establish said charge consisted solely of the testimony of the judge advocate of the court, who was also commanding officer of the accused. This officer, in answer to a question, made the following statement in the course of his testimony:

A representative of the sheriff in Olympia, " in turning over the accused to me, reported that the accused had been arrested in Olympia, Washington, soon after March 19, 1902, for stealing a watch; that he had been convicted, had served a sentence of 25 days, and had been released, and then rearrested, soon after his release, upon the receipt of my offer of reward."

So much of the above testimony as relates to the offense for which the accused had been arrested and punished by the civil authorities was clearly inadmissible, as it was irrelevant to the case being tried and was, moreover, prejudicial to the rights of the accused, who had not in any way placed his general character in issue.

Finally, the court concluded its examination of the judge advocate by asking the following question:

"What has been the general character of the accused while serving at his station?" the answer to which question was in part as follows:

"He has quite frequently been in trouble for infringements of regulations."

Here again a manifest injustice was done the accused by the court, which not only admitted but expressly called for evidence affecting his former reputation and character before the same had been made a part of the issue by the accused himself.

The department held that the proceedings above set forth were so plainly violative of the fundamental principles of law and justice that the accused can not be said to have had a fair trial on this occasion, and that, irrespective of the question whether his guilt of the offense charged was established by such portions of the evidence as were competent, he ought not to stand convicted of and be punished for any offense as the result of a trial conducted as was the one under consideration. Accordingly the proceedings, finding, and sentence were set aside. C. M. O. 91, 1902.

14. **Same**—In one case the department stated: It appears that the judge advocate introduced, and the court accepted, as evidence the conduct record of the accused, which action was improper, inasmuch as the accused had not during the trial put his character in issue. In view of this error on the part of the court, the effect of which must have been detrimental to the interests of the accused, the proceedings, findings, and sentence in the case have been disapproved. C. M. O. 96, 1898. *But see* SUMMARY COURTS-MARTIAL, 13.

15. **Same**—Accused pleaded guilty, and after the finding of the court the judge advocate was instructed to introduce evidence of previous convictions, if any existed, to the admission of which the judge advocate raised the objection that as the accused had not placed his character in issue, the evidence called for was not admissible. This objections was overruled by the court. The Navy Regulations [Navy Regulations. 1913, R–617 (3); R–804 (2)] provide for the admission of evidence of previous convictions and these regulations do not exempt from this provision cases wherein the char-

Digitized by Google

acter of an accused has not been placed in issue, but it applies alike in all cases, and the ordinary rules of evidence as to character are to that extent modified thereby. Accordingly the department held that the ruling of the court was regular. C. M. O. 98, 1898.

16. **Same**—It appears that certain improper evidence was introduced by the prosecution and admitted by the court, that is, evidence relating to the previous character of the accused (which he had not put in issue), as illustrated by his conduct while in the naval hospital. This evidence appeared in the testimony of two witnesses. The accused objected to the testimony of only one of these witnesses, and the court improperly overruled the objection. The department held that "the offense alleged against the accused has, however, been so clearly established by the evidence that this may be regarded as constituting an error without injury, except in so far as it may have influenced the court in the severity of the punishment inflicted." Accordingly the department merely mitigated the sentence. C. M. O. 50, 1899. *See also* 23 J. A. G., 376,
17. **Same**—Court-martial order introduced by prosecution to rebut evidence of good character introduced by defense. C. M. O. 11, 1897, 2. *See also* COURT-MARTIAL ORDERS, 11.
18. **Same**—While in civil courts particular good or bad acts can not be shown in proof or rebuttal of good character, in military cases this is not strictly followed. At military law evidence of character, which is always admissible, need not be limited to *general* character, but may include particular acts of good conduct, bravery, etc. Rebutting evidence of bad character in military cases may be of similar form and nature to the evidence of good character. C. M. O. 11, 1897, 2-3.
19. **Same**—The accused introduced testimony as to character and efficiency and made a written statement in extenuation of his conduct, and the court added to the record a unanimous recommendation to clemency in the following terms: In consideration of the excellent record of the accused as testified to by witnesses for the defense, his medal of honor and commendatory letter, and the favorable impression made before the court, we recommend the said Boatswain * * *, United States Navy, to the clemency of the revising authority. C. M. O. 118, 1905, 1.
20. **Same**—Testimony as to character of a witness. G. C. M. Rec. 28652, 23; WITNESSES, 52.
In cases where it is necessary the judge advocate should cross-examine witnesses as to the character of the accused. C. M. O. 39, 1915.
If the judge advocate is called as a witness as to character, the record of proceedings should contain a notation to that effect as called for by the Forms of Procedure, 1910, p. 36. G. C. M. Rec. 30465, p. 2.
21. **Same**—A wardroom cook was tried by general court-martial for "Desertion," and pleaded guilty to both the charge and specification thereof; though precluded by his plea from the benefits of a regular defense, he was, nevertheless, entitled to introduce evidence in extenuation of his conduct or to show his previous good character. The record of proceedings of his trial failed to show that opportunity to present such evidence was afforded him.
When an accused has pleaded guilty, the court, before proceeding to deliberate and determine upon the sentence, shall allow him to urge anything he may desire to offer in extenuation of his conduct, to call witnesses as to character; and to offer any other evidence of a strictly palliative nature. (Art. 1749 (2), U. S. N. R. [Navy Regulations, 1913, R-778(2)]; Forms of Procedure, 1910, p. 22.)
A general court-martial being a court of limited jurisdiction, each step taken during the trial should be set forth in the record of its proceedings; and consequently, where certain privileges are by law or regulations accorded an accused and he does not avail himself of them, the record should affirmatively show, by an appropriate entry, that he waived such rights; in this case, that he did not desire to offer any evidence. C. M. O. 14, 1910, 8. *See also* C. M. O. 118, 1905, 1; 42, 1909, 12; 8, 1911, 4-6.
22. **Same**—Evidence as to character erroneously admitted by court. C. M. O. 104, 1896, 6.
23. **Circumstantial.** *See* DESERTION, 68 (p. 173); INTENT, 49 (p. 294).
24. **Citizenship**—Evidence of. *See* CITIZENSHIP, 13.
25. **Collateral facts**—Illegal custom—Evidence that similar offenses had been committed by others during many years, and that inadequate penalties or no penalties at all had been inflicted, is immaterial as affecting the guilt or innocence of the accused. There can be no such thing as a lawful custom to commit a crime, and the fact that others had escaped punishment could in no wise justify the accused in violating the law. C. M. O. 128, 1905. *See also* COLLISION, 8.
26. **Same**—Evidence to excuse in case of a collision. *See* COLLISION, 8; EVIDENCE, 25.
27. **Common law rules of evidence,** C. M. O. 21, 1910, 14. *See also* COMMON LAW, 8.
28. **Competent evidence.** *See* DECK COURTS, 58; EVIDENCE, 79; WITNESSES, 29, 52.

Digitized by Google

29. **Confession.** *See* CONFESSIONS.
30. **Conflict in evidence.** *See* CRITICISM OF COURTS-MARTIAL, 14.
31. **Contradictory testimony**—It is the province of the court, after hearing the testimony of witnesses as to statements made by the accused, to weigh the same and determine for itself whether or not such statements are contradictory and false. C. M. O. 91, 1902. *See also* CONFESSIONS, 19, 20.
32. **Coroner's inquest.** C. M. O. 5, 1913, 9-11. *See also* CONFESSIONS, 10.
33. **Corroboration**—Whenever practicable, the testimony of a person making an arrest should be corroborated by other testimony, particularly when there are numerous witnesses thereto. C. M. O. 7, 1911, 10-12. *See also* ARREST, 17; EVIDENCE, 6.
34. **Same**—While observations of the civil courts concerning the testimony of police officers may not be altogether applicable to the testimony of a master-at-arms; *suggested*, that whenever practicable the testimony of a master-at-arms who makes an arrest and accuses the offender should be corroborated, particularly where it appears that there were numerous witnesses to the facts charged. File 26262-1065.
35. **Same**—Accused. *See* WITNESSES, 4, 7, 9.
36. **Court**—"Originating" evidence. C. M. O. 19, 1915, 3. *See also* WITNESSES, 40.
37. **Same**—Of its own motion may exclude. *See* EVIDENCE, 82.
38. **Criminating questions.** *See* SELF-INCRIMINATION.
39. **Death gratuity**—Must be satisfactory to Paymaster General for payment of. *See* DEATH GRATUITY, 21-23.
40. **Deck court**—Appeal. *See* DECK COURTS, 1, 2.
41. **Definition**—"That which tends to prove or disprove any matter in question, or to influence the belief respecting it. Belief is produced by the consideration of something presented to the mind. The matter thus presented, in whatever shape it may come, and through whatever material organ it is derived, is evidence (1 Bouv. 701).
42. **Degree of criminality involved**—Where the accused has committed a grave offense and pleaded guilty the judge advocate should advise the court of the nature of the offense in order that evidence can be taken for the prosecution as provided by Navy Regulations, 1913, R-778(3), for the purpose of presenting the entire circumstances of the offense to the court. C. M. O. 1, 1914, 5-6. *See also* C. M. O. 50, 1900; DEGREE OF CRIMINALITY INVOLVED; JUDGE ADVOCATE, 50, 70.
43. **Demurrer.** *See* DEMURRER.
44. **Discrediting testimony of a witness.** *See* SELF-INCRIMINATION, 11, 12; WITNESSES, 51, 52.
45. **Documentary.** *See* EVIDENCE, DOCUMENTARY.
46. **Drunkenness—Evidence of.** *See* DRUNKENNESS, 34.
47. **Dying declarations.** *See* DYING DECLARATIONS.
48. **Exclusion of.** *See* EVIDENCE, 82.
49. **Expert testimony.** *See* EVIDENCE, 12; EXPERT WITNESSES.
50. **Extenuation**—Should the accused persist in a plea of guilty, the court before proceeding to deliberate and determine the sentence, shall allow him to urge anything he may desire to offer in extenuation of his conduct, to call witnesses as to character, and to offer any other evidence of a strictly palliative nature; and the judge advocate shall have the right to cross-examine such witnesses and to introduce evidence in rebuttal. C. M. O. 42, 1909, 12; 14, 1910, 8; 8, 1911, 4-6.
51. **Same**—If the evidence of the accused in extenuation after he has pleaded guilty is inconsistent with such plea the court should have the accused change his plea to "not guilty." By a plea of guilty an accused deprives himself of the benefits of a regular defense and can call witnesses and introduce evidence only as to previous good character or in extenuation of his conduct. C. M. O. 2, 1905; 30, 1910, 4; 8, 1012, 5. *See also* CLEMENCY, 20.
52. **Same**—"It thus appears that practically the entire testimony (in extenuation) as to the intoxication of the accused introduced by the defense would have been inadmissible upon objection thereto." The evidence referred to is testimony to show that the accused was so drunk that he was unaware of what he was doing when he committed the acts alleged. C. M. O. 8, 1912, 5. *See also* EVIDENCE, 60.
53. **Same.** C. M. O. 17, 1915, 2; 23, 1915, 2.
54. **Facts**—Evidence should be confined to testimony of facts; the inferences to be drawn from established facts must be drawn by the court alone. C. M. O. 49, 1915, 15.
55. **False swearing**—Under charge of "Perjury." C. M. O. 47, 1910, 5. *See also* PERJURY, 16.
56. **Same**—Before a court of inquiry. (G. C. M. Rec. 29422.) C. M. O. 51, 1914, 9. *See also* COURTS OF INQUIRY, 23, 40; PERJURY, 3.
57. **False testimony**—Under charge of "Perjury." C. M. O. 47, 1910, 5. *See also* PERJURY, 16.

Digitized by Google

58. **Finding**—Additional evidence can not be taken after the court has reached its findings. Evidence of previous convictions may be admitted, however. *See* PREVIOUS CONVICTIONS, 19; REVISION, 14–16.
59. **"Guilty," plea of**—After warning, should the accused persist in a plea of guilty, the court, before proceeding to deliberate and determine upon the sentence, shall allow him to urge anything he may desire to offer in extenuation of his conduct, to call witnesses to character, and offer any other evidence of a strictly palliative nature; and the judge advocate shall have the right to cross-examine such witnesses and introduce evidence in rebuttal. (Navy Regulations, 1913, R–778 (2).) *See* C. M. O. 50, 1900; 2, 1905, 3; 42, 1909, 12; 14, 1910, 8; 8, 1911, 4–6. *See also* EVIDENCE, 21, 50, 51, 60.
60. **Same**—Accused may not testify after plea of "guilty." Accused pleaded "guilty." of "Desertion" and was then sworn as a witness and testified that he had no intention of deserting. Court found the specification "proved by plea" and that the accused was of the charge "guilty." *Held:* That the accused, by his plea, deprived himself of the benefit of a regular defense and could call witnesses and introduce evidence only as to previous good character or in extenuation of his conduct. That the court erred in admitting this testimony after the plea, and also erred when, after hearing the inconsistent testimony, it did not change the pleas to not guilty and proceed with the trial. No evidence having been introduced to support the finding, and it not being permitted to introduce new evidence in revision, the proceedings, findings, and sentence were disapproved. C. M. O. 2, 1905, 3. *See also* EVIDENCE, 52, 58.
61. **Hearsay.** *See* HEARSAY EVIDENCE,
62. **Higher evidence.** *See* C. M. O. 47, 1910, 7; 49, 1910, 10.
63. **Hypothetical questions.** *See* HYPOTHETICAL QUESTIONS.
64. **Impeaching testimony of witnesses.** *See* IMPEACHMENT.
65. **Incompetent**—Failure to make objection to evidence until after conclusion of trial amounts to acquiescence. Testimony of an incompetent witness does not vitiate the proceedings necessarily. C. M. O. 21, 1910, 13–15; 14, 1911, 4–9; 31, 1911, 7.
66. **Incrimination.** *See* SELF-INCRIMINATION.
67. **Informal evidence.** *See* C. M. O. 37, 1909, 9.
68. **Initiative to object to evidence**—Is on opponent. C. M. O. 31, 1911, 7. *See also* EVIDENCE, 82.
69. **Insufficient to convict.** C. M. O. 37, 1909, 4. *See also* C. M. O. 29, 1902.
70. **Intent, evidence of**—That participants in a fight knew they were doing something wrong is sufficiently shown by their interrupting the fight when an officer was believed to be approaching. C. M. O. 128, 1905.
71. **Irrelevancy.** *See* EVIDENCE, 102, 103.
72. **Judge advocate**—If authorized by convening authority may admit that a certain person, if present, would give certain testimony. *See* ADMISSIONS, 3.
73. **Judicial notice.** *See* JUDICIAL NOTICE.
74. **Leading questions.** *See* LEADING QUESTIONS.
75. **Miscarriage of justice**—Caused by court receiving incompetent evidence. *See* COURT, 78.
76. **Misinterpretation of**—By court. C. M. O. 37, 1915, 10.
77. **"Negative testimony."** *See* DRUNKENNESS, 100.
78. **Objection to competency**—When to be taken. *See* EVIDENCE, 79–84.
79. **Objection to introduction of**—Failure to make objection to evidence until after conclusion of trial amounts to acquiescence. Testimony of an incompetent witness does not vitiate the proceedings necessarily. If, therefore, no objection is made during the trial to matters of evidence, any question as to its admissibility must be deemed to have been waived by the accused. C. M. O. 14, 1911, 4–9; 31, 1911, 7. *See also* C. M. O. 47, 1910, 4; 15, 1910, 8; DECK COURTS, 58 (p. 159).
80. **Same**—Objections to rulings on the admission of evidence in a criminal case, taken after the evidence has been closed on both sides, are too late. McDuffie et al. *v.* U. S., 227 Fed. Rep., 961.
81. **Same**—By court. *See* EVIDENCE, 82 (p. 223).
82. **Same**—If the evidence had, in fact, been objectionable on the ground of inadmissibility, by whom should this objection have been made? Should the court interpose *sua sponte* and reject evidence which is offered, and, if it does not, should the reviewing authority reject it when the case comes before him?

"The initiative in excluding improper evidence is left entirely to the opponent—so far at least as concerns his right to appeal on that ground to another tribunal. The judge may of his own motion deal with offered evidence, but for all subsequent purposes it must appear that the opponent invoked some rule of evidence." (Wigmore, Sec. 18.)

Digitized by Google

Cases where the court might, *of its own motion*, refuse to permit the introduction of evidence are conceived to be those in which some rule of public policy would be contravened, as in the case of privileged communications, between husband and wife, State secrets, etc. But aside from these a trial court would not ordinarily intervene, and would leave the matter of objection to the party against whom it was offered.

An accused either has counsel, or waives such assistence, as did the accused in this case; but even then, the recorder is required to safeguard the interests of the accused. As was said in McKinney *v.* People (17 Ill., 556), quoted in 3 Rice on Evidence, 259:

"A prisoner on trial under our laws has no right to stand by and suffer irregular proceedings to take place, and then ask to have the proceedings reversed on error on account of such irregularities. The law, by furnishing him with counsel to defend him, has placed him on the same platform with all other defendants, and if he neglects in proper time to insist on his rights, he waives them."

If, therefore, no objection is made during the trial to matters of evidence, any question as to its admissibility must be deemed to have been waived by the accused. C. M. O. 31, 1911, 6-7. *See also* 16 J. A. G., 78; REVIEWING AUTHORITY, 9.

83. **Same**—If no objection is made to the introduction of evidence given during the trial by naval court-martial, then in accordance with ordinary procedure, there is nothing in question for the reviewing authority to decide as to the admissibility of evidence. A possible exception to this, however, in view of the greater latitude allowed in all courts-martial procedure, would be a case where the trial had ignored the objectionable character of certain evidence on the ground of public policy. If objectionable evidence is given without objection, its inadmissibility must be deemed to have been waived. File 26262-1194, J. A. G., June 16, 1911, p. 3. *See also* 16 J. A. G., 78; REVIEWING AUTHORITY, 9.

84. **Same**—"It is a vain conceit, that because the proceedings are irregular, and fatally irregular (*if the exception be taken in proper time*), therefore the judgment once suffered to be entered up is viod. Thus there are many things * * * in the conduct of a trial, that make the verdict void; yet, if advantage be not taken of them by motion in arrest of judgment, no writ of error lies, even where there is a competent court of errors (Rob. Abr., 783; 4 Cro. Eliz., 616), and it is very proper it should be so; * * * and the repose of society, and the putting an end to controversy and litigation, are more desirable than mere accuracy of procedure, or even the justice of a particular case—*not to mention that acquiescence implies consent, and consent cures error.*" (4 Op. Atty. Gen., 171.) C. M. O. 13, 1916, 6. *See also* ESTOPPEL, 9.

If the defect is discovered before the jury retires, it must be taken advantage of at once, as inaction in such a case amounts to an acquiescence in the reception of the unsworn witness's statement. (30 A. and E. Enc., 910.)

"Where irrelevant evidence has been admitted or an incompetent witness has been examined *it is not held sufficient to vitiate the proceedings;* and the reviewing officer, on a consideration of all the circumstances, may either confirm the sentence or extend his pardon to the prisoner. If the finding of the court, in such case, be agreeable to equity and justice, there are not sufficient grounds for a pardon." (De Hart, p. 205.)

In criminal as well as in civil actions, when the witness leaves the stand, there is an end of all questions as to his competency; it is then too late to object on this ground, especially if his incompetency appeared when he was first on the witness stand. (30 A. & E. Encycl. Law, p. 971.) C. M. O. 14, 1911, 5-7.

85. **"Official knowledge"**—An accused was tried before a summary court-martial for absence without leave and was acquitted because the court accepted the recorder's statement as conclusive that no witnesses to prove the offense were available. The department stated:

It is suggested that the commanding officer who preferred the charge would have been a competent witness to testify before the court as to such facts pertaining to the specification as were within his official knowledge, and which therefore induced him to cause the accused to be brought to trial by summary court-martial. C. M. O. 42, 1909, 16.

86. **Opinions.** *See* EXPERT WITNESSES, 12, 13; OPINION.

87. **Oral testimony**—For defense is not admissible to prove the contents of certain letters when those letters were in possession of counsel for the accused and could have been produced in court. C. M. O. 119, 1905.

88. **Same**—All testimony before a summary court-martial shall be given orally, upon oath or affirmation, administered by the senior member of the court. (A. G. N. 29.)

89. **Order of introducing**—May be introduced out of usual order for satisfactory cause at discretion of court—After the prosecution and defense had rested, the judge advocate in rebuttal called a witness who had previously testified for the prosecution

Digitized by Google

and again questioned said witness concerning the condition of the accused on the four dates mentioned in the specifications. Counsel for the accused objected on the ground that the proper place to introduce such evidence was in the former direct examination of this witness. The objection of counsel for the accused was properly overruled by the court. (Forms of Procedure, 1910, pp. 39 and 144; Navy Regulations, 1913, R-780.) C. M. O. 31, 1914, 2. *See also* G. C. M. Rec. 27285, p. 181; 29422; 30485.

90. **Same**—After the court had admitted certain evidence out of usual order the judge advocate stated that he desired it spread on the record that such procedure in admitting the evidence out of its usual order was not in accordance with the prescribed forms and practices. The judge advocate was in error in thus advising the court since the Navy Regulations, 1913, R-780, authorize the court, in the interest of justice, to allow evidence to be introduced out of usual order. Index-Digest, 1914, page 19 states that evidence may be introduced out of usual order for satisfactory cause at the discretion of court. (*See also* Forms of Procedure, 1910, pp. 39, 144; C. M. O. 31, 1914, p. 2.) C. M. O. 41, 1915, 10.
91. **Originating evidence**—By court. *See* COURT, 75; WITNESSES, 40.
92. **Parol**—In proving desertion. C. M. O. 31, 1915, 16. *See also* SERVICE RECORDS, 16.
93. **Perjury**—Evidence necessary to prove guilt. *See* File 26262-1569, Sec. Navy, Dec. 18, 1912. *See also* PERJURY, 6.
94. **Previous convictions.** *See* PREVIOUS CONVICTIONS.
95. **Prima facie evidence.** C. M. O. 9, 1916, 9. *See also* DESERTION, 102–105; DISCRIMINATION AGAINST UNIFORM, 1; EMBEZZLEMENT, 24.
96. **Primary evidence**—Waived if accused has counsel and does not object to introduction of secondary evidence. C. M. O. 47, 1910, 4; 15, 1910, 8. *See also* C. M. O. 49, 1910, 15.
97. **Privilege.** *See* COUNSEL, 4, 43; EVIDENCE, 82, 83; PRIVILEGE; SELF-INCRIMINATION; WIFE.
98. **Quantity of.** *See* EVIDENCE, 126; REASONABLE DOUBT.
99. **Rambling**—Objected to. G. C. M. Rec. 30485, pp. 332, 357.
100. **Reasonable doubt.** *See* REASONABLE DOUBT.
101. **Rebutting.** C. M. O. 31, 1915, 15.
102. **Relevancy**—Judge advocate shall point out to court the irrelevancy of any evidence. C. M. O. 49, 1915, 11. *See also* JUDGE ADVOCATE 59, 68.
103. **Same**—Evidence must be relevant to issue. C. M. O. 48, 1915, 14.
104. **Revision**—Illegal to introduce evidence in revision. *See* REVISION, 14–16.
105. **Same**—Under certain conditions, evidence of previous convictions may be admitted in revision. C. M. O. 29, 1914, 5. *See also* PREVIOUS CONVICTIONS, 19.
106. **Rules of evidence**—Naval courts-martial in their proceedings should be governed by the rules of evidence as laid down in the United States courts. C. M. O., 21, 1910, 13–14; 51, 1914, 4, 7–8; G. C. M. Rec. 24813; File 4578-04, May 25, 1904.
107. **Same**—Naval courts-martial are bound by the decisions of the Supreme Court of the United States with regard to the introduction of evidence and its admissibility. C. M. O. 31, 1911, 5; 16 J. A. G. 78.
108. **Same**—As no statute prescribes the rules of evidence to govern naval courts-martial, courts and boards, they are made by the department and published in Forms of Procedure and Court-Martial Orders. If a desired rule is not found in the above publications, the rule applied by Federal courts should be followed. If such rule can not be secured from the above sources, the tribunal must rule as it thinks just and reasonable. File 5252-74.
109. **Same**—The rules of evidence of the common law as recognized and followed by the criminal courts of the country are to be observed in general by courts-martial. File 6465-03, J. A. G., July 22, 1903, p. 10.
110. **Secondary evidence.** C. M. O. 119, 1905; 47, 1910, 6, 7; 49, 1910, 10, 15.
111. **Self-incrimination.** *See* SELF-INCRIMINATION.
112. **Self-serving statements**—Not competent. C. M. O. 29, 1914, 8. *See also* SELF-SERVING STATEMENTS; WORDS AND PHRASES.
113. **Silence of accused**—As an admission of guilt. *See* CONFESSIONS, 22.
114. **Single witness**—The evidence of a single witness against the accused, as to the details of a "riot or furious affray," should be regarded with much caution, since no single witness can tell with absolute precision what took place and describe accurately all the details. C. M. O. 7, 1911, 8. *See also* EVIDENCE, 128.
115. **Statements made in presence of accused.** *See* STATEMENTS MADE IN PRESENCE OF ACCUSED.
116. **Statements of accused.** *See* STATEMENT OF ACCUSED.
117. **Sufficiency of evidence.** *See* CRITICISM OF COURTS-MARTIAL, 14.
118. **Summary courts-martial.** *See* EVIDENCE, 88.

Digitized by Google

119. **"Testimony"**—"Testimony and other evidence"—Distinction between "testimony" and "evidence." C. M. O. 41, 1888, 6.
120. **Unobjected to**—Convening authority should not notice. *See* CONVENING AUTHORITY, 23; EVIDENCE, 82, 83, 125; REVIEWING AUTHORITY, 9.
121. **Verification of**—By witnesses is mandatory, and can not be waived. C. M. O. 47, 1910, 6; 3, 1917, 5. *See also* G. C. M. Rec. 21196; 21198.
122. **Same**—Material corrections of testimony on verification should not be made in absence of accused. *See* ACCUSED, 4.
123. **Same**—Witnesses should verify testimony before finding and sentence. C. M. O. 14, 1910, 9.
124. **Voir dire.** C. M. O. 128, 1905, 2; G. C. M. Rec. 27960. *See also* VOIR DIRE.
125. **Waiving of objectionable evidence**—If no objection is made during the trial to matters of evidence, any question as to its admissibility must be deemed to have been waived by the accused, and in accordance with ordinary procedure there is nothing in question for the reviewing authority to decide as to the admissibility of evidence. C. M. O. 21, 1910, 13–15; 14, 1911, 4–9; 31, 1911, 7. *See also* EVIDENCE, 78–83; EVIDENCE, DOCUMENTARY, 59, 60.
126. **Weight of evidence.** *See* DRUNKENNESS, 100; EVIDENCE, 31; REASONABLE DOUBT; WITNESSES, 4, 52, 112–114.
127. **Wife of accused.** *See* EVIDENCE, 82; WIFE.
128. **Witnesses, excited**—Excited witnesses of a riot or furious affray are not likely to comprehend and remember accurately the movements of the various persons actually engaged. The truth is that no two witnesses on such occasions quite agree as to the details of an occurence and no single witness can tell with absolute precision what took place and describe accurately all the details. The confusion and excitement of a crowd must have prevented witnesses from hearing distinctly and comprehending the movements of persons most actively engaged. File 26262–1065; EVIDENCE, 114.
129. **Witnesses, manner and bearing**—That the manner of the witness on the stand—his appearance, demeanor, style of expressing himself, etc.—is proper to be considered in connection with his testimony as adding to or detracting from his credibility and relative weight, is a point frequently noted by the authorities. C. M. O. 63, 1899, 2. *See also* COURT, 198; WITNESSES, 52, 76.

EVIDENCE, DOCUMENTARY.

1. **Affidavit.** *See* AFFIDAVITS.
2. **Authentication of documents**—During the course of a general court-martial trial of an officer it was desirable to introduce in evidence his medical record. Accordingly a copy authenticated by the Chief of the Bureau of Medicine and Surgery was introduced. It was not under seal. Later during the trial a member moved to strike it out on the ground that it was not properly authenticated. The court did not strike it out but permitted the introduction of a properly authenticated copy under seal of the department in accordance with the provisions of Navy Regulations, 1913, R–751(3), Revised Statutes, 882, and Forms of Procedure, 1910, pp. 32, 141. G. C. M. Rec. 30485, pp. 684–685.
3. **Same**—The law, when copies are made evidence by statute, demands that the mode of authentication, prescribed by statute, shall be strictly pursued. (Smith *v.* U. S., 5 Peters, 290–300; Block *v.* U. S., 7 Ct. Cls., 414.)
4. **Boards of investigation.** *See* BOARDS OF INVESTIGATION, 5–8.
5. **Carbon copies.** *See* CARBON COPIES, 1.
6. **Certificate of civil officer**—Is secondary evidence. *See* CERTIFICATES 3–5.
7. **Same**—Written statement of civilian sergeant of police is only hearsay. *See* CERTIFICATES, 5.
8. **Checks, photographic copies.** *See* CHECKS, 6; EVIDENCE, DOCUMENTARY, 37.
9. **Confessions.** *See* CONFESSIONS.
10. **Copy**—A copy of a document of any kind is never competent evidence [except when made so by statute] when it is practicable to produce the original in the case. The fact that a copy submitted is certified to by the judge advocate shows conclusively that if it was available for the purpose of making a copy, it was also available for introduction as evidence, and therefore such copy as introduced is wholly incompetent as evidence. C. M. O. 40, 1909, 2. *See also* West Virginia *v.* U. S., 37 Ct. Cls., 201, 205.
11. **Court-martial orders.** *See* COURT-MARTIAL ORDERS, 11, 26–28.
12. **Court of Claims**—Calls for evidence. *See* COURT OF CLAIMS, 1, 3.
13. **Court of inquiry record.** *See* COURTS OF INQUIRY, 18, 24.
14. **Court of inquiry findings**—As evidence. *See* COURTS OF INQUIRY, 18, 24.
15. **Depositions.** *See* DEPOSITIONS.

Digitized by Google

16. **Efficiency reports of officers.** *See* REPORTS ON FITNESS.
17. **Enlistment records.** *See* SERVICE RECORDS.
18. **Examining board records.** *See* NAVAL EXAMINING BOARDS, 12.
19. **Facts recorded as official duty**—It is an elementary rule in the law of evidence that where facts are recorded as a matter of official duty at or about the time of the transaction recorded, the contents of such records or documents are proven by the production of the records or documents themselves, and by proof that they come from the proper custody. Matters so proved are treated as prima facie evidence of the facts stated therein. (See Jones on Evidence, sec. 521.) These remarks apply to the entries on the enlistment record referring to a charge of "Desertion" entered thereon by the commanding officer of the naval vessel on which the accused was serving when he deserted. C. M. O. 10, 1912, 8. *See also* C. M. O. 31, 1915; SERVICE RECORDS, 16.
20. **General orders of Army.** *See* ARMY, 15.
21. **Identification of**—A judge advocate offered a paper (receipt for transportation) in evidence, stating that it was signed by the accused, but if had not been identified in any way, and the department held that the objection to this paper going in evidence was a good objection and should have been upheld by the court. C. M. O. 17, 1910, 4.
22. **Interpretation of**—What evidence may be given. C. M. O. 52, 1910, 2.
23. **Letters.** *See* LETTERS.
24. **Letterpress copies.** *See* CARBON COPIES, 1.
25. **Marine examining boards.** *See* NAVAL EXAMINING BOARDS, 12.
26. **Naval examining boards.** *See* NAVAL EXAMINING BOARDS, 12.
27. **Objection to**—Documentary evidence against accused should be submitted to him for the purpose of affording him an opportunity to make reasonable objection to its introduction. C. M. O. 37, 1909, 9; 47, 1910, 4; 49, 1910, 16. *See also* G. C. M. Rec. 30485, p. 318.
28. **Same**—Primary documentary evidence is waived if unobjected to. C. M. O. 47, 1910, 4; 52, 1910, 3.
29. **Same.** *See* EVIDENCE, 78-84.
30. **Officers' records.** *See* RECORDS OF OFFICERS; REPORTS ON FITNESS.
31. **"Official reports"**—Made contemporaneously with facts stated. *See* EVIDENCE DOCUMENTARY, 19; SERVICE RECORDS, 16.
32. **Official duty**—Facts recorded as. *See* EVIDENCE, DOCUMENTARY, 19.
33. **Press copies.** *See* CARBON COPIES, 1.
34. **Previous convictions.** *See* PREVIOUS CONVICTIONS.
35. **Privilege.** *See* PRIVILEGE; SELF-INCRIMINATION; WIFE.
36. **Procedure in introducing**—Documentary evidence before courts-martial will be introduced by the proper custodian taking the stand as a witness to identify such document, presenting it to the party against whom it is to be offered for inspection and opportunity to object to its admission, and also to the court; then if no reasonable objection is made, reading therefrom such entry as may be pertinent to the issue. Upon objection being entered by the party against whom it is offered, the court will rule upon the objection and its decision thereon is final. (Forms of Procedure, 1910, p. 31; C. M. O. 37, 1909, p. 9; 40, 1909, p. 2; 47, 1910, p. 4; 28, 1910, p. 7; 1, 1911, p. 5.) C. M. O. 41, 1914, 4; 15, 1916, 3. *See also* SERVICE RECORDS, 23.
37. **Same**—It was noted that the counsel for the accused irregularly introduced documentary evidence in the form of a letter addressed to the agent of the accused and also photographic copies of certain checks. The record does not show that either the court or the judge advocate was afforded an opportunity to object to the introduction of these documents, or even that the same were received in evidence by the court. Also the judge advocate irregularly introduced documentary evidence in the form of a letter written by the Army and Navy Club to the Navy Department.

    The proper procedure in introducing documentary evidence is to have the proper custodian take the stand as a witness to identify such document, presenting it to the party against whom it is to be offered for inspection and opportunity to object to its admission, and also to the court; then if no reasonable objection is made, to ask witness to read therefrom such extracts as may be pertinent to the issue; and finally either the original or certified copy of the extract read should be appended to the record. (Forms of Procedure, 1910, p. 31; Index-Digest, 1914, p. 19.)

    In the present case the record does not positively show, as should be the case, that the above-mentioned documents were properly identified before being introduced; that they were submitted to both the court and the accused, or to the court and the judge advocate, depending upon the use to be made of this evidence; and whether or not objection was made to its receipt in evidence and the court's action thereon.

Digitized by Google

Also, in consequence of the irregular manner of their introduction, the court did not pass upon the question of the competency or relevancy of these documents as evidence to be used in the trial of this case, and the court thereby and to that extent failed to fully perform its functions as a court. C. M. O. 15, 1916, 3.

38. **Quarterly clothing return.** *See* QUARTERLY CLOTHING RETURNS.
39. **Reading from**—It is improper, and in violation of the rules of evidence, to read from a document until it has been properly introduced in evidence. The document in this case was the appointment of the accused as petty officer. C. M. O. 49, 1910, 16. *See also* C. M. O. 1, 1911, 4.
40. **Same**—Should be offered in evidence before being read. C. M. O. 37, 1909, 9; 40, 1909, 2; 47, 1910, 4; 49, 1910, 16.
41. **Reading "aloud."** *See* ALOUD, 1.
42. **Records of officers.** *See* RECORDS OF OFFICERS; REPORTS ON FITNESS.
43. **Record of Army trial**—The record of trial by general court-martial while serving in the Army is inadmissible as evidence to show mental irresponsibility in a trial before a naval court-martial subsequently, and a request by the defense for postponement until copy of such record of trial is secured was properly overruled. C. M. O. 17, 1910, 9. *See also* ARMY, 13.
44. **Record of proceedings**—Not competent as evidence in another trial. C. M. O. 47, 1910, 6; 49, 1910, 10. *See also* FALSE SWEARING, 5.
45. **Record of proceedings should show**—The record of proceedings should show affirmatively that the documentary evidence was properly identified; that it was submitted to the party against whom offered and the court; whether objection was made to its receipt in evidence; and if objected to, the court's action thereon; that it was received in evidence if unobjected to or the court permitted it to be received over an objection; and finally notation made as to whether the original or a certified copy of the extract read is appended to the record. (Navy Regulations, 1913, R-780 (2); Forms of Procedure, 1910, pp. 31-32; C. M. O. 28, 1909, p. 2; 37, 1909, p. 9; 40, 1909, p. 2; 42, 1909, p. 11; 47, 1910, p. 4; 17, 1910, p. 4; 28, 1910, p. 7.) When documentary evidence is ruled out, neither the original nor a certified copy need be appended to the record, but its contents should be referred to, so that the reviewing authorities may know what the documents was. (Forms of Procedure, 1910, p. 33.) C. M. O. 41, 1914, 4-5.

When documentary evidence is offered, it must be in public session of the court, and, if admitted, the document in full, or an authenticated copy thereof, must be appended to the record. (R-780 (2).) *See* C. M. O. 108, 1899.

46. **Records of officers**—As evidence. *See* RECORDS OF OFFICERS; REPORTS ON FITNESS.
47. **Reports of deserters received on board.** *See* REPORTS OF DESERTERS RECEIVED ON BOARD; SERVICE RECORDS.
48. **Reports on fitness.** *See* RECORDS OF OFFICERS; REPORTS ON FITNESS.
49. **Report of surgeon.** *See* DRUNKENNESS, 34, 100; EPILEPSY, 3.
50. **Ruled out by court.** *See* EVIDENCE, DOCUMENTARY, 45.
51. **Rules of evidence**—Should be closely observed. C. M. O. 49, 1910, 16.
52. **Same**—To be followed by naval courts-martial. *See* EVIDENCE, 106-109.
53. **Service records.** *See* SERVICE RECORDS.
54. **Ship's log**—To show who was officer of the deck. *See* SHIP'S LOG AS EVIDENCE.
55. **Statement of accused, written.** *See* STATEMENT OF ACCUSED.
56. **Telegram**—To prove desertion. C. M. O. 110, 1896, 3. *See also* TELEGRAMS, 1.
57. **Textbook**—As evidence. *See* G. C. M. Rec. 23037, p. 89; 30669, p. 37; TEXTBOOKS.
58. **True copy**—A true copy should be an exact copy. C. M. O. 17, 1910. 3; 23, 1910, 3. *See also* CERTIFIED COPIES, 1, 2.
59. **Unobjected to**—Convening authority should not notice. *See* CONVENING AUTHORITY, 23; EVIDENCE, 82, 83, 125; REVIEWING AUTHORITY, 9.
60. **Waived**—Documentary evidence against accused should be submitted to him for the purpose of affording him an opportunity to make reasonable objection to its introduction in evidence. But where such was not done, the accused being represented by civilian counsel, there were no objections entered, and no injury done accused, as he was acquitted, the department held that such irregularity was not considered sufficient to invalidate the proceedings. C. M. O. 47, 1910, 4. *See also* EVIDENCE, 125.
61. **Same**—Original evidence is waived if secondary evidence unobjected to. C. M. O. 52, 1910, 3.

EXCEPTIONS.

1. **Findings.** *See* FINDINGS, 27-37.
2. **Record of proceedings**—Neither the accused (or counsel), judge advocate, nor any member of the court has any right to enter an objection or protest on the record.

Digitized by Google

(Navy Regulations, 1913, R-752 (2).) C. M. O. 17, 1910, 11; 21, 1910, 13-14; 23, 1910, 3; 19, 1912, 6; 49, 1915; 11; File 26287-3475, Sec. Navy, July 5, 1916. *See also* BILLS OF EXCEPTIONS, 1.

3. **Same**—Counsel for accused, in a summary court-martial case, repeatedly "noted an objection" to rulings of the court—this in violation of Navy Regulations, 1913, R-611 (9), R-752 (2); C. M. O. 49, 1915, 11. File 26287-3475, Sec. Navy, July 5, 1916.
See G. C. M. Rec. 16098, p. 4, where counsel for accused asked for an "exception," which the court granted.
In commenting upon a certain case the department stated in part: "It may further be remarked that counsel for the accused repeatedly 'noted an objection' to the rulings of the court, this in violation of articles R-611 (9) and R-752 (2), Navy Regulations, 1913 (C. M. O. 49, 1915, p. 11)." File 26287-3475, Sec. Navy, July 5, 1916.
4. **"Statement of exceptions"**—As to findings and opinion by Court of Inquiry by the applicant. Ct. Inq. Rec. 4952, pp. 1831, 1843.

EXCESSIVE SENTENCES.

1. **General court-martial**—Accused was tried for "Absence from station and duty without leave," "Theft," and "Scandalous conduct tending to the destruction of good morals." Limitations to punishments were, respectively: Six months, two years, and two years. Sentence was four years six months. Court exceeded its powers, sentence reduced to three years, and it is believed that such reduction will be in interests of justice, irrespective of whether the court was within its powers, because of small value of articles stolen. Second and third charges were same offense. File 26251-3756; 2 JAG, Nov. 15, 1912. *See also* EXCESSIVE SENTENCES, 3.
2. **Same**—The accused (paymaster's clerk) was tried on three charges, "Assault with intent to commit rape," "Indecent assault," and "Scandalous conduct tending to the destruction of good morals." All of the charges and the specifications thereunder were one and the same transaction. The court sentenced the accused to dismissal and imprisonment at hard labor for thirty years.
This case was approved by the Department on December 1, 1913, with the following remarks:
"All of the charges and the specifications thereunder allege one and the same transaction. The court, therefore, should have imposed but one penalty, and should not have sentenced the accused to a greater punishment than that authorized for the highest degree of the crime of which the accused was found guilty."
"Where two counts in an indictment charge different crimes, which are of the same character and which grow out of the same transaction yet differ in degree, the sentence based on a general verdict of guilty must impose only one penalty, and a separate sentence for each crime, imposing a separate punishment for it, is erroneous and void." (12 Cyc. 774.)
"Where, as is a common practice, one crime is charged in several good counts in one indictment, in different degrees, and a general verdict of guilty is rendered thereon on sufficient evidence, the accused may be sentenced upon that count of the indictment which charges the highest degree of crime." (12 Cyc. 775.)
"When an indictment has several counts which either charge the same offense in different counts, to guard against insufficiency of allegation, or which, in fact, as well as form, refer to and charge separate and distinct offenses, the sentence to be imposed upon a conviction grounded on such indictment will depend upon whether the use of the multiplicity of counts was for one or the other of these purposes." (25 Am. & Eng. Enc. of Law, 308.)
A recent case in support of the doctrine quoted, *supra*, is that of the Standard Oil Co. of Indiana *v.* United States (164 Fed. Rep. 376). In this case a U. S. District Court found the plaintiff in error guilty upon 1,462 counts of an indictment and assessed the plaintiff the maximum fine for each count. In this case each count was based upon an illegal concession of each and every shipment made by the plaintiff in error, irrespective of whether each shipment was of the same or of a different transaction. In speaking of this feature, Judge Grosscup, of the Court of Appeals, said:
"The offense of accepting a concession is the 'transaction' that the given rebate consummates—not the units of mere measurement of the physical thing transported but the 'transaction' whereby the shipper, for the thing shipped, no matter how great or how little its quantity, received a rate different from the established rate—the wide range between the maximum and minimum punishment being doubtless thought to be sufficient range within which to differentiate the punishment adapted to one transaction from the punishment adapted to another. The number of offenses in the present case should have been ascertained in accordance with these principles. The measure adopted by the trial court was wholly arbitraty—*had no basis*

Digitized by Google

in any intention or fixed rule discoverable in the statute. And no other way of measuring the number of offenses seems to have been given a thought either by the Government or the trial court."

The judgment of the district court was reversed and the case remanded with instructions to grant a new trial, and proceed in further accordance with this opinion.

In view of the foregoing, the department considered that the court has adjudged an excessive punishment in the present case, and that in accordance with the well-established rule of law, the sentence should not have been greater than the punishment authorized for the highest offense of which the accused was found guilty, which, in this case, is scandalous conduct tending to the destruction of good morals, the maximum punishment for which offense, in the case of an officer, is dismissal and imprisonment at hard labor for fifteen years.

Although it is considered that the sentence is in excess of the punishment authorized by law, only the unauthorized portion of the sentence is void. This appears to be a settled rule of law. A leading case bearing upon this feature is that of U. S. *v.* Pridgeon, 153 U. S., 48, in which it is stated:

"Where a court has jurisdiction of the person and the offense, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such part of it as may be in excess open to question and attack." [*See also* HOWARD *v.* MOYER, (206 Fed. Rep. 555)].

In view of the foregoing, the proceedings and findings in this case were approved, but as the maximum punishment which can be imposed for any one of the charges of which the accused was found guilty is dismissal, and imprisonment at hard labor for fifteen years, the department, on December 1, 1913, set aside so much of the sentence as relates to imprisonment which is in excess of fifteen years. The department in its action also approved the action of the convening authority that the Government prison at the United States Naval Station, Tutuila, be designated as the place for the execution of that part of the sentence which relates to imprisonment at hard labor. C. M. O. 35, 1913. *See also* C. M. O. 211, 1902; 108, 1905; 42, 1909, 9; 15, 1910, 12.

3. **Same**—Prior to April 12, 1911, the department had held that a sentence which exceeded the period of limitation to punishment prescribed by the President, and which was not cured by the court in revision, was (1) illegal; (2) irregular; and (3) "in excess of that allowed by law." But on that date the department held that so much of the confinement as exceeded the period of limitation prescribed was not capable of execution; that the sentence in that respect was void *ab initio* and that the approval of the excessive part of the sentence could be and probably should be set aside as void. *But so much of the confinement as was within the period of limitation was held to be valid and capable of execution,* and the approval of the sentence was held to be valid as to that part which did not exceed the limitation prescribed.

The rule is that the sentence is legal when it is in the form required and proper in its *nature,* provided the excess is separable and may be dealt with without disturbing the valid portion of the sentence. But a sentence providing for "flogging" in addition to confinement at hard labor would be different in nature and could not be separated, and would be illegal. G. C. M. Rec. 23271.

4. **Same**—For sentences which exceeded the limitations, *see* C. M. O. 42, 1909, 11; 49, 1910, 17; 14, 1910, 7; 15, 1910, 7; 17, 1910, 6; 26, 1910, 5; 28, 1910, 5; 30, 1910, 8; 19, 1911, 4; 2, 1912, 4; 6, 1913, 4; G. C. M. Rec. 23271.

5. **Summary court-martial**—Where an enlisted man has been sentenced to lose pay in excess of three months, the department held that when the court has jurisdiction over the person and offense the sentence is legal so far as it is within the provisions of law, and that it is void only as to the excess when such excess is separable and may be dea t with without disturbing the valid portion of the sentence. The department accordingly set aside as void so much of the loss of pay as was in excess of that which a summary court-martial is authorized to adjudge. File 26287-11543, Sec. of Navy, April 2, 1913. *See also* G. C. M. Rec. 23271.

EXCLUSION OF WITNESSES FROM COURT ROOM. *See* EXPERT WITNESSES, 10.

EXCUSE.

1. **Drunk "night before"**—No excuse for being drunk next morning. *See* DRUNKENNESS, 61.
2. **Drunkenness, voluntary**—No excuse for unauthorized absence. *See* ABSENCE FROM STATION AFTER LEAVE HAD EXPIRED, 9, 10; DRUNKENNESS, 1.
3. **Ignorance of law**—No excuse. *See* COURT, 87; DESERTION, 110; FRAUDULENT ENLISTMENT, 23; IGNORANCE OF LAW.
4. **Insanity.** *See* INSANITY, 13.
5. **Positive belief**—That an act is lawful is no excuse, etc. C. M. O. 10, 1913, 4.

Digitized by Google

EXECUTING A FRAUD AGAINST THE UNITED STATES IN VIOLATION OF ARTICLE FOURTEEN OF THE ARTICLES FOR THE GOVERNMENT OF THE NAVY.

1. **Officers**—Charged with. C. M. O. 27, 1911; 7, 1913.
2. **Paymaster's clerk**—Charged with. C. M. O. 29, 1911; 26, 1915.

EXECUTION OF DISCHARGE AS A REMISSION OF PAY. *See* BAD-CONDUCT DISCHARGE, 3.

EXECUTIVE OFFICER.

1. **"Aid or Executive"**—At one time Executive officer was so called. G. O. 194, August 2, 1875.
2. **Oaths**—Administration of. *See* OATHS, 16-18, 49.

EXECUTIVE ORDER.

1. **Marines**—Detached for service with Army. C. M. O. 31, 1915, 6-10. *See also* MARINES SERVING WITH ARMY.

EXEMPTIONS IN SENTENCES.

1. **Convening authority can not commute**—The department stated in part: It "appears that the commander in chief, in mitigating the sentence, has violated article 54 of the Articles for the Government of the Navy, in which he is given the power to remit or mitigate, but not to commute, a sentence, as he has done in this instance by adding to the punishment given by the court, for the mitigation as recorded, deprives the accused of the $3 per month for necessary prison expenses and the $25 allowed him by the court at the time of his discharge. Inasmuch as this action is illegal, the department directs that the accused be given the $3 per month and the $25 at the expiration of his confinement, as provided in the original sentence." C. M. O. 150, 1897, 3. *See also* C. M. O. 17, 1910, 8; 12 Comp. Dec. 815; 9 Comp. Dec. 618; 91 S. and A. Memo. 841.

   In recommending the new form of general court-martial sentence set forth in Navy Regulations, 1913, R-816 (4) containing the words "and to suffer all the other accessories of said sentence," the Judge Advocate General stated: The above change is recommended for the reason that "in the large number of cases in which sentence of dishonorable discharge imposed upon enlisted men are remitted in accordance with the present system of administration of justice in the Navy, will obviate the necessity of paying such men when restored to duty the sum which the court excepted from forfeiture for the specific purpose of being paid them when dishonorably discharged, but which, under decisions of the Comptroller of the Treasury, they now receive notwithstanding the dishonorable discharge is remitted. (91 S. and A. Memo. 841.) In consequence of the comptroller's decisions payments made to prisoners on restoration to duty which were not contemplated by the regulations, and which will not be required if the above changes are approved, amounted to" many thousands of dollars during the last year. File 3980-1049, J. A. G., Feb. 2, 1915.
2. **Necessary prison expenses**—The convening authority, in acting upon the case of a man sentenced to confinement and discharge, with the customary exemption from forfeiture of pay of twenty dollars ($20) to be paid him on discharge, remitted the discharge and then stated in his action that that part of the sentence referring to the twenty dollars to be paid the accused when discharged would be withheld. The department held that as such exemption accrued to the benefit of the accused he was entitled to it at the end of his confinement and it must be credited to him then, and that the action of the convening authority in withholding such from him was in error. C. M. O. 17, 1910, 8. *See also* G. C. M. Rec. 28521.
3. **Same**—By a display of gross carelessness by the entire personnel of the court a sentence was adjudged in which the accused was allowed twenty dollars a month for necessary prison expenses.

   The customary exemption is three dollars a month for necessary prison expenses. C. M. O. 14, 1913, 5.
4. **Same**—The customary exception for prison expenses is three dollars per month and it is desirable that all general court-martial prisoners be placed upon an equal basis, as far as forfeitures, exemptions, and allowances for prison expenses are concerned, in the absence of good reason to the contrary.

   Therefore a court should not include in a sentence an exemption of two instead of three dollars for necessary prison expenses.

   The record was returned to the court for a reconsideration of the sentence and revised the same to exempt three dollars. C. M. O. 28, 1912, 3; 20, 1913, 3.

Digitized by Google

5. **Same**—The sentence of a general court-martial must set forth the manner in which the excepted three dollars a month is to be applied. The regulations permitting such exception, and the customs of the service, provide that the exception referred to is for necessary expenses. C. M. O. 42, 1909, 5.
6. **Paid on discharge**—Exemption of $20 is not subject to action of convening or reviewing authority. *See* EXEMPTIONS IN SENTENCES, 1, 2.
7. **Same**—Exemption of $20 may not be withheld if dishonorable discharge is remitted. *But see* EXEMPTIONS IN SENTENCES, 1; SENTENCES, 3.
8. **Same**—Sentences of general courts-martial involving forfeiture of pay and discharge shall provide that the accused shall be paid $20 when discharged. (R-816 (5).) *See* G. O. 196, Dec. 15, 1875.
9. **Same**—In a case where a general court-martial sentence provided for an exemption of $30 to be paid on dishonorable discharge the department in part stated: "This sum is in excess of that usually provided for as exemption from forfeiture of pay, the customary exemption being but $20. It is considered desirable that naval general court-martial prisoners be placed upon the same basis as nearly as practicable, particularly so far as concerns the gratuity to be paid when discharged from the service pursuant to the sentence." C. M. O. 1, 1913, 5. *See also* EXEMPTIONS IN SENTENCES, 8.

EXHIBITS.
1. **Officers' records**—As exhibits. C. M. O. 29, 1915, 8.
2. **Record**—Properly secured to record. C. M. O. 16, 1915, 4.

EXIGENCIES OF THE SERVICE.
1. **Promotion of Marine officers**—Delayed by. C. M. O. 29, 1915, 9.
2. **Reconvening of court**—Prevented by. *See* COURT, 143, 146.

EXPATRIATION. *See also* WORDS AND PHRASES.
1. **Evidence as to.** *See* CITIZENSHIP, 17, 18; RETIRED OFFICERS, 31.
2. **Naturalized by foreign state**—Act, March 2, 1907, sec. 2 (34 Stat. 1228), provided that "any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state." File 26252-104, J. A. G., April 25, 1916.

EXPERT WITNESSES. *See also* EVIDENCE, 12; HYPOTHETICAL QUESTIONS, 2-4.
1. **Court of inquiry**—Fees. *See* EXPERT WITNESSES, 3, 4.
2. **Drunkenness**—A naval surgeon, an expert, stated in effect, that no other drug than alcohol would account for the condition of the accused. C. M. O. 36, 1898, 2. *See also* C. M. O. 92, 1905, 3.
3. **Employment of**—Authority of department required—The compensation of expert testimony is a matter for determination between the witness and the party calling him for such testimony. If a naval court-martial or court of inquiry desires to employ and subpœna a witness at an expense to the Government, to testify as an expert, the authority of the department in each specific instance must first be obtained. (File 26276-105 (*medical expert*); file 26251-10626:1, Sec. Navy, May 15, 1915 (*handwriting expert*). *See also* C. M. O. 12, 1915, p. 13.) C. M. O. 20, 1915, 6.
4. **Fees for**—A civilian doctor who had been subpœnaed, as an ordinary witness, to testify as to the facts of the question under investigation before a court of inquiry, submitted a claim for $100 for expert witness fees for two days attendance. *Held*, The claimant having been summoned as an ordinary witness and not as an expert, and the authority of the department not having been obtained to employ the above witness as an expert, he is not entitled to fee as an expert but only at the rate of $1.50 per day, the same as allowed in the civil courts of the State in which the court of inquiry sat. (Navy Regulations, 1913, R-4542; Forms of Procedure, 1910, pp. 67-72.) File 26276-105, Sec. Navy, March 16, 1915; C. M. O. 12, 1915, 13.
5. **Handwriting.** *See* G. C. M. Rec. 30684, pp. 264-292; EXPERT WITNESSES, 3.
6. **Medical.** *See* EXPERT WITNESSES, 3.
7. **Same**—Medical experts are in practice employed and paid by the accused, and are not summoned by the Government as witnesses for the accused. G. C. M. Rec. 28613; 29422; Ct. Inq. Rec. 5777.
8. **Officer**—In private litigation. *See* File 1981-00; 6053, Oct. 30, 1906. *See also* EXPERT WITNESSES, 14; MERCHANT VESSELS, 3.

Digitized by Google

9. **Ordinary witness**—Not to be examined as an expert—A medical officer of the Navy was called by the prosecution as an ordinary witness to the facts of the case. Upon cross-examination counsel for the accused examined the witness at length as an "expert," stating in one part of the cross-examination, "I ask you this as a medical expert." (Rec. p. 154.) The mere fact that a person who witnessed a certain act, which is a violation of the law, happens to be a professional man, does not constitute him an expert when he testifies as to his observation of that act. "All persons in the course of ordinary life are liable to witness the transactions, or casualties, or crimes of their fellowmen . . . A surgeon walking down the street and witnessing an accident or murder may describe the injuries of the victim more clearly than an ordinary beholder. But he is not an expert; he is merely the fortuitous witness of an occurrence concerning which he may be made to testify." (Smith *v* U. S., 24 Ct. Cls. 216.) In this case the irregular examination of the witness having been made by the defense, and not being prejudicial to the interests of the accused, did not invalidate the proceedings. C. M. O. 19, 1915, 5.

In one case a general court-martial properly sustained an objection to one who was called as an ordinary witness, testifying as an expert when he had not qualified as such. G. C. M. Rec. 31925, p. 9.

10. **Presence during trial**—In a recent general court-martial case a question was raised by the request of counsel for the accused that two expert witnesses be allowed to be present throughout the trial and hear all of the testimony adduced.

In civil courts "the exclusion of witnesses from the court room is a matter for the discretion of the court, and not a matter of right." So also "even after the rule or order has been granted sequestering the witnesses, it is within the discretion of the trial judge to permit some of them to remain and testify if the circumstances require it; and so if asked to exclude all of the witnesses it is within his discretion to send out only a portion of them. This rule has been applied to the following witnesses: Attorneys, court officers, experts, and relatives of the accused." (12 Cyc. 546–547.)

In naval court-martial procedure, however, it is expressly required that "before the charges and specifications are read to the accused, the president of the court shall caution *all* witnesses in the case to withdraw and not to return until they are officially called. In the outset of each day's proceedings the warning to withdraw shall be repeated to all who are cited as witnesses and may chance to be present" (Navy Regulations, 1913, R–776; Forms of Procedure, 1910, pp. 21, 22), and "when the court has finished with a witness, he shall be directed to retire, and a minute shall be entered on the record to the effect that the witness withdraw to show that two witnesses are not in court at the same time." (Navy Regulations, 1913, R–789; Forms of Procedure, 1910, pp. 26, 36.)

It will thus be seen that naval procedure differs from that in the civil courts, no discretion being vested in a naval court-martial to allow any witnesses to be present; the only cases where certain witnesses are allowed to remain, such as the accused, the judge advocate, or members of the court, being specifically authorized. Since the Navy Regulations are explicit on the subject, and under their provisions expert witnesses, the same as all other witnesses, must be excluded unless the regulations should be modified or waived by competent authority, the court errs if it permits them to remain. In the case in question the court permitted the experts to remain in the court room, but such action having been taken on motion of counsel for the accused and not being prejudicial to the accused, did not invalidate the proceedings. G. C. M. Rec. No. 29422; File 26251–92?0; C. M. O. 51, 1914, 8–9.

11. **Private litigation**—An officer giving expert testimony in a suit between private parties may receive compensation therefor at the usual rates in accordance with his agreement with the party for whom he appeared. File 1981–1900, J. A. G. *See also* File 6053, Oct. 30, 1906; 26276–125, Nov. 1915; MERCHANT VESSELS, 3, 4.

12. **Scope of rules governing expert testimony**—A court errs when it allows opinion evidence to be given by medical witnesses in answer to hypothetical questions, when such witnesses have not qualified as experts and are admittedly not competent to give such testimony as to mental diseases. Their testimony can not, therefore, be accepted by the court as of any special value in arriving at a conclusion in a case. A court also errs in allowing medical witnesses to state directly their opinion as to whether or not, from the facts in evidence, the accused in the case is responsible for his acts. The law allows medical experts to state their opinion upon an assumed state of facts, but it does not permit them to express their opinion upon the specific question whether or not upon the evidence, the accused is responsible—that is, guilty of the acts charged. This is the very question which the court is convened and sworn

Digitized by Google

to determine upon its own opinion, and to allow a witness to express his opinion on this point is an attempted delegation of the court's powers and duties. The witness in forming his opinion may accept certain facts as true which the court upon the evidence would not regard as proved. Accordingly, the question to an expert is—assuming that certain facts exist, state what is your opinion. The court must, therefore, decide for itself upon the question of the accused's guilt, and can not under its oath allow certain witnesses to decide the case. C. M. O. 24, 1914, 22. *See also* C. M. O. 51, 1914, 6–8; 12, 1917; ACCUSED, 2.

13. **Same**—"It does not follow, because a witness is duly qualified and the general subject is a proper one, that his judgment can be asked on any branch of the inquiry. The precise point of each individual inquiry must be beyond the intelligence of an average jury, and 'so far partake of the nature of a science as to require a course of previous habit or study in order to an attainment of a knowledge of them.'" (17 Cyc., 45.) Thus, the accused being present in court, where his demeanor and attitude may be observed by the members, an expert witness is not permitted to testify that he has observed the attitude of the accused during the trial and state in his opinion it indicated indifference, lack of comprehension, and that the accused was not considerably affected or worried by the situation, as a normal person would be. This is a matter concerning which expert testimony is neither necessary nor proper. "Thus it has been held to be unnecessary to rely upon the inferences of witnesses as to a fact when all doubt has been or may be set at rest by the use of the senses, either directly or through the use of plans or photographs." (17 Cyc., 41.) "Where the fact is one cognizable by any ordinary observer and the inferences from it may be drawn by the jury themselves, before whom it is produced for inspection, no statement by a witness as to his inferences are necessary and therefore such evidence is rejected." (17 Cyc., 41.)

"The judgment of an expert must be more than a guess. A tribunal which is called upon to decide a definite issue of fact by the use of the reasoning faculty can not be aided where no mental certainty is shown by a witness. That a judgment is based upon conjecture shows that little or no aid can be given the jury on this point by witnesses, however skilled, and therefore evidence of it is rejected." (17 Cyc., 226.) Thus, whether or not it is possible that certain manifestations of a disease may be feigned may be a proper subject of expert testimony. But whether or not, in a particular case, such symptoms were or were not feigned by the accused obviously can not be testified to by a witness who did not see the accused at the time, and whose opinion is necessarily based on conjecture. The medical feature being established, that certain symptoms may be feigned under certain circumstances, it is the duty of the court to draw its own inference therefrom as to the particular case; little or no aid can be given the court by witnesses, however skilled, and testimony of an expert that "I do not think it was feigned" is incompetent.

"The witness can not be asked to apply the standard of law involved in the case; for example whether the person in question had sufficient mental capacity to make a will, or to be responsible for his criminal acts by knowing the difference between right and wrong, or for his conduct in civil matters, as such a question unnecessarily invades the province of the court or jury." (17 Cyc., 238.) "Thus on an issue of insanity on an indictment for homicide it is not permissible for defendant to ask a medical expert 'when the defendant has been undeniably subject to fits of epilepsy, should he not have the benefit of every reasonable doubt that might arise as to his sanity.'" (17 Cyc., 238.)

The question whether or not the accused is responsible for a criminal act committed by him, is the very question which the court must determine, and therefore the testimony of an expert that "I feel that he is not fully responsible; that he should not be held up to the standard to which a well man should be held" is not competent. "A desire to economize time has occasionally induced the court to permit a witness examined as an expert to ascertain the facts directly from the evidence. In some jurisdictions, but not in all, where the facts are undisputed, an expert who has heard all the testimony may be asked for his judgment 'upon the evidence,' provided that he has heard the whole of it, or is familiar with it, or even upon such part of it as is material to the inquiry." (17 Cyc., 253–254.) This rule, however, is not applied by the Federal courts (Manufacturers Acc. Indemnity Co. *v.* Dorgan, 58 Fed. Rep. 945, 22 L. R. A., 620), which should be followed by courts-martial (Forms of Procedure, 1910, p. 135; C. M. O. 21, 1910, p. 13; G. C. M. Rec. No. 24813), and is similarly rejected in many well considered decisions of the State courts.

Digitized by Google

"In some jurisdictions the practice of allowing an expert witness to ascertain the facts directly from the evidence, instead of their being embodied in a hypothetical question, has been condemned and generally disallowed. And even where the practice is allowed it is subject to limitations. There are serious objections to any other than the hypothetical question. (1) The course under consideration can not be adopted where the facts are disputed. The witness can not properly be asked for his judgment as to disputed matters of fact, to comment on the evidence, or to include his 'understanding' of the evidence of another witness, or as to the credibility of a witness. (2) The practice unnecessarily invades the province of the jury. (3) It may also happen that the witness may not be able to recollect all the testimony, and to allow him to proceed upon what he chances to remember deprives all parties of knowledge as to the basis of his inference. (4) The same ignorance of the real basis of the inference results where the witness has not heard all the material testimony and is asked to testify from what he has heard, from what he has seen and heard, or from what he has heard and from newspaper reports of the remainder of the evidence; and evidence elicited by these forms of question has accordingly been rejected, even where the evidence of a witness is incorporated with facts hypothetically stated." (17 Cyc., 255-258.) C. M. O. 51, 1914.

14. **Weight of.** *See* 7 Op. Atty. Gen. 165.

EXPIRATION OF LEAVE OF ABSENCE.

1. **Burden**—On individual to ascertain time of. C. M. O. 23, 1915.

EXPLOSION OF BOILERS. C. M. O. 12, 1915, 9; 36, 1915; 37, 1915; 38, 1915. *See also* EMERGENCY, 1, 5; LINE OF DUTY AND MISCONDUCT CONSTRUED, 6; ORDERS, 6, 26.

EXTENSION OF ENLISTMENTS.

1. **Credit for double time.** *See* ENLISTMENTS, 13.
2. **Good conduct medals.** *See* GOOD CONDUCT MEDALS.
3. **I-4893.** *See* NAVAL INSTRUCTIONS, 1913, I-4893.
4. **Marine Corps.** File 26507-214:3, J. A. G., Apr. 5, 1915.
5. **Minority**—The act of August 22, 1912 (37 Stat., 331), authorizes extension of enlistment only in the cases of men enlisted for a term of four years. Therefore, *held*, that a man enlisted for minority can not extend his enlistment under the provisions of said act. File 7657-182; J. A. G., Apr. 14, 1913; C. M. O. 29, 1915, 6. *See also* ENLISTMENTS, 12.

EXTENUATION.

1. **Definition**—It may be that matters of legal excuse and those in extenuation have been confused. As to this Winthrop says (572):

"While all matter of legal excuse will justly affect the findings, it is quite otherwise with matter of extenuation. Such a matter can legitimately be considered only in connection with the sentence (where the punishment is discretionary) or as a basis for a recommendation to clemency; or more properly by the reviewing authority in taking action upon the proceedings."

The defense of the accused was that he was detained by civil authorities, which is shown above to be a legal excuse and not a matter of extenuation. The latter would be some such circumstance as that the accused did not return at the expiration of his liberty because of illness in his family, etc. This, if proved, would be taken into consideration in adjudging sentence, or in determining upon clemency. C. M. O. 5, 1912, 12.

2. **Evidence.** C. M. O. 17, 1915, 2; 23, 1915, 2.
3. **Same**—Accused may introduce after plea of "Guilty." *See* ACCUSED, 38; EVIDENCE, 50-53.
4. **Witnesses**—Record of proceedings should show witness was called in extenuation if such is the case. *See* WITNESSES, 63.

EXTRA DUTY.

1. **Deck court**—May adjudge "extra police duty," not "extra duty." C. M. O. 35, 1915, 7.

EXTRA NUMBERS.

1. **Promotion of.** *See* ADDITIONAL NUMBERS.

Digitized by Google

EXTRA POLICE DUTY.
1. **Deck court**—May adjudge "extra police duty," not "extra duty." C. M. O. 35, 1915, 7.
2. **Sentences.** C. M. O. 7, 1914, 11; 33, 1914, 4.
3. **Same**—Except where the offender is serving on a receiving ship or at a shore station, sentences involving extra police duties are undesirable; but this will not be construed as prohibiting the imposition of this sentence on board ships on which circumstances render it desirable. *See* C. M. O. 15, 1910, 12.

EXTRADITION. *See* CIVIL AUTHORITIES, 8, 16, 42; GENERAL ORDER No. 121, Sept. 17, 1914, 10; WORDS AND PHRASES.

FACTS IN DISPUTE.
1. **Court**—Findings of court in general not disturbed. *See* CRITICISMS OF COURTS-MARTIAL, 14.

FAILING TO OBEY A LAWFUL ORDER OF ARREST.
1. **Officer**—Charged with. C. M. O. 82, 1905.

FAILING TO OBEY THE LAWFUL ORDER OF HIS SUPERIOR OFFICER.
1. **Warrant officer**—Charged with. C. M. O. 18, 1912.

FALLING AND INJURING KNEE.
1. **Enlisted man.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 49.

FALLING FROM MAINMAST.
1. **Enlisted man**—Killed. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 48.

FALLING INTO DRY DOCK.
1. **Enlisted man**—Killed. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 50.

FALSE CERTIFICATES. *See* CERTIFICATES, 10.

FALSE IMPRISONMENT. *See* also ARREST, 10.
1. **Actions**—For false imprisonment. *See* COUNSEL, 29, 36; MEMBERS OF COURTS-MARTIAL, 7.

FALSE STATEMENTS.
1. **Evidence to prove**—A certain specification alleged that an accused made certain false statements before a board of investigation. The accused pleaded not guilty and the court found him guilty. No evidence was introduced to show that the accused ever made any statements whatever before a board of investigation, or, in fact, ever appeared before such board. It appeared to have been assumed that the alleged statements were made before a board of investigation and evidence introduced only to prove that such presumed statements were false.
   In view of this insufficient evidence the department disapproved the proceedings, findings, and sentence. C. M. O. 8, 1911, 8.
2. **Summary court-martial**—An enlisted man was tried by summary court-martial for false statements before a board of investigation. C. M. O. 17, 1916, 8–9; File 26287–3475. *See also* KNOWINGLY, 2.

FALSE SWEARING.
1. **Enlisted men**—Charged with. C. M. O. 52, 1905, 1; 47, 1910, 5; File 26251–12618, Dec., 1916.
2. **Same**—Accused tried for false swearing before a summary court-martial. C. M. O. 52, 1905, 1.
3. **Officer**—Charged with. G. C. M. Rec. 13670.
4. **Perjury**—Since act March 4, 1909 (35 Stat. 1111), false swearing and perjury are synonymous. *See* PERJURY, 7.
5. **Proof of**—The record of proceedings of the trial of one man is incompetent as evidence against another on trial for false swearing, as it is the constitutional right of the accused to be confronted with the witnesses against him. C. M. O. 47, 1910, 5–6. *See also* C. M. O. 49, 1910, 10; EVIDENCE, DOCUMENTARY, 44.

FALSEHOOD.
1. **Enlisted man**—Charged with. C. M. O. 19, 1911, 3. *See also* G. C. M. Rec., 22866.
2. **Midshipman**—Charged with. C. M. O. 36, 1909; 41, 1909.
3. **Motive**—The false statement made could have had no other motive than to accomplish the result which it actually did accomplish, i. e., to deceive. C. M. O. 163, 1902, 2.

Digitized by Google

4. **Nature of**—Falsehood "is not a crime in civil life;" File 26251-12159, Sec. Navy, Dec. 9, 1916, p. 18.
5. **Officers**—Charged with. C. M. O. 41, 1889; 35, 1892; 11, 1894; 76, 1896; 117, 1902; 163, 1902; 48, 1904; 92, 1903; 71, 1906; 74, 1907; 26, 1906; 48, 1907; 10, 1908; 23, 1909; 53, 1910; 24, 1910; 4, 1911; 15, 1911; 32, 1911; 13, 1912; 7, 1913; 37, 1913; 27, 1914; 1, 1916; G. C. M. Rec. 8317; 8720; 11173; 13670; 16960; 25063; C. M. O. 10, 1917.
6. **Same**—An officer convicted of deliberate falsehood should not be retained in the Naval Service. *See* ADEQUATE SENTENCES, 11; File 26251-12310.
7. **Paymaster's clerk**—Charged with. C. M. O. 32, 1908.
8. **Warrant officers**—Charged with. C. M. O. 48, 1899, 3, 1905; 102, 1905; 26, 1906; 93, 1906; 48, 1907; 19, 1909; 27, 1909; 34, 1909; 29, 1913.
9. **Warrant officers (commissioned)**—Charged with. C. M. O. 20, 1912; 32, 1912; 21, 1914; G. C. M. Rec. 25648.

FALSIFYING ACCOUNTS.
1. **Paymaster's clerk**—Charged with. C. M. O. 28, 1887.

FAMILIES.
1. **Medical attention**—While it may be true that the family of an officer is not directly recognized by law in all respects, yet the law does give such recognition in various ways. Thus recognition is given, either expressly or impliedly, in the following: Act, Feb. 9, 1889 (25 Stat., 667); act, June 10, 1896 (29 Stat., 361); act, May 13, 1908 (35 Stat., 128). File 28019-17, J. A. G., Jan. 26, 1912. *See also* MEDICAL ATTENDANCE, 1.

FEES.
1. **Counsel in court-martial cases**—Naval officers prohibited by law from accepting compensation. *See* COUNSEL, 17.
2. **Expert witness.** *See* EXPERT WITNESSES, 3, 4.
3. **Lloyd's board of survey**—Naval officer as a member of. *See* MERCHANT VESSELS, 4.
4. **Officers**—Prohibited to receive compensation for acting as counsel in court-martial proceedings. *See* COUNSEL, 17.
5. **Retired officer**—As counsel for accused—Compensation prohibited. *See* COUNSEL, 17.
6. **Witnesses.** *See* ADDRESS, 3; EXPERT WITNESSES, 3; NAVAL MILITIA, 45, 46.

FEINT TO STRIKE.
1. **Assault.** *See* ASSAULT, 12.

FELONIOUS.
1. **Assault.** *See* ASSAULT, 13, 14.
2. **Intent**—Charges and specifications must allege an offense. C. M. O. 15, 1895.

FELONIOUSLY. *See also* EMBEZZLEMENT, 14.
1. **Assault.** *See* ASSAULT, 14.
2. **Definition**—The word "feloniously" has no special inherent meaning; it is a mere technical word used to designate offenses which were declared a felony at common law or offenses of considerable gravity which are declared felonies by statute. It is descriptive of the offense and if the *facts* proved establish a felony, then the crime was committed feloniously. File 26251-3252, J. A. G., April 28, 1910, p. 2. *See also* G. C. M. Rec. 28796 (argument of counsel): C. M. O. 42, 1909, 9–10; 30, 1910, 7; 23, 1911, 2–12; MANSLAUGHTER, 13 (p. 353).

FIANCÉE. *See* FLAGS, 2.

FIFER, U. S. M. C.
1. **General court-martial**—Tried by. C. M. O. 4, 1885; 14, 1885; 36, 1885; 42, 1885; 10, 1895; 156, 1896.

FIGHTING WHILE ON DUTY.
1. **Enlisted man**—Charged with. C. M. O. 65, 1892.

Digitized by Google

FILIPINOS.

1. **Clemency**—Recommended because accused was a Filipino. *See* CLEMENCY, 21.
2. **Naturalization**—Of an enlisted man who is a Filipino under act of June 30, 1914 (38 Stat., 395)—Twenty months' service in the Navy by a native Filipino is not a sufficient declaration of intention to become a citizen of the United States. In order for a Filipino to become a citizen of the United States on account of service in the Navy and without previous declaration of intention it is necessary that he shall have served at least one enlistment of not less than four years in the Navy or Marine Corps and have received an honorable discharge therefrom, or an ordinary discharge with recommendation for reenlistment. (*See* C. M. O. 6, 1915, p. 7; *see also*, In re Monico Lopez, Supreme Court, District of Columbia, Naturalization No. 1340, File 26252–103; 27 Op. Atty. Gen. 12.) File 26282–240, J. A. G., Nov. 8, 1915; C. M. O. 42, 1915, 10. *See also* File 26252–69, J. A. G., Dec. 4, 1912; 1547–31, J. A. G., Mar. 25, 1908. (In re Alverto, 128 Fed. Rep., 688, overruled as far as the naval service is concerned.)
3. **Same**—The following unreported opinion was rendered on December 13, 1915, in the case of In re Monico Lopez (Naturalization No. 1340), holding that a native Filipino is eligible to naturalization. (*See* File 26252–10.)

This is a petition for naturalization filed by Lopez and resisted by the United States. The undisputed facts are that Lopez was born May 4, 1878, on the Island of Luzon, one of the Philippine Islands. His father and mother were mestizos, born in the Philippines. Lopez came to this country in 1904 with former President Taft. He is now a messenger in the War Department, having been such since March, 1913. He filed his declaration of intention September 4, 1909, and this petition was filed more than two years thereafter. His admission to citizenship, as above stated, was resisted by the United States, and a brief has been filed in support of such resistance by its attorney. The petitioner was not represented by counsel at the hearing, but a member of the local bar has filed a brief in behalf of petitioner as *amicus curiæ*. No question has been raised as to the petitioner's qualifications for citizenship other than as hereinafter stated.

The application is based upon section 30 of the Naturalization Act of June 29, 1906 [34 Stat., 596, 606–607], which reads as follows:

"All the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any State or organized Territory of the United States, with the following modifications: The applicant shall not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States at least two years prior to his admission; and residence within the jurisdiction of the United States, owing such permanent allegiance, shall be regarded as residence within the United States within the meaning of the five years' residence clause of the existing law."

The contention of the United States is that petitioner is debarred by section 2169 Revised Statutes, United States, which provides:

"The provisions of this Title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent."

It is argued that section 30 of the act of June 29, 1906, and section 2169 Revised Statutes, United States, must be read together, and that the former section applies only to persons who are designated in the latter, viz, "aliens being free white persons and to aliens of African nativity," etc.

The court is unable to agree with the contention of the Government. The language of section 30, above quoted, is that "all the *applicable* provisions of the naturalization laws * * * shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States and who may become residents of any State or organized Territory of the United States." But section 2169 is not *applicable* to petitioner. He is not an alien nor is he of African nativity or descent.

By the treaty with Spain the Philippines were ceded to the United States on April 11, 1899. By the act of July 1, 1902 (32 Stat., 691), inhabitants of the Philippines who were Spanish subjects on April 11, 1899, other than those who had elected to preserve their allegiance to Spain, were declared "to be citizens of the Philippine Islands and as such entitled to the protection of the United States." Four years later Congress, with the act of 1902 before it, making Filipinos local citizens and with the knowledge that the islands were being governed by the United States, and that thereby its

Digitized by Google

citizens owed allegiance to the United States, enacted section 30, with the evident intention of providing means whereby such citizens could become citizens of the United States.

In the case of Fourteen Diamond Rings *v.* U. S. (183 U. S., 176) the Supreme Court, speaking of the Philippines, used this language: "The Philippines thereby ceased, in the language of the treaty, 'to be Spanish.' Ceasing to be Spanish, they ceased to be foreign country. They came under the complete and absolute sovereignty and dominion of the United States, and so became territory of the United States over which civil government could be established.

"The result was the same, although there was no stipulation that the native inhabitants should be incorporated into the body politic, and none securing to them the right to choose their nationality. *Their allegiance became due to the United States* and they became entitled to its protection."

This decision was handed down December 2, 1901. Five years later Congress provided a means whereby those persons described by the quoted language of the Supreme Court, owing allegiance to the United States, might become citizens thereof. To contend that this provision must be read in *pari materia* with a section relating to aliens and persons of African descent is to ignore the evident intent of Congress in extending citizenship to a definite and ascertained class of persons who were neither aliens nor of African descent.

I am aware that in other jurisdictions an opposite conclusion has been reached, but to my mind the above considerations are compelling, and I will admit the petitioner to citizenship. C. M. O. 49, 1915, 23–25. *See also* Filipinos, 2.

FINANCIAL IRREGULARITIES.

1. **Chief boatswain, retired**—Tried by general court-martial for. C. M. O. 15, 1915.
2. **Debt.** *See* DEBTS.

FINDINGS.

1. **Absence from station and duty without leave**—Finding of, on charge of "Desertion" is acquittal of latter. *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 18; DESERTION, 6.
2. **Same**—Where accused charged with "Desertion" is found guilty in a less degree than charged the proper finding in such a case is: And that the accused, * * * , is of the charge, "Guilty in a less degree than charged, guilty of absence from station and duty without leave [or absence from station and duty after leave had expired]." (Forms of Procedure, 1910, p. 40.) C. M. O. 53, 1914, 5–6.
3. **Accused**—In trials ordered by the department, the findings, sentence, and action of convening authority will be furnished by the department upon application of the accused. *See* ACCUSED, 36; RECORD OF PROCEEDINGS, 32.
4. **Same**—Findings not to be furnished accused until the sentence is published. *See* ACCUSED, 36; RECORD OF PROCEEDINGS, 32.

   Name of accused should be the same in the findings, action of convening authority and senior officer present, and charges and specifications and arraignment. File 26262–2520, Sec. Navy, Mar. 1, 1916.
5. **Acquittals.** *See* ACQUITTAL.
6. **Adhered to**—In revision. C. M. O. 7, 1911, 14–16; 36, 1915, 1; 36, 1916.
7. **Alterations**—Findings shall be free from all alterations—The judge advocate in recording the findings made an error in writing a word and attempted to correct the mistake by writing the word "by" over what he had first written. While this is neither an "erasure" nor an "interlineation" it is as objectionable an alteration as either. If the judge advocate makes a mistake in recording the finding he should rewrite the whole page. (*See* Forms of Procedure, 1910, p. 40; C. M. O. 55, 1910, p. 8.) C. M. O. 6, 1916, 3.
8. **Beyond reason and understanding.** C. M. O. 49, 1910, 13.
9. **Brackets**—In some cases the specifications have been printed in full in the court-martial order and certain words found not proved placed in brackets. The findings were then recorded: The first specification; "Proved in part; proved except the words [in brackets], which words are not proved." C. M. O. 10, 1889, 7; 28, 1891, 2; 56, 1898, 65–66; 70, 1898, 104–105.
10. **Charges**—The findings must specify the numbers of charges. C. M. O. 55, 1910, 9.
11. **Same**—No finding on charge—Department disapproved because of this and other irregularities. C. M. O. 135, 1897, 2. *See also*, C. M. O. 33, 1905, 1; File 426–98; FINDINGS, 38, 64.

Digitized by Google

12. **Same**—When the accused has pleaded guilty, the proper finding is, for the specification; "proved by plea," and for the charge "guilty." (Navy Regulations, 1913, R-802 (5), Forms of Procedure, 1910, p. 40; C. M. O. 12, 1895, 2; 109, 1897, 2; 55, 1910, p. 9; 14, 1910, p. 6; 15, 1910, p. 6; 28, 1910, p. 4; 26, 1912, p. 4; 1, 1913, p. 5; 36, 1914, 7.) C. M. O. 11, 1916, 3. *But see* C. M. O. 29, 1916, 1, in which the phraseology used is misleading and erroneous.
13. **Clemency**—Findings and recommendation should not be inconsistent. *See* CLEMENCY, 22; FINDINGS, 53.
14. **Collision**—Evidence to prove. *See* COLLISION, 8, 9.
15. **Court**—After arriving at a finding should call the judge advocate before it to record the findings before court closes to deliberate on sentence, because the judge advocate will thereby be enabled to advise the court upon any possible irregularity in findings before court proceeds to sentence accused. C. M. O. 25, 1914, 6; 6, 1916, 3. *See also* C. M. O. 17, 1910, 10; 23, 1910, 7; 26, 1910, 7; 26, 1910, 8; 6, 1916, 3.
16. **Court of inquiry findings**—As evidence. *See* COURTS OF INQUIRY, 18.
17. **"Culpable inefficiency in the performance of duty"**—Where an accused is charged with "Culpable inefficiency in the performance of duty" and court finds him guilty in a less degree than charged, guilty of "Inefficiency in the performance of duty," such finding is legal. C. M. O. 4, 1914. *See also* C. M. O. 21, 1885; 40, 1891; 56, 1898; 70, 1898; 129, 1898, 6; 89, 1901; 19, 1905, 1; 5, 1906, 1; 19, 1916, 2.
18. **Dates**—Substitutions of dates in specifications—It is not necessary that the precise date given in a specification be proved, but the court may find that the offense was committed on or about said date, or may substitute an entirely different date, provided it be within the statutory period of limitations. (12 Cyc. 615.) "Save in those cases in which time is of the essence of the offense, the prosecution is not confined in its evidence to the precise date laid in the indictment, but may prove the offense to have been committed upon any date prior to the finding of the indictment and within the period of limitations." (22 Cyc. 451.)

    The deparment's precedents disclose numerous instances where findings have been approved in which courts have substituted definite dates, or "on or about" certain dates, for the dates alleged in the specifications. C. M. O. 19, 1915, 5-6. *See also* C. M. O. 129, 1898, 5, 7; 48, 1899, 3; 230, 1902, 3; 3, 1905, 2; FINDINGS, 27, 32, 33.

    "In the fall of the year 1901" found not proved. C. M. O. 230, 1902, 3.
19. **Desertion**—Where an accused charged with "Desertion" is found guilty in a less degree than charged the proper finding is: And that the accused, * * *, is of the charge, "Guilty in a less degree than charged, guilty of absence from station and duty without leave [or absence from station and duty after leave had expired]." C. M. O. 53, 1914, 5.
20. **Same**—Guilty of desertion—Removal of mark of desertion from record. *See* MARK OF DESERTION.
21. **Disapproval.** *See* ACQUITTAL, 7-10; FINDINGS, 38.
22. **Dissolution**—A finding arrived at prior to dissolution of court remains unaffected, and established culpability. C. M. O. 4, 1914, 5.
23. **Erasures**—Should not be made in the findings. C. M. O. 55, 1910, 8; 28, 1915.
24. **Errors in**—Quotation marks should be used correctly. C. M. O. 36, 1914, 6.
25. **Evidence**—Not in accord with—Record returned for revision. C. M. O. 36, 1915, 1.
26. **Examining boards.** *See* NAVAL EXAMINING BOARDS, 13.
27. **Exceptions and substitutions**—Where a court-martial determines that the accused is guilty of a *specification* but not precisely as laid—that is to say, is guilty of a part but not of the remainder, or is guilty of the substance of the entire specification but not of certain details—it may, and it is its duty, in convicting him thereon, to *except* specifically from the finding of guilty such portions as are not proved, and thus declare the exact measure of the criminality deemed to be established. In making *exceptions* as to items in the *specifications*, not precisely proved, such as amounts, numbers, quantities, names, dates, places, words spoken, or allegations, the court is authorized to go further, and *substitute* the true facts or details, or proper allegations. A substitution, however, like a mere exception, must not so modify the specifications as to render it inappropriate to the charge as found. C. M. O. 27, 1896, 2.

    In view of the peculiar authority of a court-martial to make corrections and substitutions in its finding, and to convict of a breach of discipline where the proof fails to establish the specific act alleged, the charging of the same offense under different forms is much less frequently called for in the military than in the civil practice. C. M. O. 19, 1911, 3. *See also* CHARGES AND SPECIFICATIONS, 61-68.

Digitized by Google

28. **Same**—It is settled law that a naval court-martial is empowered in its findings to except certain words in a specification as not proved, to substitute other words which are proved, and to find the accused guilty of a lesser offense which is embraced in that charged and which is established by the evidence. (Dynes *v.* Hoover, 20 How. 65; Swaim's case, 18 Op. Atty. Gen. 113, 28 Ct. Cls. 173, affirmed 165 U. S. 553.) Accordingly an appeal from the court's action in this respect must be denied by the Secretary of the Navy, the finding of the court being legally supported by the evidence, and it having been decided in habeas corpus proceedings that the court-martial had jurisdiction to try, convict, and sentence the accused for the offenses charged and found proved. File 26251-9281:16, Sec. Navy, May 12, 1915; C. M. O. 20, 1915, 6.
29. **Same**—The words "intoxicants or drugs" for the words "intoxicating liquor." C. M. O. 62, 1904. *See also* C. M. O. 155, 1897, 2.
The word "intoxicated" for the word "drunk." C. M. O. 53, 1905.
30. **Same**—Place—The following finding has been approved: The first specification of the first charge "proved," except the words "Pensacola, Florida," which words are not proved, and for which the court substitutes the words, "Warrington, Florida," which words are proved. C. M. O. 117, 1902, 6.
31. **Same**—"An unknown sum"—The following finding has been approved: The first specification of the third charge "proved," except the words "four hundred and eighty-three dollars and sixty-five cents," which words are not proved, and the court substitutes the words "an unknown sum," which words are proved. C. M. O. 117, 1902, 6, 7. *See also* C. M. O. 173, 1902.
32. **Same**—Time—"May" for "June"—The second specification of the second charge "proved," except the word "June," which word is not proved, and for which excepted word the court substitutes the word "May," which word is proved; and except the words "giving therefor to the said * * * a worthless check," which words are not proved. C. M. O. 230, 1902, 3.
33. **Same**—"About" such a time, for a definite date—The eighth specification of the second charge "proved," except the words "on the fifteenth day of August," which words are not proved, and for which excepted words the court substitutes the words, "about the fifteenth day of August," which words are proved.
34. **Same**—The court, in its finding, may not substitute an entirely new and distinct charge for the one under which the accused was tried, and where this was done the department held the findings invalid. C. M. O. 37, 1909, 3, 7.
35. **Same**—Time—The court found the fifth specification of the fourth charge "not proved." This specification alleged that the accused on a certain date did order and cause a noncommissioned officer in uniform and on duty to purchase and bring to him intoxicating liquor for the unlawful purpose of drinking same while on duty. The noncommissioned officer in question could not definitely fix the date of this offense, but did testify positively that such an occurrence took place on three different occasions, two of which were covered by other specifications; but he was not sure of the precise date of the third transaction, which was the one covered by this specification. It is not necessary that the precise date given in a specification be proved, but the court may find that the offense was committed on or about said date, or may substitute an entirely different date, provided it be within the statutory period of limitations. (12 Cyc. 615.) "Save in those cases in which time is of the essence of the offense, the prosecution is not confined in its evidence to the precise date laid in the indictment but may prove the offense to have been committed upon any date prior to the finding of the indictment and within the period of limitations." (22 Cyc. 451.)
The department's precedents disclose numerous instances where findings have been approved in which courts have sustained definite dates, or "on or about" certain dates, for the dates alleged in the specifications. (C. M. O. 129, 1898, p. 5; 230, 1902, p. 3; 3, 1905, p. 2.) [*See* G. C. M. Rec. 32851, p. 2.]
In the present case the evidence mentioned was sufficient to have supported a finding of "proved" upon the specification in question, either as it read or with the insertion of "on or about" before the date mentioned. C. M. O. 19, 1915, 1, 5–6.
36. **Same**—Should not eliminate the essence of the offense, etc. C. M. O. 146, 1900; 41, 1903, 2; 12, 1904, 3; 29, 1909, 2; 4, 1913, 54; 38, 1916; File 26251-12739.
37. **Same**—Words. C. M. O. 38, 1905, 1–2.
38. **Failure to make**—Department disapproved. C. M. O. 33, 1905, 1.
Where court records a finding on the specification but fails to record a finding on the charge, it is directed to reconvene for the purpose of recording a finding upon both the charge and specification in the usual and proper manner. File 426-98. *See also* FINDINGS, 11.

Digitized by Google

39. **G. O. 110**—A finding of "Guilty in a less degree than charged, guilty of *unauthorized absence*" is incorrect. C. M. O. 53, 1914, 6. *See also* FINDINGS, 2, 19.
40. **Gravamen**—In finding guilty upon a specification, to except from such finding the word or words which express the *gravamen* of the act as charged and found is contradictory and irregular. C. M. O. 4, 1913, 54. *See also* C. M. O. 146, 1900, 2; 41, 1903, 2; 12, 1904, 3; 29, 1909, 2; FINDINGS, 41; File 26251-12739, Sec. Navy, Jan., 1917.
41. **Same**—Court in its finding should not eliminate essential gravamen from specification and then find guilty of charge. *See* COURT, 86.
42. **"Guilty"**—When the accused has pleaded "guilty" the proper finding is, for the specification, "proved by plea" and for the charge, "guilty." *See* FINDINGS, 12.
43. **"Guilty but without criminality."** *See* FINDINGS, 69.
44. **"Guilty but without culpability"**—A finding of "guilty but without culpability" is inconsistent without finding of guilty of a specification which alleges that the act was committed "wilfully and deliberately." C. M. O. 7, 1911, 16.
45. **Guilty except to certain words**—A finding on a plea of "guilty except to * * * " should be recorded as "proved in part by plea." C. M. O. 14, 1910, 6; 1, 1911, 5.
46. **"Guilty in a less degree than charged."** *See* GUILTY IN A LESS DEGREE THAN CHARGED.
47. **"Guilty of specification"**—Used in Court-Martial Order 7, 1911, 4, erroneously. *See also* G. C. M. Rec. 23282.
48. **Handwriting**—The *entire* findings must be recorded in the handwriting of the judge advocate. This includes everything which properly forms a part of the finding, commencing with the words, "The specification of the first charge."
    Forms of Procedure, 1910, page 40, states, "The judge advocate was recalled and directed to record the following findings," Everything which follows this statement is a part of the finding, and therefore must be recorded in the handwriting of the judge advocate. C. M. O. 29, 1914, 5; 42, 1914, 4-5; 23, 1916, 2.
49. **Same**—If court adheres to former findings in revision, such statement should be in handwriting of judge advocate. C. M. O. 29, 1914, 5.
50. **Same**—The judge advocate shall enter the findings of the court on the record of proceedings in his own handwriting. He shall not typewrite the findings. C. M. O. 155, 1897, 2; 24, 1909, 3; 37, 1909, 4; 42, 1909, 6; 29, 1914, 5; 42, 1914, 4; 17, 1915, 3.
51. **Ignorance of law**—An incorrect finding was caused by court's ignorance of law. C. M. O. 4, 1913, 13. *See also* File 26251-12159.
52. **Inconsistent**—A finding of "guilty" of fraudulent enlistment, but a light sentence imposed because the accused was "mentally unbalanced" when fraudulently enlisting, was held by the department to be utterly inconsistent, and therefore disapproved the case. C. M. O. 49, 1910, 12-13.
53. **Inconsistent with recommendation to clemency**—Where the court found the accused guilty of absence without leave and subsequently recommended him to the clemency of the convening authority because he was "half-witted and irresponsible" the department held that such recommendation was inconsistent with the finding of the court, as a man half-witted and irresponsible can hardly be held accountable for his acts. C. M. O. 49, 1910, 17. *See also* C. M. O. 21, 1910, 4-6; 30, 1910, 5; 5, 1911, 4.
54. **Interlineations**—Findings must be free from interlineations or erasures. C. M. O. 55, 1910, 8; 28, 1915. *See also* FINDINGS, 7.
55. **Irregular**—Specifications proved, but "not guilty, because of mental irresponsibility." C. M. O. 24, 1914, 3.
56. **Same**—Specifications proved, but not guilty of the charge. Disapproved. C. M. O. 59, 1897, 3. *See also* C. M. O. 87, 1897, 2; 12, 1895, 2; 23, 1910, 7; 5, 1911, 7.
57. **Same**—Court found the accused "Not guilty," but sentenced him "to be dishonorably dismissed." The department stated: "A sentence so evidently illegal, in view of the findings, is of course set aside." G. O. 57, June 9, 1865.
58. **Italics**—The specifications were printed in full, the words which were found "not proved" being italicized. The finding then read: The first *specification*, "proved, except the words (italicized) which words are not proved." C. M. O. 8, 1886, 32. *See also* C. M. O. 4, 1913, 49.
59. **Joinder**—Trial in. *See* JOINDER, TRIAL IN.
60. **Judge advocate**—Finding in handwriting of. *See* FINDINGS, 48-50.
61. **Same**—Court should call judge advocate before it to record findings before deliberating upon sentence. *See* FINDINGS, 15.
62. **"Justifiable cause"**—"and without justifiable cause" not proved, but guilty of charge. C. M. O. 59, 1904, 1-2. *See also* ASSAULT, 27.

Digitized by Google

63. **"Not guilty"**—In case the finding is "not guilty" upon any charge, the explicit statement should immediately follow that the court acquits the accused of such charge. C. M. O. 49, 1888, 3; 40, 1891, 2; 60, 1898, 2; 41, 1900; 92, 1903, 3; 49, 1910, 15; 17, 1910, 12; 21, 1910, 16; 28, 1912, 3; 34, 1913, 6; 29, 1914, 6. *See also* C. M. O. 26, 1902, where the express statement of acquittal was erroneously omitted. *See also* FINDINGS, 67.
64. **Omission**—Of findings on record—Department returned to have findings recorded. C. M. O. 5, 1911, 5. *See also* C. M. O. 33, 1905, 1; File 26251-12159, Sec. Navy, Oct. 30, 1916, p. 1; FINDINGS, 11, 38.
65. **Same**—Fatal defect not to make a finding where court dissolved.
66. **Same**—Voting must be continued until a finding has been reached. It is therefore improper to find that "the court can not reach a finding after numerous ballots cast." G. C. M. Rec. 23134. *See also* C. M. O. 155, 1897, 2.
67. **Same**—In case the finding is "not guilty" upon any charge, the explicit statement should immediately follow that the court acquits the accused of such charge.
    In a case where this was not done the department stated, "Inasmuch, however, as the intention of the court to acquit may be regarded as a necessary inference from its findings upon the charge in question," "the omission from the record of the customary statement expressing such intention is not material." C. M. O. 25, 1902.
68. **Same**—Finding of "not guilty" fully acquits in law. C. M. O. 5, 1912, 13.
69. **"Proved, but without criminality"**—A finding of "proved, but without criminality" is not to be encouraged in any case. It is virtually a form of acquittal, being a determination that the accused is not guilty in law. It will therefore be more legally accurate, as well as more military and more just to the accused, to express and record the findings simply as "not guilty." This finding is particularly inappropriate upon a charge of desertion in which intent forms an essential ingredient of the offense and must be proved. C. M. O. 10, 1911, 5. *See also* C. M. O. 10, 1913, 3.
70. **"Proved, but without culpability."** C. M. O. 30, 1909, 2; 7, 1911, 16. *See also* FINDINGS, 44.
71. **Reconsideration of.** *See* File 26258-302, May 29, 1912. *See also* 16 Op. Atty. Gen. 104.
72. **Record**—Findings on the charges should be entered regularly. C. M. O. 55, 1910, 8-9.
73. **Same**—When the accused has been tried under one charge with one specification thereunder, it is improper to record that the court finds the accused of the *first* charge guilty or not guilty. C. M. O. 21, 1910, 11.
74. **Retiring board**—Finding can not be changed by act of Congress. 15 Op. J. A. G. 461.
75. **Revision**—A finding arrived at after dissolution of court has no legal effect, even though attempt is made to reconvene court. C. M. O. 4, 1914.
76. **Same**—Original finding should be revoked before new one is adjudged. C. M. O. 19, 1912, 6.
77. **Same**—Accused pleaded guilty to first charge (absence without leave) and not guilty to second charge (conduct to the prejudice of good order and discipline).
    Court found specification of first charge proved and not guilty of the charge; specification of the second charge not proved and not guilty of charge, and acquitted accused of both charges.
    In revision the court revoked its former finding upon the specification of the first charge and found the specification "proved except that the necessary criminal animus nowhere appears in the evidence," and the accused of the first charge not guilty. Department disapproved. C. M. O. 6, 1908, 5-6.
78. **Revoking.** *See* FINDINGS, 76.
79. **Setting aside.** *See* SETTING ASIDE.
80. **Single charge**—When an accused has been tried under a single charge, it is improper to record that the court finds the accused of the *first* charge guilty (or not guilty). C. M. O. 21, 1910, 11.
81. **Specifications**—Where there is more than one specification there should be a finding on each separately. C. M. O. 49, 1910, 14.
82. **Same**—Finding on specification should be "not proved" rather than "not guilty." C. M. O. 72, 1903.
83. **Same**—When the accused has pleaded "guilty," the proper finding for the specification is "proved by plea." (Navy Regulations, 1913, R-802 (5); Forms of Procedure, 1910, p. 40; Index-Digest, 1914, p. 20.) C. M. O. 11, 1916, 3. *See also* FINDINGS, 12.
84. **Same**—Irregularity in finding of "not guilty" instead of "not proved" not sufficient to invalidate. C. M. O. 72, 1903, 1.

Digitized by Google

5. **Summary courts-martial**—If there are two or more specifications, there should be a finding on each separately, referring to each of them by number, and the general form of findings shall be same as in general courts-martial. C. M. O. 5, 1914, 4.
   Word "findings" not used in actions on summary courts-martial. C. M. O. 36, 1914, 5. *But see* General Order No. 110, July 27, 1914, 3 (p. 261).
86. **Surplusage**—The words "in consequence of which neglect and failure the * * * was stranded" in a specification under a charge of "culpable inefficiency in the performance of duty" is surplusage, and is not an essential part of the specification which will support the charge without such words. C. M. O. 24, 1916, 4.
87. **Typewriting**—Findings should not be typewritten. C. M. O. 155, 1897, 2; 17, 1915, 3. *See also* FINDINGS, 48–50, 60, 61.
88. **Unintelligible**—In exceptions and substitutions of words in the findings the court should not leave the findings in unintelligible shape or so that they do not allege an offense. C. M. O. 29, 1893; 30, 1893; 12, 1904, 3; 47, 1906, 2; 28, 1904.
89. **"Unjustifiable"**—Found not proved. *See* ASSAULT, 27; FINDINGS, 62.
90. **Unreasonable.** *See* COURT, 88.
91. **Violation of law**—"I believe it would be dangerous for the department to sanction a finding by a court-martial which imports that a violation of a distinct provision of law (incorporated for the better information of the service in the Navy Regulations, article 1473), constitutes neither scandalous conduct nor any other offense whatever." File 6465-03, J. A. G., July 22, 1903, p. 5.
   "The department can not sanction a decision which would seem to indicate a deficiency in the moral sense, as well as in the reasoning powers, of those who pronounced it, and the tendency of which would be to encourage a disregard of law." G. O. 22, Oct. 17, 1863.
93. **Voting on finding.** *See* COURT, 189–191; CRITICISM OF COURT-MARTIAL, 35, 36; FINDINGS, 15; OATHS, 47.

FINDING OF FACT BY COURT OF CLAIMS. C. M. O. 10, 1915, 13.

FINGER PRINTS.
1. **Evidence, as.** *See* G. C. M. Rec. 28488, pp. 6–16; 29305. *See also* C. M. O. 37, 1909, 5.
2. **Same**—Weight—People *v.* Jennings, 96 N. E. Rep. 1077 (Ill.).
3. **Furnished to persons outside of naval service.** File 7657-396:1, J. A. G., Sept. 20, 1916.

FIRES.
1. **Reimbursement for property**—Of enlisted men destroyed in extinguishing a fire on board a naval vessel. *See* File 9464-03. *See also* File 3674-57; 1 Comp. Dec., 441.

FIRE EXTINGUISHERS. *See* C. M. O. 37, 1915, 4.

FIREARMS.
1. **Care in handling**—Commanding officers are directed to bring the above case (man who accidentally shot another) to the attention of all under their command, particularly emphasizing the importance as thus exemplified of all persons in the service who have occasion to handle dangerous weapons exercising the utmost caution to avoid a repetition of such a deplorable fatality; and that under no circumstances should any person carrying a firearm point it at another, however certain he may feel that such firearm is not loaded, except when required to do so in the discharge of duty. C. M. O. 33, 1914, 12.
2. **Sentries, use of, by**—Use of firearms by sentries while on their post to defend Government property. *See* File 7657-125, J. A. G.

FIREROOMS. *See* C. M. O. 36, 1915; 37, 1915; 38, 1915.

FIRST SERGEANT.
1. **General court-martial**—Tried by. C. M. O. 48, 1880.

FIST FIGHT. *See* C. M. O. 128, 1905, 6.

FITNESS REPORTS. *See* REPORTS ON FITNESS.

FLAGS.
1. **Dishonored**—Flag dishonored. C. M. O. 14, 1879, 2.
2. **Draping coffin**—The act of June 30, 1914 (38 Stat. 406), authorizing the Secretary of the Navy to issue upon request to the relatives of the deceased, etc., the flag used to drape the coffin of officers or enlisted men, does not include the fiancée of the deceased. File 3768-514, Sec. Navy, June 6, 1916.

Digitized by Google

"FLEET CAPTAIN." *See* CHIEF OF STAFF, 1.

FLEET COURT-MARTIAL ORDERS. *See* COURT-MARTIAL ORDERS, 12, 13.

FLEET NAVAL RESERVE.
1. **Obligations assumed on enrollment.** File 28550-21, J. A. G., Nov. 7, 1916.
2. **Retainer pay.** File 28550-20, Sec. Navy, Nov. 1, 1916. *See also* File 28550-20:1, J. A. G., Nov. 10, 1916.

FLOATING DRY DOCKS. *See* DRY DOCKS, 2-4.

FLOGGING.
1. **Abolished**—Flogging was abolished by act of September 28, 1860 (9 Stat. 515). *See also* G. O. of June 5, 1512.
2. **Sentences involving flogging.** *See* DESERTION, 119; EXCESSIVE SENTENCES, 3.

FLOTILLA OF FLEET.
1. **General courts-martial**—Convening of. *See* CONVENING AUTHORITY, 27.

FOGGY WEATHER.
1. **Navigation in.** C. M. O. 2, 1915; 3, 1915. *See also* NAVIGATION, 39.

FOOT CRUSHED. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 51.

FORCED DRAFT.
1. **Boilers exploded**—Insufficient feed water. C. M. O. 36, 1915; 37, 1915; 38, 1915.

FORCIBLY.
1. **Defined and discussed.** G. C. M. Rec. 21315.

FOREIGN COUNTRIES.
1. **Bad-conduct discharge.** *See* BAD-CONDUCT DISCHARGE, 4.
2. **Collisions.** *See* COLLISION, 2, 4, 10.
3. **Expatriation**—Evidence of. *See* EXPATRIATION; CITIZENSHIP, 17, 18.
4. **General courts-martial**—Convening of, on foreign territory. C. M. O. 42, 1915, 10. *See also* JURISDICTION, 53.
5. **Officer**—Official residence in. *See* CITIZENSHIP, 17, 18; RESIDENCE, 2.

FOREIGN GOVERNMENTS.
1. **Decorations**—Acceptance of, by officers and enlisted men. *See* DECORATIONS.

FOREIGN LAWS.
1. **Proof of.** *See* ATTORNEY GENERAL, 11.

FOREIGN TERRITORY.
1. **General courts-martial**—Convening of, on foreign territory. C. M. O. 42, 1915, 10. *See also* JURISDICTION, 53.

FOREIGNERS ON WARSHIPS. *See* ALIENS, 5.

FORFEITURE OF PAY. *See* PAY.

FORGERY.
1. **Definition**—To constitute forgery there must be a making of a false instrument for the purpose of creating another's liability with fraudulent intent to injure him. C. M. O. 37, 1909, 11. *See* CRIMINAL CODE (35 Stat. 1094, 1112) for other definitions.
2. **Enlisted men**—Charged with. C. M. O. 37, 1909, 9; G. C. M. Rec. 30447; File 26251-10492b.

FORGING SIGNATURE.
1. **Paymaster's clerk**—Forged prisoner's signature. C. M. O. 26, 1915.

FORMAL ADMISSIONS. *See* ADMISSIONS, 1, 3.

FORMER JEOPARDY. *See* JEOPARDY, FORMER; PLEA IN BAR.

FORMER JUDGMENT.
1. **When a good bar.** *See* JEOPARDY, FORMER.

FORMS OF PROCEDURE, 1910. *See* COURT, 90.

FORNICATION.
1. **Enlisted man**—Tried by general court-martial for, under "Scandalous conduct tending to the destruction of good morals." C. M. O. 42, 1915, 3.

Digitized by Google

FOUR MONTHS' GRATUITY PAY. *See* File 28550-20.

FRATERNAL ORDERS.

1. **Medical officers**—Signing forms for enlisted men to secure sick dues. C. M. O. 29, 1915, 6. *See also* MEDICAL RECORDS, 5.

FRAUD.

1. **A. G. N. 8**—Proof of fraud under. *See* FRAUD, 5; FRAUDULENT ENLISTMENT, 50 (p. 255).
2. **A. G. N. 14**—Proof of fraud under. *See* FRAUD, 5; FRAUDULENT ENLISTMENT, 50 (p. 255).
3. **Attempt to commit fraud.** *See* FRAUD, 5.
4. **Classes of.** *See* FRAUD, 5.
5. **Definition and discussion**—The accused (officer) was charged with "Fraud in violation of article 14 of the Articles for the Government of the Navy." The court first found the accused guilty of "Irregularity and carelessness in regard to discharge of pecuniary obligations" and upon revision guilty of "Conduct unbecoming an officer and a gentleman." The convening authority (fleet) approved the proceedings but disapproved the finding and sentence for the reason that the sentence was wholly inadequate for the offense of "Conduct unbecoming an officer and a gentleman."

The department, on February 1, 1916, pronounced the proceedings, findings, and sentence in this case illegal, and set aside the same with the following remarks:

The specification in this case is not in due form and technically correct, because it quotes therein both a public statute and a Navy regulation. Forms of Procedure, 1910, p. 137, provides that courts take judicial notice of "public statutes" and "the Navy Regulations," and that such "are not required either to be charged or proved." Also in the same publication (p. 83) it is provided that "in drawing up the charges and specifications, all extraneous matter is to be carefully avoided." The specification in this case is not in accordance with the above provisions of Forms of Procedure and is also contrary to the Navy Regulations, 1913, R–712 (3).

Aside from the irregular form of the specification, it does not allege an offense supporting the charge under which it appears nor any other charge cognizable by court-martial.

There are two broad classes of fraud, viz, fraud against the United States and fraud not against the United States. The first class is punishable under article 14, A. G. N., and the other under article 8, A. G. N.

The accused certainly was not guilty of any fraud against the United States. Having no money to his credit, the pay officer could not have honored the accused's draft without himself being guilty of embezzlement and being required to reimburse the Government under his bond. Furthermore, even had the accused money on the books, the pay officer would not have been authorized to pay such money to another on the accused's order, as the law provides that assignment of claims against the United States shall be void except under specified conditions (*see* sec. 3477, R. S.) and in certain cases of which this is not one. The "false" and "fraudulent" claims against the United States referred to in article 14, A. G. N., evidently contemplate claims false or fraudulent in matters of fact and not such as on their face are null and void under the law.

Furthermore, the specification in this case does not aver that the accused actually presented or caused to be presented the above-mentioned order or draft to the Navy pay officer. (*See* C. M. O. 160, 1901; 15, 1902.)

If an offense was committed by the accused in this case, it must therefore have been in violation of article 8, A. G. N.; that is, fraud against a private person. To constitute such fraud, however, it would be necessary in the present case for the specification to have shown affirmatively that the accused had (1) made a false representation of some existing or past fact to the person concerned with intent to defraud; (2) that the accused knew such representation to be false; (3) that the person concerned had believed, and relied upon such false representation; and (4) that said person concerned had actually been defrauded by, and parted with something of value in consequence of, such false representation.

If the accused had actually not defrauded the person concerned, the specification might have supported a charge of attempt to commit fraud, provided it averred that the accused had made the necessary false representation with intent to defraud.

In the present case, however, the specification merely alleges that the accused issued an order or draft on the pay officer, which order appears on its face, as set forth in the specification, to be null and void under the law. It does not allege that the accused did this with any intent to defraud, that he made any false representations as to matters of fact, that he received anything of value, nor that he deceived or actually defrauded the aforesaid person concerned or any other person.

Digitized by Google

The specification, therefore, does not in any aspect support the charge under which it appears nor any other charge cognizable by court-martial.

It is proper to add that the uncontradicted evidence in this case established that the accused made no attempt to deceive or defraud anyone; that when he applied to the person concerned for a loan he was asked by the latter to sign an order on the pay officer for the amount in question; that the accused informed the person concerned that such an order would be wholly without value, and that said person concerned was already aware of the fact, and would not have believed the accused had he represented that the order would be good; but that the said person concerned wanted the order or draft merely for the purpose of using same, if necessary, as a means of bringing the matter to the attention of the naval authorities if the accused should default in payment. Incidentally, the evidence shows that the accused actually repaid the loan, after a brief delay, which was satisfactorily explained. C. M. O. 4, 1916. *See also* STATUTES, 10.

6. **Disbursing officer.** *See* EMBEZZLEMENT, 7; FRAUD, 5, 11.
7. **Discharge**—Obtained fraudulently by an enlisted man may be set aside. *See* DISCHARGE OBTAINED BY FRAUD, 2.
8. **Fraud in violation of article 14 of the Articles for the Government of the Navy.** *See* FRAUD IN VIOLATION OF ARTICLE 14 OF THE ARTICLES FOR THE GOVERNMENT OF THE NAVY.
9. **Fraudulent practices**—Whether or not a person accused has knowledge of fraudulent practices is, as a rule, from the necessities of the case largely matter of inference. No direct or positive proof in regard to such a matter can be expected. C. M. O. 129, 1898, 6.
10. **Fraudulent intent.** C. M. O. 37, 1893, 6.
11. **Pay officer**—Fraud is not necessary to constitute a pay officer guilty of embezzlement. File 26251-3252, J. A. G., April 26, 1910, page 11. *See also* EMBEZZLEMENT, 7.
12. **Paymaster's clerk**—Charged with. G. O. 143, October 28, 1869.

FRAUD, IN VIOLATION OF ARTICLE 14 OF THE ARTICLES FOR THE GOVERNMENT OF THE NAVY.

1. **Officer**—Charged with. C. M. O. 27, 1887; 4, 1916. *See also* EXECUTING A FRAUD AGAINST THE UNITED STATES, IN VIOLATION OF ARTICLE 14 OF THE ARTICLES FOR THE GOVERNMENT OF THE NAVY.
2. **Paymaster**—Charged with. C. M. O. 27, 1887.
3. **Warrant officer (commissioned)**—Charged with. G. C. M. Rec. 25648.

FRAUDULENT ENLISTMENT.

1. **"Alias"**—Used in specifications of "Fraudulent enlistment." *See* ALIAS, 3.
2. **Alien**—Effect of fraudulent enlistment. G. C. M. Rec. 24710.
3. **Allowances**—It is not considered that in proving "Fraudulent enlistment" that "allowance" means necessarily a pecuniary allowance, as an allowance of clothing or rations is sufficient. C. M. O. 23, 1910, 9. *See also* C. M. O. 5, 1911, 6.
4. **Same**—Not necessary to allege or prove receipt of pay or allowances where the accused was a deserter at large at the time of his fraudulent enlistment. The act of March 3, 1893 (27 Stat., 715), making the receipt of pay or allowances an ingredient of the offense relates to fraudulent enlistment by persons not already in the service. File 26251-3570:2. *See also* C. M. O. 23, 1910, 8-9; FRAUDULENT ENLISTMENT, 50.
5. **Same**—The proof of receipt of pay or allowences is an essential feature necessary to substantiate the charge of "Fraudulent enlistment" if the accused is not in naval service. C. M. O. 37, 1909, 5, 7; 15, 1910, 8; 23, 2910; 17, 1916, 4.

   The accused was tried by general court-martial, by order of the Commander in Chief, U. S. Atlantic Fleet, and found guilty of "Fraudulent enlistment." The specification under the charge alleged that the accused fraudulently enlisted on September 20, 1915, having procured such enlistment by concealing from the recruiting officer that he had, on October 22, 1906, deserted from the U. S. Navy. The specification did not allege that the accused had, since said fraudulent enlistment, received pay or allowances thereunder.

   The *gist* of the offense, therefore, with which the accused was charged, was that on September 20, 1915, he procured his enlistment by means of false representations. In other words, the gravamen of the offense charged was an act committed before the accused, on September 20, 1915, had completed a contract—voidable on the part of the Government by reason of the fraud of the accused, but none the less binding upon the accused—whereby he submitted himself to naval jurisdiction. The question now

Digitized by Google

arises as to what was the status of the accused at the time of making the false representations, which were preliminary to this voidable contract and made before the same had become effective. Was he at that time subject to naval jurisdiction, and was an offense *then* committed one of which a naval general court-martial could later take cognizance?

It appears that the accused in this case first enlisted in the Navy on August 30, 1906, and that this enlistment expired on August 29, 1910. On October 22, 1906, the accused deserted from the naval service and remained absent until September 20, 1915, when he fraudulently enlisted by concealing his desertion. Upon these facts it may be seen that while the enlistment of the accused expired on August 29, 1910, yet he had never been discharged from the naval service. So the specific question to be decided is whether on September 20, 1915, the time of the fraudulent act of the accused, he was still in the naval service by virtue of his previous enlistment and the fact that he had never been discharged therefrom, or whether he ceased to be in the naval service after August 29, 1910, by virtue of the expiration of his contract of enlistment on that date.

In an Opinion of the Attorney General, discussing the limitation of the offense of desertion, it is stated:

"This engagement [contract of enlistment] binds the soldier for a specific term of service, beginning at a certain time and running thence continuously day after day until the end is reached, the last day of the term being as much fixed by the contract as the first. * * * Thus it seems that in our military service the contract of enlistment must in all cases, even in that of desertion, be regarded as having expired when the last day of the term of enlistment therein fixed has elapsed. And since the obligation to serve depends upon the contract, and necessarily ceases therewith, the offense of desertion, on grounds already set forth, must be deemed to terminate at the same time. In short, that offense may be viewed as continuing up to the end of the term of his engagement, but not beyond." (15 Op. Atty. Gen., 161, 162.)

While it is to be remarked in connection with the foregoing Opinion of the Attorney General that there are legal ways in which an enlisted man may be held to service after the expiration of his enlistment, a discussion of the same is not pertinent to the present issue for the purpose of which it is sufficient to accept the above opinion as controlling on the point that the offense of desertion is completed upon the expiration of the offender's enlistment. This, however, does not mean that the offender can no longer be punished for desertion—for the statutes specifically provide that he remains amendable therefor for a period of two years after the expiration of his enlistment, etc.—but merely establishes the date when the offense of desertion has been completed. In other words, subsequent to the expiration of his enlistment a deserter remains none the less a deserter, but *does not continue in desertion.*

Applying then this conclusion to the facts in the present case, it follows that the accused's desertion came to a termination upon the expiration of his enlistment on August 29, 1910, and upon that date his connection with the naval service came to an end, except that a statutory provision permitted of his trial for desertion during the period allowed by the statute of limitations. The status of the accused, therefore, on September 20, 1915, when he presented himself for enlistment, was that of a civilian—a civilian, it is true, with a mark of desertion against him, but none the less a civilian. Having thus established the accused's status, it is now apparent that at the time of committing the offense with which he is here charged, that of inducing the government by means of fraudulent representations to enter into a contract with him, the Navy had no jurisdiction over his person and could, therefore, not assume jurisdiction over an offense then committed by the accused. The department accordingly held the specification charging the accused with fraudulent enlistment to be fatally defective and set aside the findings and sentence thereunder. G. C. M. Rec. No. 32175.

In connection with the above case it is to be remarked that the failure to bring the accused to justice for fraudulently enlisting was due entirely to faulty pleading. A statute is in force which was specifically intended to remedy a situation similar to that which existed in the present case. The act of March 3, 1893 (27 Stat., 716), provides that:

"Fraudulent enlistment, and the receipt of any pay or allowance thereunder, is hereby declared an offense against naval discipline and made punishable by general court-martial under article 22 of the Articles for the Government of the Navy."

Up to the time of the passage of this act there were in existence no legal means of trying by court-martial for this offense one who was not at the time of fraudulently enlisting subject to naval jurisdiction. Since the passage of the above act the legal

Digitized by Google

means exist for trying such an offender, but in order to make use of the same it is necessary that they be properly pleaded.

Now, having in mind the conditions which were to be remedied by the act of March 3, 1893, and considering the language of that statute, it may be seen that the *gist* of the offense of fraudulent enlistment, when committed by persons not in the service at the time of procuring such enlistment, is not the false representations made prior to their acceptance, but is the receipt of pay and allowances under a fraudulent enlistment, which act is committed *after* the offender has completed a contract—binding as to him even though voidable by the government—whereby he has submitted himself to naval jurisdiction. In order, then, to have preferred a valid specification against the accused, it would only have been necessary to have added to the specification the further and *material* allegation that he had received pay and allowances under his fraudulent enlistment.

The foregoing, of course, applies only to the cases of persons who are not in the naval service at the time of fraudulently enlisting. In the cases of men, who are actually *in desertion* as explained above, the allegation of receipt of pay and allowances is not essential to the validity of a specification in support of a charge of fraudulent enlistment. In the latter cases the offenders are subject to naval jurisdiction at the time of making the false representations whereby the fraudulent enlistments are obtained and the statutory provision need not be utilized in order to complete the offense. In fact, the insertion of the allegation of the receipt of pay and allowances in these cases merely makes necessary an attempt to prove more than would otherwise be required to sustain the charge. However, inasmuch as in such cases even in the event of failure to prove the receipt of pay and allowances, the charge would be sustained by the proof of having procured enlistment by fraudulent representations, while, in the cases of persons enlisting fraudulently while not subject to naval jurisdiction, the allegation of the receipt of pay and allowances is vital to the specification, it is a good rule, in all cases of fraudulent enlistment about which there may be any doubt, to set forth this allegation in the specification. (In this connection *see* C. M. O. 23, 1910, 7–13). C. M. O. 17, 1916, 5–8. *See also* FRAUDULENT ENLISTMENT, 87.

6. **Same**—The offense of "Fraudulent enlistment" by persons not in naval service is completed by receipt of pay or allowances thereunder. Before such receipt of pay, persons so enlisting shall be discharged as undesirable. File 10031–03; 4061–03.
7. **Same**—Receipt of either pay or an allowance by a person not in the service when fraudulently enlisting completes the offense, and proof of receipt of either under such enlistment will support a finding of guilty of that offense. C. M. O. 23, 1910, 9; 5, 1911, 6.
8. **Same**—It is not necessary to prove receipt of pay or an allowance where accused was in service (as a deserter) when fraudulently enlisting. C. M. O. 23, 1910, 10. *See also* C. M. O. 103, 1893, FRAUDULENT ENLISTMENT, 5.
9. **Army**—Men dishonorably discharged from Army enlisting in naval service should be dishonorably discharged. *See* ARMY, 10.
10. **Same**—Fraudulent enlistment in Army discussed. *See* FRAUDULENT ENLISTMENT, 50.
11. **Arraignment**—Plea of nolo contendere. *See* NOLO CONTENDERE.
12. **Burden of proof**—On Government.
13. **Cancellation**—Of fraudulent enlistment and sentence served under original sentence. *See* C. M. O. 5, 1896; 49, 1905; File 2861–02; 10989–02; 26251–2544:3; FRAUDULENT ENLISTMENT, 83.
14. **Charge of**—Prior to 1893, those men who were in the service (deserters, etc.), and who fraudulently enlisted, were tried under the charge of "Conduct to the prejudice of good order and discipline" or "Scandalous conduct tending to the destruction of good morals." Subsequent to 1893 fraudulent enlistment was charged as "Conduct to the prejudice of good order and discipline." Later the charge was changed to read "Fraudulent enlistment, in violation of article 22 of the Articles for the Government of the Navy." C. M. O. 23, 1910. *See also* FRAUDULENT ENLISTMENT, 50.
15. **Classes**—Persons who fraudulently enlist are divided into two general classes: (1) Persons in the service, as deserters, etc., and (2) persons not in the service, as those who never have enlisted or have been discharged.

Persons in the service when fraudulently enlisting were amenable to trial for that offense prior to the act of July 27, 1892 (27 Stat., 278), and that statute was passed to bring the act of fraudulently enlisting by a person *not* in the service within the naval jurisdiction as fraudulent enlistment by making the receipt of pay or allowances under such enlistment the gravamen of the offense. C. M. O. 23, 1910, 9–13.

Digitized by Google

16. **Clothing allowance**—Receipt of clothing allowance as a proof of "Fraudulent enlistment." *See* FRAUDULENT ENLISTMENT, 3.
17. **Concealing prior discharge obtained under habeas corpus**—A minor who procures formal release from enlistment under writ of habeas corpus must disclose such fact to recruiting officer when applying for enlistment subsequently; otherwise he is guilty of "Fraudulent enlistment." C. M. O. 12, 1911, 3–5.
18. **Concealment of previous service**—Where a seaman was regularly discharged from the service upon expiration of his enlistment and reenlisted under his proper name, but denied that he had previous service, the department held that such denial did not constitute a fraud inasmuch had it been known to the recruiting officer, it would not have militated against the man's reenlistment, and therefore such reenlistment would not be fraudulent. File 7906–98.
19. **Conduct to the prejudice of good order and discipline**—"Fraudulent enlistment" charged under, at one time. *See* FRAUDULENT ENLISTMENT, 14, 50.
20. **Continuing offense**—The offense of fraudulent enlistment is not a continuing offense like "Desertion." C. M. O. 31, 1910, 5. *See also* File 5256–04; 1551–04; C. M. O. 17, 1916, 6, line 36.
21. **Corpus delicti.** *See* CORPUS DELICTI, 2.
22. **De facto enlistment**—A fraudulent enlistment is still an enlistment, and a man so enlisting is *de facto* in the service and subject to the jurisdiction of a naval court-martial. (U. S. *v.* Reaves, 126 Fed. Rep., 127, file 152–04; Ex parte Rock, 171 Fed. Rep., 240; Dillingham *v.* Booker, 163 Fed. Rep., 696, file 5956–6; In re Scott, 144 Fed. Rep., 79, file 2757–4; In re Lessard, 134 Fed. Rep., 305; Solomon *v.* Davenport, 87 Fed. Rep., 318; In re Morrissey, 137 U. S., 157; *compare* Ex parte Bakley, 148 Fed. Rep., 56, affirmed; Dillingham *v.* Bakley, 152 Fed. Rep., 1022, file 5506–5; and Ex parte Losk, 145 Fed. Rep., 860, file 2757–8.)
23. **Defense**—Accused did not know he was enlisted. The accused was tried by general court-martial upon the charge "Fraudulent enlistment." The specification of the offense alleged, in substance, that the accused fraudulently enlisted by concealing from the recruiting officer the fact that he had been discharged from the service for physical disability.

The court found the specification of the charge "proved without criminality," and acquitted him of the charge.

The department's letter returning the record contained the following remarks:

The accused was charged with "Fraudulent enlistment," the specification alleging that he falsely represented to the recruiting officer that he had never been discharged from the service for physical disability, etc. He pleaded not guilty, and the prosecution proved a *prima facie* case against him.

The accused testified in effect that he did not think he was an enlisted man under his enlistment of November 6, 1912, until he "drew clothes and was assigned to some duty"; that he thought he was merely "on trial and they were examining" him to see if he "was able to do service." Apparently upon the testimony of the accused the court found the specification "proved without criminality" and acquitted him of the charge. It is to be observed, however, that the accused also stated that he changed his surname when he applied for the second enlistment; that he *enlisted* in San Francisco the first time; that he remembered that when he signed his shipping articles there was a statement there as to whether he had ever had any previous service; that during the eight days he was first in the service the Government paid his expenses; that he was given money at the end of that period; that he was given a paper with the money, and that the paper plainly showed on its face that it was a discharge from the naval service.

From the man's own testimony he is guilty of "Fraudulent enlistment." The mere fact that he did not think he had enlisted in November does not relieve him from the offense, such being ignorance of the law—not of the facts. In the opinion of the department the man had no good reason for believing that he had not been enlisted in November. A reading of his testimony leaves no other conclusion. But even if the court believes that the accused did not think he had been enlisted, yet, as a matter of law, he should be found guilty—as will hereinafter be shown—and an adequate sentence should be adjudged. The fact that the man did not think he had been enlisted is a matter upon which a recommendation to clemency properly may be based.

As to the enlistment of November 6, 1912, the prosecution proved that the accused was regularly enlisted on that date. That enlistment was shown to be legal and binding. If the accused believed he had not been enlisted, it is manifest that his

Digitized by Google

mistake is a result of ignorance of the law, since in the eyes of the law he was legally enlisted. The fact that he did not know that the various acts and steps taken constituted an enlistment can not avail him as a defense. "It is the settled rule that everyone is presumed to know the law and that ignorance thereof furnishes no exemption from criminal responsibility. This rule was even applied in the extreme case of violation of a statute by a person who was at sea when it was enacted, and when he violated it, and who could not have learned of it. Even foreigners coming into a country and ignorantly violating its laws are liable, though the act may not be a crime in their own country. *Nor is positive belief that an act is lawful an excuse.*" (Clark's Cr. L., p. 80, cited by the department with approval in C. M. O. 10, 1911, 7, to which remarks the attention of the court is directed.) As was stated by the department in another case (G. C. M. Rec. 26032), "there is nothing at all unusual in a man's willfully and deliberately doing the acts in violation of laws of which he is ignorant. The court is not supposed to investigate and determine whether or not the accused knew the law, the only question being whether he willfully and deliberately did the acts with which he is charged. As plainly stated by the Attorney General [with reference to statutory offenses] in a recent case, published in Court-Martial Order No. 4, 1913, it is the intention to do the *act charged* and *not* the intention of violating the law which constitutes criminal intent. (A. G. Op., Nov. 12, 1912.) It appears that the accused knew what he was doing when he made a false oath to the recruiting officer, and he certainly intended to deceive the recruiting officer or he would not have taken such a false oath. He does not say he was drunk or insane when he enlisted, or that he had a lapse of memory.

In this case the accused acknowledged having performed in November last the acts which in fact constituted a lawful enlistment. He did not contend that he was drunk or insane or that he had a lapse of memory at that time. The same is applicable to his enlistment in January, 1913.

Therefore, as a matter of law, the accused should be found guilty of the charge. If the facts warrant, the department may remit the entire sentence and restore the accused unconditionally to duty.

The court, in revision, revoked its original findings and acquittal, found the specification of the charge proved and the accused guilty of the charge, and adjudged an adequate sentence in view thereof. C. M. O. 10, 1913, 3-5.

24. **Same**—Drunkenness as a defense. C. M. O. 10, 1913, 4. *See also* FRAUDULENT ENLISTMENT, 23.

25. **Same**—Lapse of memory as a defense. C. M. O. 10, 1913, 5. *See also* FRAUDULENT ENLISTMENT, 23.

26. **Same**—Insanity as a defense. C. M. O. 10, 1913, 5. *See also* FRAUDULENT ENLISTMENT, 23.

27. **Same**—Typhoid fever affecting intent—The accused was tried by general court-martial, being charged with "Fraudulent enlistment," having deliberately and willfully concealed from the recruiting officer the fact that he had been discharged from the United States Navy as undesirable while serving under another name.

In the opinion of the department every allegation contained in the specification of the charge was proved by the evidence adduced by the prosecution and the admission by counsel for the accused as to the identity of the accused.

The court found the accused "guilty but without culpability," presumably in view of the testimony brought forward by the defense to show that the accused was in the first stages of typhoid fever at the time of his fraudulent enlistment and was therefore mentally incapable of entertaining the required *criminal intent* to deliberately and willfully conceal from the recruiting officer the fact that he had been discharged from the Navy as undesirable.

The first witness for the defense testified that when the accused arrived at the navy yard, Philadelphia (Oct. 18, 1910), the day after enlisting, that he had a temperature of 104° F.; that in the opinion of the witness the accused was on that date in the seventh day of the disease. Witness stated that in his opinion the accused, *on the day he reported*, would not "have been in a proper condition to commit legal involvement, or to sign papers, or to have been responsible for any legal contract," due to his high temperature. This witness's testimony was almost entirely negatived by his answers to questions when he testified that the accused, *at the time of enlistment*, did not have as high a temperature; that he did not see him when he enlisted, and therefore did not know whether or not the accused had sufficient temperature to make him irresponsible at that time.

Digitized by Google

The second witness for the defense testified that in his opinion the accused had been suffering from typhoid fever "some few days" before coming to the hospital (Oct. 20, 1910, three days after enlisting); that the accused "had been infected and there were some symptoms, I would say, on the 17th," when he enlisted; that he "probably had a temperature of a hundred and one or two when he enlisted." Witness, when asked by the court if he thought that a man with a temperature of 101 would be likely to forget his own identity, or to lose his own identity, answered, "No, sir; I can't say that he is." Witness then stated that he had seen cases with a temperature of 99 and 99½ delirious and had to be restrained physically, but that he did not think any doctor would have passed such a subject on an examination for enlistment.

The department therefore returned the record to the court for a reconsideration of its findings and sentence.

The court in revision respectfully adhered to its former finding and acquittal.

In other words, the court puts itself on record as finding the accused guilty of *deliberately and willfully* concealing from the recruiting officer his prior discharge as undesirable from the United States Navy, but that this deliberate and willful act by the accused was "without culpability." Such findings are utterly inconsistent. From the evidence in the case it is apparent that the accused assumed a false name and concealed the fact of a prior undesirable discharge from the service in order to procure himself to be accepted for enlistment.

The department, therefore, disapproved the proceedings, findings, and acquittal in this case, and directed that as an entirely separate and independent proceeding, the accused be discharged from the service as undesirable as soon as practicable. C. M. O. 7, 1911, 14–16.

28. **Same**—Statute of limitations. *See* FRAUDULENT ENLISTMENT, 87–90.

29. **Definition**—A fraudulent enlistment is an enlistment procured by means of a willful misrepresentation in regard to a qualification or disqualification for enlistment, or by intentional concealment of a disqualification, which has had the effect of causing the enlistment of a man not qualified to be enlisted, and who, but for such false representation or concealment, would have been rejected. C. M. O. 23, 1910, 7–8.

The gist of the offense of "Fraudulent enlistment" is the concealment of a fact knowingly and willfully which, if known to the recruiting officer, would cause the rejection of the applicant. C. M. O. 12, 1911, 4.

The offense of fraudulent enlistment consists of two elements: (1) Entry into the service by false pretenses, i. e., misrepresentation or concealment of some matter which, if known, would stand as a bar to enlistment; and (2) receipt of pay and allowances under such enlistment. File 5256–04. *See also* FRAUDULENT ENLISTMENT, 48–50.

30. **Deserter**—Void or voidable—The accused deserted from the Navy and fraudulently reenlisted, was tried and convicted of "Desertion," the department inadvertently failing to charge him with "Fraudulent enlistment" at the same time; the finding and sentence for desertion were approved but the period of confinement was mitigated and action on the dishonorable discharge held in abeyance with a view to the restoration of the prisoner to duty. The department held that the fraudulent enlistment of the accused "is not void but voidable only and may, if the public interests so indicate, be treated as valid." File 1676–01.

31. **Same**—For complete reference to laws and decisions supporting the conclusion that the fraudulent enlistment of a deserter is void *ab initio* and not merely voidable, together with a discussion of the question and rulings of the War Department thereon, see File 7657–132. *See also* File 7657–132; 7657–129; G. C. M. Rec. 25190.

32. **Same**—The contracts were voidable and not void, and I am of the opinion that, until rescinded by the action of the Government, any proper payments made by the disbursing officer must be considered as legally made and he should be entitled to credit for the same. (11 Comp. Dec. 712.) File 4640, April, 1906.

33. **Same**—Statute of limitations expired. *See* File 26262–2585. *See also* FRAUDULENT ENLISTMENT, 87–90.

34. **Same**—Where a man deserted from one branch of the service (Navy) and enlisted in another (Marine Corps), it appears to be the practice to discharge him dishonorably from his second enlistment only, the first being apparently regarded as abrogated, so far as the United States is concerned, by desertion. C. M. O. 5, 1896.

35. **Same**—"It seems to me illogical to say that a man can commit a crime, and, when arrested, obtain a discharge on the ground that the original enlistment was not proper or regular." File 7969–04; 7988–04. *See also* HABEAS CORPUS, 16.

Digitized by Google

36. **Same**—Continuous service—A fireman holding a continuous-service certificate who deserted and subsequently fraudulently enlisted after having been tried for the offense and served his sentence, and his fraudulent enlistment having been canceled is held entitled to the benefits of continuous service from the date of his last, or fraudulent, enlistment. File 10462-04.
37. **Desertion, proof as part of**—"Fraudulent enlistment" constitutes proof of technical desertion, but in a case where the accused manifestly lacked the intention to desert and enlisted fraudulently as the only means within his knowledge of returning to his post, the department held that under the facts of the case he was criminally guilty of only absence from station and duty without leave. C. M. O. 30, 1910, 4–5.
38. **Desertion**—Fraudulent enlistment as proof of desertion. C. M. O. 22, 1904, 2; 23, 1910, 8. *See also* FRAUDULENT ENLISTMENT, 50.
39. **Dishonorable discharge**—Men concealing dishonorable discharge from the Army should be dishonorably discharged from the naval service. *See* ARMY, 10.
40. **Same**—The department considers that a man who has been found guilty of "Fraudulent enlistment" is not a suitable person to be retained in the naval service. C. M. O. 102, 1893, 2. *See also* FRAUDULENT ENLISTMENT, 84.
41. **Enlistment ratified**—Accused may be tried for fraudulent enlistment even where enlistment has been ratified. File 26251-8539; 1, J. A. G., Jan. 21, 1914. *See also* FRAUDULENT ENLISTMENT, 75, 76.
42. **Evidence of**—Corpus delicti. *See* CORPUS DELICTI, 2.
43. **Same**—In trial for "Fraudulent enlistment," court ruled that statement of age given in first sheet of the enlistment record of the accused was not evidence; the department held that the ruling of the court was erroneous. C. M. O. 94, 1905.
44. **Finding**—Inconsistent. *See* FINDINGS, 52.
45. **"Fraudulent enlistment, in violation of article 22 of the Articles for the Government of the Navy"**—"Fraudulent enlistment," charged as. C. M. O. 23, 1910. *See also* FRAUDULENT ENLISTMENT, 14.
46. **General courts-martial**—Fraudulent enlistment and the receipt of any pay or allowance thereunder are offenses against naval discipline punishable by general court-martial. (Act, Mar. 3, 1893, 27 Stat. 715.) (R–3534.) File 26262-2585, J. A. G., June 8, 1916; G. C. M. Rec. 32175. *See also* C. M. O. 17, 1916.
47. **General Order No. 110**—Schedule of punishments in General Order No. 110, July 27, 1914, provided that "Fraudulent enlistment" might be tried by summary courts-martial; General Order No. 110 (Revised) does not. *See* FRAUDULENT ENLISTMENT, 91.
48. **Gist**—The gist of the offense of "Fraudulent enlistment" is the concealment of a fact knowingly and willfully which, if known to the recruiting officer, would cause the rejection of the applicant. (C. M. O. 12, 1911, 4.) The *gist* of the legal offense of "Fraudulent enlistment" by a person who is not (as is a deserter) in the naval service consists in the receipt of pay or allowance. (C. M. O. 23, 1910.) *See also* FRAUDULENT ENLISTMENT, 5, 29, 50.
49. **Gravamen**—In the case of "Fraudulent enlistment" of persons not in the naval service when fraudulently enlisting it is not the misrepresentations but the further and material fact of obtaining pay or allowances, etc., from the Government that constitutes the gravamen of the charge. C. M. O. 23, 1910. *See also* FRAUDULENT ENLISTMENT, 5, 50.
50. **History, definition, and discussion**—A fraudulent enlistment is an enlistment procured by means of a willful misrepresentation in regard to a qualification or disqualification for enlistment, or by intentional concealment of a disqualification, which has had the effect of causing the enlistment of a man not qualified to be enlisted, and who, but for such false representation or concealment, would have been rejected.

Persons who enlist fraudulently are divided into two general classes: (1) Persons in the service, i. e., deserters, etc., and (2) persons not in the service, i. e., those who have never been enlisted, or those who, having once been enlisted, have been discharged.

With regard to the first of these classes there is an Article of War which, in the Army, covers such cases. That article reads as follows:

"ART. 50. No noncommissioned officer or soldier shall enlist himself in any other regiment, troop, or company without a regular discharge from the regiment, troop, or company in which he last served, on penalty of being reputed a deserter, and suffering accordingly * * *."

Concerning the foregoing, Winthrop says (p. 1009):

"It is to be construed, however, not as creating an offense distinct from the desertion made punishable by article 47, but as indicating a specific form of such offense, or

Digitized by Google

rather as declaring that the act of reenlisting under the circumstances described shall constitute *proof of desertion* on the part of the soldier. The object of the provision evidently was to preclude the notion that a soldier could be relieved from liability as a deserter because on abandoning his regiment he proceeded to *reenter the service in another*, or, in other words, that he could be excused from repudiating his pending contract by substituting another in its place."

It will be seen, therefore, that the act of enlisting in the Army by a deserter who has not been regularly discharged was and is an offense under the fiftieth Article of War, and when a deserter reenlists under the circumstances contemplated therein he is charged with *desertion* and with *violation of the fiftieth article of war*. The specification sometimes merely alleged the facts of the reenlistment (Army G. C. M. O. No. 63, 1879), and sometimes alleged that the offender did "fraudulently enlist," etc. (Army G. C. M. O. No. 35, 1878).

In the act of July 27, 1892 (27 Stat. 278), appears the following:

"SEC. 3. That fraudulent enlistment, and the receipt of any pay or allowance thereunder, is hereby declared a military offense and made punishable by court-martial under the sixty-second article of war."

Concerning the foregoing, Winthrop (p. 1140) says:

"Prior to this legislation fraudulent enlistment was not, in the opinion of the author, triable by court-martial, for the reason that the fraudulent representations, etc., in which the offense consisted must have been preliminary and made as an inducement to the enlistment, and so before it was consummated, and while therefore the individual was still a *civilian* and not constitutionally amenable to such trial."

It should be observed that Winthrop calls "Fraudulent enlistment" the offense of a civilian enlisting by means of misrepresentations, etc., and does not mean the offense of a deserter reenlisting, the punishment for which was already provided for in the fiftieth article of war. He then goes on to say:

"A statute assuming to make mere fraudulent enlistment so triable would not remove the objection, since a statute can not do away with a constitutional incapacity to confer jurisdiction where the Constitution denies it. But the receipt of 'pay' or an 'allowance' under an enlistment knowingly fraudulent *is* an offense, because the pay, etc., is not received until the enlistment has been completed and the party is actually in the military service. It is thus the receipt of pay or of an allowance (as an allowance of clothing or rations, for it is not considered that 'allowance' means necessarily pecuniary allowance) which is the *gist* of the legal offense and which in fact constitutes it."

That is, the *gist* of the legal offense of the fraudulent enlistment by misrepresentations, etc., of a person who is not, as is a deserter, in the service, consists in the receipt of pay or allowance.

Winthrop continues:

"A person who has procured himself to be enlisted by means of false representations as to his status is not, *before* having received pay or an allowance, or *until* he receives one or the other, amenable to military trial."

Concerning the foregoing matters, the following paragraphs are taken from the Army Digest, 1901:

"1417. Before fraudulent enlistment was made a military offense by the act of July 27, 1892 [27 Stat. 278], it was held that persons fraudulently enlisting (*except those who were undischarged under a former enlistment*) could not be tried for the fraudulent enlistment as a military offense, because when the act was done they were not in the 'land forces.' So in the act of 1892, receipt of pay or allowance was made part of the offense. The complete offense therefore is the entry into the service by means of a misrepresentation and the receipt of pay or allowance. The procuring of the enlistment by means of misrepresentation, etc., and not the misrepresentation itself constitutues the offense."

From the above it will be seen that persons fraudulently enlisting who were undischarged under a former enlistment, i. e., deserters, etc., *could*, before the legislation of 1892, *be tried* for the offense of fraudulent enlistment. As already seen, such persons were amenable under the fiftieth article of war. The Army Digest, 1901, then in the next paragraph continues:

"1418. The act of enlisting without a discharge from a prior enlistment was punishable as fraudulent enlistment before the enactment of the legislation of July 27, 1892 [27 Stat. 278], there being no doubt that the soldier so enlisting is in the military service at the time of such fraudulent enlistment. In such a case it is not necessary

Digitized by Google

to allege the receipt of pay or allowances. These words were inserted in the act of 1892 to meet the cases of men, not bound to service, who fraudulently enlist; * * *. In these cases, therefore, an allegation in the specification of receipt of pay or allowances is essential to properly describe the military offense of fraudulent enlistment defined and prohibited by the statute."

From the foregoing it will be seen that a plain distinction is drawn between the two kinds of fraudulent enlistment, i. e., that of deserters, and that of persons who are not in the service; and that the act of 1892 was passed specially to reach this latter class, which was not previously amenable to trial for the offense. And with regard to the latter class, it is essential in their cases to allege the receipt of pay and allowances; but even before the statute the other class could be tried for the offense and it was not then necessary to introduce any similar allegation in the specification, and their status is the same as before.

Winthrop, on page 1141, cites a number of instances of the offense under the statute, and an examination of them shows that they are all cases where the offender was not in the military service at the time of the fraudulent enlistment. In view of the fact that article 50 of the Articles of War specially provides for punishing the reenlistment of deserters, Winthrop (p. 1141) says that such an offense (in the Army) is a form of *desertion*, and is erroneously charged as "Fraudulent enlistment," or otherwise than as "Desertion." But inasmuch as there is no similar article in the Articles for the Government of the Navy, as has been already pointed out, these remarks would not apply to the Navy. Furthermore, even had there been no such provision in the Articles of War, such offenses would still have been triable under the sixty-second article, being one not specially "mentioned in the foregoing articles," etc., and consisting of "Conduct to the prejudice of good order and military discipline."

With regard to fraudulent enlistment in the Navy, the act of March 3, 1893 (27 Stat., 715), contained the following provision:

"Fraudulent enlistment, and the receipt of any pay or allowance thereunder, is hereby declared an offense against naval discipline and made punishable by general court-martial under article 22 of the Articles for the Government of the Navy; * * *"

The foregoing is expressed in almost identical terms with the similar provision relating to the Army in the act of July 27, 1892. (27 Stat. 278.)

Before 1893, while there were no trials of men not in the service, i. e., deserters, for "fraudulent enlistment," yet those who deserted and fraudulently reenlisted were tried under the charge of "conduct to the prejudice of good order and discipline;" that is, under article 22 of Articles for the Government of the Navy or in some cases the facts of the fraudulent enlistment were alleged in the same specification which included the facts of the former desertion. (G. C. M. Rec. 7419, 7424.) Cases have also been found where it was charged as "scandalous conduct tending to the destruction of good morals." (G. C. M. Rec. 7440, 7445.)

Subsequent to 1893, the year of the passage of the legislation above quoted, it seems to have been the practice, for a time, to charge this offense in all cases as "conduct to the prejudice," etc.; samples of specifications and charges involving this offense are found in Lauchheimer's Forms of Procedure, 1896, including specifications covering cases where the offender was and also where he was not in the service at the time of his fraudulent enlistment, and all of those specifications allege the receipt of pay and allowances thereunder.

Later, in Lauchheimer's Forms of Procedure, 1902, the charge was changed to read "Fraudulent enlistment, in violation of article 22 of the Articles for the Government of the Navy," the specifications including both classes of cases, and all alleging the receipt of pay and allowances.

No questions having arisen as to the form of these specifications, they were carried into the Forms of Procedure, 1910, using the same phraseology as that previously used.

In the annual report of the Judge Advocate General, dated October 1, 1893, the first report after the enactment of the legislation relating to fraudulent enlistment in the Navy, it is stated:

"Although the above enactment respecting fraudulent enlistment did not go into effect until May 2, 1893, trials and convictions have already been had under its authority, and it is believed that its effect upon the *morale* of the service will be excellent, inasmuch as it provides for the salutary punishment of a class of offenders who, not being regularly enlisted, were formerly beyond the reach of a naval court, although the offenses committed by them were strictly offenses against naval discipline and tended to exercise a demoralizing influence upon the service."

Digitized by Google

Here it is seen that the class which the legislation was intended to reach was that which included men "not being regularly enlisted." It was not aimed to reach those who were *already amenable* to naval discipline, but, just as in the Army, to secure the punishment of those persons who could not previously be tried.

And again, in a memorandum prepared by the Judge Advocate General for the Secretary of the Navy, dated September 8, 1905, relating to the question whether it would not be better to stand upon the man's oath as conclusive evidence of his age unless released by a civil court upon *habeas corpus* proceedings (Press copy book, No. 13, Briefs and Opinions, pp. 484, 486), it is said:

"It is of record, among the traditions of this offense, that prior to 1893 much annoyance was caused by the enlistment of boys under the statutory age through false oaths and fictitious impersonation of parents or guardians, such boys remaining in the naval service as long as they chose so to do and then repudiating the contract. "Fraudulent enlistment" was not then an offense reachable by naval authority. The abuse became of such magnitude, particularly in New York City, that remedy was sought through the passage of the following statute, embodied in the act of March 3, 1893 (27 Stat. 715): * * *"

In the Navy, then, as in the Army, the statute was passed, not to make the receipt of pay or allowance *an additional ingredient* of the offense, but rather that by the insertion of that provision there could be reached, in both services, a class of offenders who were not before punishable.

There seems to be no doubt that the act of a deserter in enlisting fraudulently could have been punished *prior to 1893* under article 22 of the Articles for the Government of the Navy; it is not one of the offenses "specified in the foregoing articles," but it is, nevertheless, an offense which is prejudicial to naval discipline, and it is, in such a case, committed by a person "belonging to the Navy." And this is so, even though the offense may not fall within the kinds of "fraud" contemplated in article 8, paragraph 1, or under "any other fraud" mentioned in the next to the last paragraph of article 14.

But, on the other hand, before 1893, it was not possible to try a person who was *not* in the service for "fraudulent enlistment," and such offenders went unpunished.

Subsequent to the legislation of 1893, the status of deserters was unchanged, but the other general class was *also* reached by that enactment, when before they could not be, and this was accomplished by making the offense consist of "*fraudulent enlistment, and the receipt of any pay or allowance thereunder.*"

From a review of the history of the matter, and considering the mischief that was to be cured by the act of March 3, 1893 (27 Stat. 715), it is not believed that it was the intention of the law to *increase the difficulty of proof* of the offense by the further allegation of the receipt of pay or allowance in the cases of manifest offenders, i. e., those who were already deserters, who proceeded to add a fraudulent enlistment to their offense of desertion. Rather, as has been said, it was intended to reach a class of offenders who, not being in the service, were not amenable to trial until such receipt actually completed the offense, the offense being, as set forth in the statute, "fraudulent enlistment and the receipt of any pay or allowance thereunder." In such cases it is not the misrepresentations but the further and material fact of obtaining pay, etc., from the Government that constitutes the *gravamen* of the charge. [*See* File 26262–2585; J. A. G., June 8, 1916; G. C. M. Rec. 32175; C. M. O. 17, 1916, 4.]

While, therefore, in the cases of *deserters* who fraudulently enlist, it is not *necessary* to allege the receipt of pay, etc., as a material element of the specification, it can not be harmful, except that it may not be possible to prove it in all cases. But even though it be *not* proved, still *without* proof of such receipt the *charge* may, in those cases, be found *proved*, because the fact of such receipt is not necessary to support the charge. C. M. O. 23, 1910, 7–13.

51. **Identification of accused**—It is essential to prove that the man at the bar is the same as the one charged with having deserted (or been discharged) prior to enlistment. Such may be done by proving that the previous enlistment record applied to the accused—that it was the paper containing the history of his naval service—and by proving that the same man described therein fraudulently enlisted by concealing his prior service. C. M. O. 37, 1909, 5–7; 14, 1910, 15–16. *See also* C. M. O. 28, 1910, 8.

52. **Insanity**—As a defense to "fraudulent enlistments" must be shown to have existed at the time of the commission of the act. It will also be a good bar to trial if existing at the time of the trial. C. M. O. 42, 1909, 12–15. *See also* FRAUDULENT ENLISTMENT, 23; INSANITY, 8, 32.

53. **Intent.** *See* FRAUDULENT ENLISTMENT, 23, 27.

Digitized by Google

54. **Jurisdiction.** *See* FRAUDULENT ENLISTMENT, 22, 46, 87–90.

55. **Limitation to punishment**—The accused was found guilty of "fraudulent enlistment" and sentenced to 18 months' confinement at hard labor and dishonorable discharge. The record was returned to the court for a reconsideration of the sentence, as it was in excess of the limitations prescribed by the President of one-year confinement and dishonorable discharge for the offense of "fraudulent enlistment." C. M. O. 28, 1910, 5.

56. **Malum in se**—"Fraudulent Enlistment" is *malum in se*, not merely *malum prohibitum*. *See* FRAUDULENT ENLISTMENT, 61.

57. **Minor**—Where a minor during the lifetime of his father had a guardian appointed to sign his consent papers upon enlistment, and the father demanded the boy's release, on the ground that he enlisted without his consent, it was held that the department can not go behind the action of the court to inquire into the legality of the guardian's appointment, and that the enlistment was accordingly valid. File 3956, Jan. 25, 1906. *See also* File 7657–207.

58. **Same**—The accused was tried upon the charge of "fraudulent enlistment," the specification alleging that at the time of his enlistment he falsely stated that his age was over 18 years, whereas in fact it was about 14 years.

The accused pleaded guilty to the charge and specification. The court did not accept this plea, but entered a plea of not guilty and proceeded with the trial. For the prosecution there was introduced ample evidence to fully sustain all the allegations in the specification and the charge, and the accused did not desire to introduce any testimony in his defense nor to make any statement. Notwithstanding this, the court found the specification not proved and acquitted the accused of the charge.

It appears from the evidence and from the findings thereon that the ends of justice have been defeated in this case; and inasmuch as *habeas corpus* proceedings have been instituted in the civil courts looking to the discharge of the accused because of his being under age and that it has been practically decided that at the time of his enlistment his age was less than 18 years, and that he should be discharged from the service, it is not considered desirable to return this record for reconsideration of the finding. The proceedings, findings, and acquittal were disapproved, and the accused was released from arrest and restored to duty. C. M. O. 81, 1905.

59. **Same**—Misrepresenting age—In the case of a minor, who was awaiting result of court-martial for desertion, whose parents stated that when he enlisted as private in Marine Corps he was under legal age of enlistment; that he misrepresented his age in order to secure enlistment; and parents made affidavit that such was the case and produced a birth certificate in support of these statements and requested that said enlistment be set aside and the man's discharge ordered, the Secretary of the Navy in disapproving the request stated in part: "The Federal courts have repeatedly decided that a person who fraudulently enlists in the military service can not set up his fraud as a defense when held by court-martial to answer for military offenses; and the discharge of the man under such circumstances will not be ordered until he has satisfied the sentence of the court-martial." File 26251-9831:1, Sec. Navy, Dec. 26, 1914; C. M. O. 6, 1915, 14.

60. **Minor, parents divorced**—The accused enlisted as an apprentice, third class, with consent of father, after his mother had instituted proceedings against said father for divorce and care or custody of minor child, which enlistment was held to be illegal. File 9750–04. *See in this connection* FRAUDULENT ENLISTMENT, 59.

61. **Moral turpitude involved**—Fraudulent enlistment is an offense involving moral turpitude, for, as held by the courts, every fraudulent enlistment includes the offense of perjury, and that is a crime which has always been visited with most serious consequences by the civil laws, being recognized as *malum in se*, and not merely *malum prohibitum*. File 14535–1088.

62. **Nolo contendere.** *See* NOLO CONTENDERE.

63. **Pay**—In cases of persons not in naval service when fraudulently enlisting, receipt of pay or allowances, etc., must be proved. *See* FRAUDULENT ENLISTMENT, 3–8, 50.

Proceedings, findings, and sentence disapproved in a case where no evidence was introduced to prove the receipt of pay or allowances by accused while serving under his fraudulent enlistment. C. M. O. 37, 1909, 1.

64. **Same**—Pay continues after conviction of fraudulent enlistment unless forfeited in whole or in part by the sentence. File 26254–279. *See also* FRAUDULENT ENLISTMENT, 66.

65. **Same**—Pay actually received by an enlisted man for services during a fraudulent enlistment can not be recovered from him (12 Comp. Dec.; 445.)

Digitized by Google

66. **Pay and allowances**—An apprentice seaman discharged for fraudulent enlistment is entitled to such pay as he may have received, but all pay and allowances accrued and unpaid at the time of the discovery of the fraud shall be checked as forfeited. File 2792–01; Comp. Dec.; Aug. 12, 1897. *See also* FRAUDULENT ENLISTMENT, 64.
67. **Pay and allowances not received**—Where the fraudulent character of an enlistment is discovered before receipt of pay and allowances thereunder courts-martial have no jurisdiction, and the man [not in naval service] should accordingly be "set at large" or discharged as undesirable. File 4061–03; 10031–03.
68. **Pecuniary allowance**—Receipt of a "pecuniary" not necessary as "allowance" of clothing or rations is sufficient. *See* FRAUDULENT ENLISTMENT, 3.
69. **Perjury**—A private in the Marine Corps who was discharged on *habeas corpus*, was arrested upon the charge of "perjury" and held for the December term of court. (File 5939–1); prosecution was discontinued because of hardship to mother. (File 5939–6; HABEAS CORPUS, 2.) Fraudulent enlistment involves perjury. *See* DESERTERS, 13; FRAUDULENT ENLISTMENT, 61.
70. **Persons not in naval service**—When fraudulently enlisting. *See* FRAUDULENT ENLISTMENT, 5, 50.
71. **Prima facie case established.** C. M. O. 12, 1911, 4; 10, 1913, 3. *See also* FRAUDULENT ENLISTMENT, 23, 27, 72.
72. **Prima facie evidence**—In trial for fraudulent enlistment the only evidence as to age was the sworn statement of the accused in the enlistment record that he was over 21, and his unsworn admission (made to a chief yeoman who was directed by the executive officer to take the statement of the accused "as to his alleged fraudulent enlistment") that he was 17 years and 11 months. The court found the specifications not proved and of the charge, not guilty. The department held that the court erred in acquitting the accused and disapproved the proceedings, findings, and acquittal, but restored the accused to duty. C. M. O. 42, 1905. *See also* FRAUDULENT ENLISTMENT, 23, 27, 73.
73. **Prior to 1893**—Not possible to try a person who was *not* in the naval service when fraudulently enlisting for "fraudulent enlistment" and such offenses went unpunished. C. M. O. 23, 1910. *See also* FRAUDULENT ENLISTMENT, 50.
74. **Proof of**—*See* FRAUDULENT ENLISTMENT, 5, 50.
75. **Ratification of fraudulent enlistment**—The restoration to duty of a man operated as a ratification of his fraudulent enlistment—A well-recognized distinction, however, exists between the civil aspect of a contract of enlistment and the liability to penalties attaching by law upon conviction where the contract of enlistment is fraudulent. (*See* 26 Op. Atty. Gen., 239, 242; File 26251–1963: 1, J. A. G., Aug. 17, 1910, p. 11.) Accordingly, the fact that the man was restored to duty could not bar disciplinary proceedings for his offense in fraudulently enlisting if the department desires to bring him to trial therefor. File 26251–8539: 1, J. A. G., Jan. 21 and 24, 1914. *See also* FRAUDULENT ENLISTMENT, 41, 76; PARDONS, 29.
76. **Same**—Accused enlisted as a landsman; discharged for inaptitude; fraudulently enlisted as an apprentice seaman; tried by summary court-martial and convicted but not discharged. In view of the above, by retaining accused in the service after his conviction by summary court-martial, the Government acknowledged and accepted his second enlistment as a valid enlistment, and the accused is serving his second enlistment within the meaning of the Act of Mar. 3, 1915 (38 Stat. 940). File 26837–7, Sec. Navy, Jan. 15, 1916. *See also* FRAUDULENT ENLISTMENT, 91.
77. **Ration allowance**—Sufficient. *See* FRAUDULENT ENLISTMENT, 3.
78. **Recruiting officer must explain law**—By General Order No. 410, April 12, 1893, the act of March 3, 1893 (27 Stat. 715), making punishable fraudulent enlistment must be read and explained to each candidate for enlistment by the recruiting officer, who must satisfy himself that the candidate understands the provisions of the law. (G. O. 410, 1893.)

Section 11 of Instructions for Recruiting Officers of the United States Navy provides that "each recruit * * * shall be informed that if he has had previous service the fact will be known as soon as the papers in his case reach the Navy Department and that he will be tried by general court-martial for fraudulent enlistment * * *. The recruit will also be informed that men who have been discharged for * * * *disability* or *other* reasons are not necessarily forever barred from reentering the service, but that an official request to be permitted to reenlist * * * will receive consideration" and that "if it is deemed advisable to reenlist him it will be *authorized*." Article 756, (3) United States Navy Regulations, provides that "no one who has already been in the naval or military service of the United States shall be enlisted without showing his discharge therefrom * * *." C. M. O. 12, 1911, 4.

Digitized by Google

79. **Reenlistment**—Of man guilty of. *See* DESERTERS, 13, 14.
80. **Restoration to duty**—*See* FRAUDULENT ENLISTMENT, 75.
81. **Reviewing authority**—Stated "aside from the rule universally applicable to criminal prosecutions, that the accused is entitled to the benefit of a doubt, the natural heedlessness of young men desiring to enlist in dealing *with the questions of their age* is a matter which must necessarily, in some degree, influence the reviewing authority." C. M. O. 76, 1899.
82. **"Scandalous conduct tending to the destruction of good morals"**—At one time "fraudulent enlistment" charged as. *See* FRAUDULENT ENLISTMENT, 14.
83. **Sentence**—Where enlistments in both Navy and Marine Corps, the following form will be used:

"The court therefore sentences the said ——, ordinary seaman, United States Navy, *alias* ——, private, United States Marine Corps, to be confined in such place as the convening authority may designate for a period of —— (—) years and —— (—) months; then to be dishonorably discharged from the United States naval service; to perform hard labor during said confinement and, after his accrued pay and allowances shall have discharged his indebtedness to the United States at the date of approval of this sentence, to forfeit all pay and allowances that may become due him except the sum of three dollars ($3) per month during said confinement for necessary prison expenses and a further sum of twenty dollars ($20) to be paid him when discharged from the service pursuant to this sentence." C. M. O. 25, 1914, 6; 29, 1914, 7. C. M. O. 49, 1910, 12; 16, 1913, 4, overruled. *Note: See* R–816 as amended. *See also* C. M. O. 47, 1901, 2; SENTENCES, 49.

84. **Same**—Should include dishonorable discharge—For several years it has been the almost invariable rule for general courts-martial to include dishonorable discharge in the sentence of an accused convicted of "Fraudulent enlistment." In view of this fact the department considers that a departure from this long-established custom is, in effect, the granting of clemency, a function that is denied a court-martial by law. C. M. O. 14, 1910, 7; 17, 1910, 7; 22, 1913, 4. *See also* C. M. O. 102, 1893; ARMY, 10; FRAUDULENT ENLISTMENT, 40.
85. **Same**—The dishonorable discharge adjudged on conviction of "Fraudulent enlistment" should read from the "United States Naval Service" if enlistments in both Navy and Marine Corps, and loss of both pay and allowances should be adjudged. C. M. O. 55, 1910, 6–7; 15, 1910, 8; 5, 1912, 14; 25, 1914, 6; 29, 1914, 7. C. M. O. 16, 1913, 4, overruled. *See also* FRAUDULENT ENLISTMENT, 83.
86. **Same**—Men who conceal a dishonorable discharge from Army should be discharged. *See* ARMY, 10.
87. **Statute of Limitations**—The receipt of pay and allowances is not in itself an offense but becomes so only in consequences of "Fraudulent enlistment," and where the "Fraudulent enlistment" was committed more than two years since, it is barred from prosecution. File 5256–04.
88. **Same**—The specification under a charge of "Fraudulent enlistment" preferred by a fleet convening authority alleged that the accused enlisted on September 20, 1915, procuring such enlistment by concealing from the recruiting officer that "he had on or about the twenty-second day of October, nineteen hundred and six, deserted from the United States Navy" but did not allege that the accused had since received pay or allowances under this fraudulent enlistment. The accused in this case was first enlisted on August 30, 1906, for four years until August 29, 1910. This enlistment, therefore, had expired five years before the alleged fraudulent enlistment and, moreover, the statute of limitations could be pleaded by him in defense of his desertion of October 22, 1906. In view of the fact of the expiration of his former enlistment, and of the fact that he is no longer amenable to trial for "Desertion," it was necessary to allege the receipt of pay or allowances in order to constitute the offense of "Fraudulent enlistment" in this case. Therefore, the specification is fatally defective, and accordingly the findings and sentence were set aside. File 26262–2585, J. A. G., June 8, 1916, approved by Sec. Navy, June 30, 1916; G. M. C. Rec. 32175. *See also* C. M. O. 17, 1916; 31, 1910, 5; FRAUDULENT ENLISTMENT, 5.
89. **Same**—The continued receipt of pay and allowances under "Fraudulent enlistment" does not bring such act within the rule respecting a continuing offense. The offense is completed by the receipt of any pay and allowances, from which time the Statute of Limitations commences to run. File 1551–04.
90. **Same**—It is not the policy of the department to try a man for "Fraudulent enlistment" unless the prosecution is prepared to prove that he was not amenable to justice within a period of two years after commission of that offense, by reason of having absented himself or some other manifest impediment. C. M. O. 31, 1910, 5.

Digitized by Google

91. **Summary court-martial**—Accused should not be tried by summary court-martial for "Fraudulent enlistment." *See* File 26524-123. (G. O. 110, p. 5, overruled.) *But see* File 26837-7, Sec. Navy, Jan. 15, 1916; FRAUDULENT ENLISTMENT, 76.
92. **Voidable, not void**—A fraudulent enlistment is not void but merely voidable. (In re Morrissey, 137 U. S. 157; In re Grimley, 137 U. S. 147.) File 26837-7, Sec. Navy, Jan. 15, 1916. *See also* FRAUDULENT ENLISTMENT, 22.
93. **Same**—An enlistment fraudulently made may be voidable, but it is not necessarily void until so pronounced by competent authority. (In re Morrissey, 137 U. S. 157.) C. M. O. 102, 1893, 2. *See also* FRAUDULENT ENLISTMENT, 22.
94. **Waiver of**—If the department waives fraudulent enlistment upon knowledge, such enlistment becomes legal, and man is entitled to pay, etc. 14 Comp. Dec. 267.
95. **Same**—Fraudulent enlistment is voidable and may be avoided only by the Government by any act clearly expressing such intention to avoid. Until such act a person fraudulently enlisting may be held. File 10031-03.

"FREEZE." *See* C. M. O. 41, 1915, 6.

FUGITIVE FROM JUSTICE.

1. **Discharged as undesirable**—And delivered to civil authorities. *See* CIVIL AUTHORITIES, 12; CONVICTS, 2.
2. **Enlisted, not to be.** File 26524-207, J. A. G., Nov. 20, 1915, Nov. 22, 1915.
3. **Warned by recruiting officers**—Many fugitives from justice who endeavor to find asylum in the Navy, would not enlist if they were sure of detection. Accordingly *suggested* that in the instructions for recruiting officers, directions be given that all applicants for enlistment be emphatically informed of the department's policy, and further that if their purpose in enlisting is to attempt to evade the consequences of some crime or other misconduct for which they are answerable to the civil authorities, they will promptly be surrendered to the proper civil authorities for trial, and that their enlistment in the Navy will not afford them any protection or exemption from prosecution, but on the contrary the department will assist in their identification and immediate surrender to the proper civil authorities for trial.

FULL POWER TRIAL.

1. **Boilers**—Exploded. C. M. O. 36, 1915; 37, 1915; 38, 1915.

FULLY ACQUIT. *See* ACQUITTAL, 15.

FUNERAL EXPENSES.

1. **Enlisted man**—Payment of by family. *See* DEATH GRATUITY, 21.

FURLOUGH.

1. **Enlisted men**—Duty to notify commanding officer of change of address. *See* ADDRESS, 2.
2. **Officer**—May be placed on furlough by Secretary of the Navy (R. S. 1442)—Officer would receive half pay (R. S. 1557). C. M. O. 49, 1915, 27. *See also* OFFICERS, 106.
3. **Without pay**—The Supreme Court has held that an officer who may be dismissed absolutely, may be furloughed without pay, which is the effect of a partial dismissal, and in some cases is in favor of the officer who might otherwise be removed. (U. S. *v.* Murray, 100 U. S. 536. *See also* 11 Compt. Dec. 560). File 27231-47, J. A. G., Aug. 20, 1915.
4. **Same**—Enlisted men of Marine Corps—Act of Aug. 29, 1916 (39 Stat. 580) applies to Marine Corps. File 7657-402.

GAMBLING.

1. **Enlisted man**—Charged with. C. M. O. 6, 1915, 3.
2. **With human lives**—And Government property. C. M. O. 37, 1915, 8.

GARRISON.

1. **Confinement**—To limits of garrison. *See* CONFINEMENT, 8, 15, 19; RESTRICTION.

GAS BUOY.

1. **Navigation**—Aid to. C. M. O. 2, 1915; 3, 1915.

GENDARMERIE OF HAITI.

1. **Officers of the United States**—Are not prohibited from rendering a friendly service to Haiti, such as assisting to organize a gendarmerie. *See* OFFICERS OF THE UNITED STATES, 1.

Digitized by Google

GENERAL COURTS-MARTIAL. *See* COURT.

GENERAL COURTS-MARTIAL OF A STATE.
1. **Officers and enlisted men of naval service**—Appearing as witnesses before. *See* GENERAL ORDER No. 121, Sept. 17, 1914, 23.

GENERAL EFFICIENCY.
1. **Candidate**—For promotion in Marine Corps. *See* PROMOTION, 72.

GENERAL ISSUE. *See* ARRAIGNMENT, 7; WORDS AND PHRASES.

GENERAL INTENT. *See* ASSAULT, 15; INTENT, 49.

GENERAL OF THE ARMY.
1. **Retirement of**—Laws relating to. 14 J. A. G. 287.

GENERAL ORDERS.
1. **Army**—A general order of Headquarters of the Department of California, U. S. Army, is such a document as may properly be admitted in evidence for certain purposes. *See* ARMY, 14.
2. **Evidence, as.** *See* ARMY, 14; GENERAL ORDERS, 1.
3. **Legality of provisions and requirements in**—Should the legality of a General Order issued by the Secretary of the Navy be raised by the defense, for violation of which he is on trial, the court, if in doubt, should submit it to the department for decision it being a question of law. [Navy Regulations, 1913, R-850.] But it is to be presumed that the legality of any order issued as above would be fully inquired into by the department before the issuance thereof. File 28019-25, Mar. 29, 1912.
4. **No. 77.** *See* GENERAL ORDER NO. 77, FEBRUARY 25, 1914.
5. **No. 100.** *See* GENERAL ORDER NO. 100, JUNE 5, 1914.
6. **No. 110.** See GENERAL ORDER NO. 110, JULY 27, 1914.
7. **No. 121.** *See* GENERAL ORDER NO. 121, SEPTEMBER 17, 1914.
8. **No. 150.** *See* GENERAL ORDER NO. 150, JUNE 14, 1915.

GENERAL ORDER NO. 77, FEBRUARY 25, 1914.
1. **Naval Militia**—This general order is merely a publication of the act of February 16, 1914. (38 Stat. 283), "to promote the efficiency of the Naval Militia and for other purposes." C. M. O. 49, 1915, 17; File 26251-10,968:6, Sec. Navy, Nov. 6, 1915; G. C. M. Rec. 31331.

GENERAL ORDER NO. 100, JUNE 15, 1914.
1. **Construed**—Diseases contracted during unauthorized absence from station are not necessarily due to misconduct, notwithstanding that unauthorized absence is of itself ordinarily an act of misconduct. In such case it remains to be determined whether the unauthorized absence from station was the natural and proximate cause of the disease and if so, whether it is on account of such disease the absence from duty is occasioned. File 7657-284, Sec. Navy, Mar. 19, 1915; C. M. O. 27, 1915, 8. *See also* File 7657-394:3, Sec. Navy, October, 1916; ENLISTMENTS, 11; MARINE CORPS, 80.

GENERAL ORDER NO. 110, JULY 27, 1914. *See also* General Order No. 110 (Revised July, 1916).
1. **Amendment to page 7, par. 9.** C. M. O. 36, 1914, 3, 4.
2. **Bad-conduct discharge**—Attention is called to the fact that the requirements of Navy Regulations 1913, R-622 (7), must be carried out, even when the convening authority remits that part of a summary court-martial sentence involving bad-conduct discharge on condition that the accused maintain a record satisfactory to his commanding officer during a specified time, as authorized by General Order No. 110. "*In every case* where a sentence involving bad-conduct discharge has been imposed, it shall be the duty of the officer ordering the court, *before acting upon the proceedings*, to spread upon the record a brief synopsis of the service of the person tried and of the offenses committed by him during his current enlistment." (Navy Regulations, 1913, R-622 (7); Forms of Procedure, 1910, p. 164; C. M. O. 1, 1914, p. 4.) C. M. O. 36, 1914, 4. *See also* BAD-CONDUCT DISCHARGE, 10.
3. **Convening authority, form of action for**—The following forms of action will be used by the convening authority in cases intended to be governed by article 4893, Naval Instructions, 1913, or General Order No. 110:

   If the sentence involves only loss of pay, the convening authority will use the form of approval given in article 4893 (1), Naval Instructions, 1913.

Digitized by Google

If the sentence involves loss of pay and discharge, the convening authority will use the following form of approval:

"The proceedings (findings) and sentence in the foregoing case of * * * are approved. That portion of the sentence which involves * * * discharge is remitted, on condition that the accused maintain a record satisfactory to his commanding officer, during a period of * * * months. That portion of the sentence involving loss of pay is remitted subject to the conditions specified in article 4893, Naval Instructions, 1913."

(The word "findings" is used only in actions on records of general courts-martial.)

The senior officer present, in approving summary court-martial cases acted upon in accordance with these instructions, will use the form given in Forms of Procedure, p. 165, var. 1. C. M. O. 36, 1914, 4–5.

General Order No. 110 was revised in July, 1916, and promulgated the following forms of action for convening authorities as substitutes for those published above:

When sentences adjudged by deck courts and courts-martial are to be executed in accordance with the provisions of this order, the following action will be placed on the record by the reviewing or convening authority:

Deck courts.—"The sentence is approved and the accused informed this day; that portion of the sentence involving loss of pay is remitted subject to the conditions specified in article 4893, Naval Instructions, 1913."

Summary courts-martial.—"The proceedings, findings, and sentence in the foregoing case of * * * are approved. The bad conduct discharge is remitted on condition that * * * during a period of * * * months conducts himself in such a manner as in the opinion of his commanding officer warrants his further retention in the service; otherwise the bad conduct discharge will be executed at the discretion of his commanding officer at any time during said period. The loss of pay (is reduced to the loss of * * * and as thus reduced) is remitted subject to the conditions specified in article 4893, Naval Instructions, 1913."

General courts-martial.—The proceedings, findings, and sentence in the foregoing case of * * * are approved; that portion of the sentence which involves confinement is remitted; the dishonorable discharge is remitted on condition that * * * during a period of * * * conducts himself in such a manner as in the opinion of his commanding officer warrants his further retention in the service; otherwise he will be dishonorably discharged at the discretion of his commanding officer at any time during said period. The loss of pay (and allowances) (is reduced to the loss of * * * and as thus reduced) is remitted subject to the conditions specified in articles 4893, Naval Instructions, 1913." (G. O. 110, Revised, pp. 4–5.)

4. **Same**—It was noted that the action of the convening authority as convening authority remitted the loss of pay in accordance with I-4893, and that his action as senior officer present stated that the portion of the sentence involving bad-conduct discharge *will be* carried into effect at any time within six months at the discretion of the commanding officer of the vessel or station to which he may be attached; thus it will be seen that the discharge adjudged was not remitted and from the action taken it will be carried into effect at some time within the period of six months, unless the sentence is further mitigated by the Secretary of the Navy.

If it was the intention of the convening officer and senior officer present to remit the bad-conduct discharge on condition that the accused maintain a record satisfactory to his commanding officer, during a period of six months, as provided in General Order No. 110, the form of action prescribed on pages 4 and 5, Court-Martial Order No. 36, 1914, should have been used. File 26287-2889, Sec. Navy, Mar. 18, 1915; 26287-2892, Sec. Navy, Mar. 23, 1915; C. M. O. 12, 1915, 5. *But see* G. O. 110 (Revised).

5. **Same**—A man sentenced to bad-conduct discharge by summary court-martial should not be placed on probation for a period extending over the expiration of his enlistment. (C. M. O. 12, 1915, p. 6.) Should a man have less than six months yet to serve on his current enlistment it would be appropriate for the convening authority to word his action as follows: "The proceedings, findings, and sentence in the foregoing case of * * * are approved. That portion of the sentence which involves bad-conduct discharge is remitted, on condition that the accused maintain a record satisfactory to his commanding officer, during the balance of his current enlistment which expires * * *". (*See for example*, S. C. M. Rec. No. 08970 of Victor R. Hagberg, private, U. S. M. C., tried May 25, 1915, at Marine Barracks, Navy Yard, Boston, Mass., File 26287-3110; S. C. M. Rec. No. 05186 of William L. McEuen, private, U. S. M. C., tried June 4, 1915, at Marine Barracks, Navy Yard, Philadelphia, Pa., File 26287-3000) C. M. O. 22, 1915, 5.

Digitized by Google

6. **Discharge by purchase.** *See* GENERAL ORDER No. 110, JULY 27, 1914, 18.
7. **Expiration of enlistment of accused during probationary period**—Accused was sentenced to loss of pay and bad-conduct discharge by summary court-martial. Convening authority remitted so much of the sentence as related to loss of pay in accordance with I–4893 and remitted the bad-conduct discharge conditionally under the provisions of General Order No. 110. It appeared from the enlistment record of the accused that his enlistment would expire before the probationary period ended. *Held*, Accused should receive a discharge upon expiration of enlistment commensurate with his conduct during the total period of enlistment and the character of his discharge will determine the amount of pay which he will receive from pay deducted during his enlistment as provided in I–4893.

   Convening authorities in their actions on court-martial records should not place the accused on probation for periods extending beyond the expiration of enlistments. Where this is done, however, this action should not operate against the probationer, and if his conduct is satisfactory up to date of expiration of enlistment, he should receive the same benefits as though his probationary period had been completed and his discharge effected thereafter. File 26287–2364, Sec. Navy, Mar. 19, 1915; C. M. O. 12, 1915, 6.
8. **Finding**—A finding of "Guilty in a less degree than charged, guilty of *unauthorized absence*" is incorrect. C. M. O. 53, 1914, 6. *See also* FINDINGS, 2.
9. **Forms of action**—For convening authorities. *See* GENERAL ORDER No. 110, JULY 27, 1914, 3–5, 7.
10. **Fraudulent enlistment**—Schedule of punishments provides that "Fraudulent enlistment" may be tried by summary court-martial, but General Order No. 110 (Revised) does not. *See* FRAUDULENT ENLISTMENT, 47, 91.
11. **Liberty, extension of**—In this connection the attention of the court is invited to the following provisions of General Order No. 110, July 27, 1914, which are enforced in the cases of enlisted men: If no reply is received they are not justified in assuming that their requests are granted merely because they telegraphed or wrote, but, *on the contrary, the failure to receive positive permission to remain absent renders it essential for them to return at once.* (G. O. 110, p. 7.) C. M. O. 25, 1915, 2.
12. **Liberty or leave of absence**—In ascertaining the date of expiration of liberty or leave granted to officers and enlisted men, the burden of ascertaining the proper time of the expiration of such leave is entirely upon the individual and the department has from time to time directed that enlisted men be carefully instructed that absence through failure to ascertain the time of expiration of liberty was wholly at the risk and peril of the individual. In a recent order (G. O. 110, July 27, 1914) the following instructions were issued upon this subject: "They [enlisted men] will be fully instructed that they are responsible for informing themselves as to the expiration of liberty, boat hours, train schedules, etc., and that ignorance thereof is not an excuse." C. M. O. 23, 1915, 1–2.
13. **Marine**—Reenlisted. *See* GENERAL ORDER No. 110, JULY 27, 1914, 19.
14. **Officers**—Principles of General Order No. 110 generally applicable to. C. M. O. 23, 1915, 2; 25, 1915, 2. *See also* GENERAL ORDER No. 110, JULY 27, 1914, 11, 12.
15. **Probationary feature**—The probationary feature of General Order No. 110 is superior to the former detention system, both on account of the increased number of men reclaimed thereby, the vast reduction in expenditures necessary for the operation of the system, and for the humanitarian reason that it avoids unnecessary imprisonment of young men guilty of military offenses. File 5087–126, J. A. G., Sept. 30, 1915.
16. **Probationary period**—Offense during—When a man is serving a sentence which has been mitagated pursuant to the provisions of General Order No. 110 or article 4893, Naval Instructions, 1913, and commits an offense of such a serious a nature that his commanding officer decides should receive a more severe punishment than would be the case if he merely terminated the probation and allowed the unexecuted part of the sentence to be carried into effect, he may either order the man's trial by summary court-martial or recommend his trial by general court-martial. In cases of this character the department desires that the man be required to serve both the original sentence and such additional sentence as may be imposed for the last offense.

   Where the man's original sentence included discharge from the service which had been conditionally remitted subject to the provisions of general Order No. 110, if he is subsequently sentenced to a period of confinement and discharge for an offense committed while on probation, the secretary of the Navy will remit the former discharge in order to permit execution of the last sentence. C. M. O. 42, 1914, 5. *But see* General Order No. 110 (Revised, July, 1916).

Digitized by Google

17. **Same**—Discharge during probationary period. *See* GENERAL ORDER No. 110, JULY 27, 1914, 7.

18. **Purchase**—An enlisted man of the Navy was sentenced by summary court-martial to loss of pay and bad-conduct discharge, the former being remitted subject to the conditions specified in article 4893, Naval Instructions, 1913, and the latter remitted on condition that the accused maintain a record satisfactory to his commanding officer during a specified period. [Provivions of G. O. 110.] The accused successfully completed his probationary period, at which time the entire loss of pay adjudged in his case had been "deducted." Thereafter he received a discharge by "purchase." *Held*, That the total amount of pay which had been "deducted" during his enlistment, in accordance with the provisions of I-4893, should be "credited" to the accused's account at date of discharge; and since, as he was discharged at his own request and for his own convenience, he received an "ordinary discharge" (Navy Regulations, 1913, R-3608 (b),) his account should be "checked" one-half the total amount of pay "deducted" and conditionally remitted in accordance with I-4893. File 26287-2971, Sec. Navy, May 27, 1915; C. M. O. 20, 1915, 5.

19. **Reenlisted marine**—*Held*, That, in view of the unambiguous phraseology of General Order 110 in which the words "reenlisted marine" are used, a soldier who enlists in the Marine Corps for the first time, upon the termination of an enlistment in the Army, is not to be regarded as a reenlisted man within the purview of said General Order File 26516-144:53, Sec. Navy, Apr. 12, 1916; C. M. O. 13, 1916, 8.

20. **Schedule of punishments**—Should be followed where practicable—The accused was tried by general court-martial by order of the Secretary of the Navy, at the navy yard, New York, on the charge of "Desertion." He pleaded "not guilty." The court found him "Guilty in a less degree than charged, guilty of absence from station and duty after leave had expired," and sentenced him to be confined at hard labor for three months, with corresponding forfeiture of pay and allowances, and to be discharged with a bad-conduct discharge.

In view of the fact that this man remained in unauthorized absence for nineteen days, the department does not consider the sentence adjudged in his case an adequate or appropriate one. General Order No. 110 prescribes a schedule of punishments for desertion and unauthorized absence, and in that schedule it is expressly suggested that in all cases of unauthorized absence over ten days a dishonorable discharge should be a portion of the sentence adjudged.

However, two of the six members of the court before which this man was tried have been relieved from duty on the court and the original membership reduced below the five required to be present in acting upon a case in revision, and it is, therefore, impracticable to return the record to the court for a reconsideration of its sentence. File 26251-11322, Sec. Navy, Dec. 16, 1915; G. C. M. Rec. No. 31401; C. M. O. 49, 1915, 11-12. *See also* BAD-CONDUCT DISCHARGE, 6.

21. **Senior officer present**—The senior officer present, in approving summary court-martial cases acted upon in accordance with the instructions contained in paragraph 3 of this heading, will use the form given in Forms of Procedure, p. 165, var. 1. C. M. O. 36, 1914, 5.

22. **Sentence**—It frequently happens that the court directs that a sentence be recorded in the following form:

"To be discharged from the service with a bad-conduct discharge, the bad-conduct discharge to be executed at the discretion of the commanding officer at any time within six months."

The court should not prescribe in its sentence how or when such sentence shall be executed. Such matters are properly within the province of the convening authority. The following form of sentence should be used by the court in recording sentences adjudged in accordance with the provisions of General Order No. 110:

"To lose pay amounting to —— (——) dollars and —— (——) cents, and to be discharged from the naval service with a bad-conduct (dishonorable) discharge."

(Dishonorable discharge, of course, can only be adjudged by a general court-martial.) C. M. O. 36, 1914, 4.

23. **Same**—The accused was tried by general court-martial, pleaded "guilty" to "desertion" and was sentenced to lose pay amounting to ninety dollars and to be dishonorably discharged from the United States Marine Corps.

The accused in this case remained in desertion until apprehended by the civil authorities and forcibly returned to the naval authorities.

General Order No. 110, page 5, provides that if a man in desertion is delivered by the civil authorities he should be tried by general court-martial and sentenced to im-

Digitized by Google

prisonment in a naval prison. This general order also provides that nothing in the schedule will be construed to limit the discretionary power vested in general courts-martial, summary courts-martial, and deck courts, but that it should be followed to secure uniformity (page 2).

It therefore follows that this sentence is both inadequate and contrary to the system of discipline which it was intended to establish in General Order No. 110.

General Order No. 110 is based on the theory that men who surrender desire to re-establish themselves in the naval service and earn an honorable discharge; in the case of a man who is apprehended, no such presumption exists, and as this man was forcibly returned to naval jurisdiction there is no good reason to believe that he will not desert again upon the first opportunity. For this reason General Order No. 110 provides that in such cases the man should receive a sentence which includes confinement. The court in this case having been reconvened to reconsider its sentence revoked its former sentence and adjudged one which was adequate. File 26251-10365, Sec. Navy, March 30, 1915; G. C. M. Rec. No. 30347; C. M. O. 12, 1915, 6-7. *See also* File 26251-10363.

GENERAL ORDER NO. 121, SEPTEMBER 17, 1914.

1. **Action where men convicted by civil authorities**—In cases in which men delivered to the civil authorities for trial are convicted, the commanding officer will make full report of the offense and sentence to the Bureau of Navigation or the Commandant of the Marine Corps, as the case may be, with recommendation as to whether the man should be discharged as undesirable. (File 1579-03, Feb. 14, 1903, and June 11, 1903.)

Form of agreement as to expenses.

The following is suggested as a form of agreement acceptable to the department in cases referred to in paragraph 9:

In consideration of the delivery of....., United States Navy (or United States Marine Corps), to....., at ....., for trial upon the charge of ....., I hereby agree, pursuant to the authority vested in me as....., that said..... will be returned to the naval authorities at the aforesaid place of his delivery without expense to the United States immediately upon the completion of his trial upon the charge aforesaid in the event that he is acquitted upon said trial, or immediately upon satisfying the sentence of the court in the event that he is convicted and a sentence imposed, or upon other disposition of his case, provided that the naval authorities shall then desire his return." (File 26524-239:3, Sec. Navy, Feb. 26, 1916.) *See* General Order No. 121, paragraphs 11, 12.

2. **Agreement not required of Federal authorities**—An agreement as to expenses will not be exacted as a condition to the delivery of men to the Federal authorities, either in response to writs of habeas corpus, as witnesses, or for trial. However, in such cases the expenses will be defrayed as follows: The person who produces a man in a Federal court in response to a writ of habeas corpus or as a witness will keep an accurate account of expenses, and present same to the United States marshal for the district in which the court is sitting, who is the proper officer to settle such account, including the expenses of the return trip. (File 26251-8684:2 & 4.) Men desired by the Federal authorities for trial will be called for and taken into custody by a United States marshal or deputy marshal; in such case the expense of transporting the man to the place of trial will, of course, be defrayed by the marshal. The question whether the man in such case may be returned to the Navy at the expense of the United States if not convicted, and if so, what appropriation is available therefore, has not been settled. (*See* 14 Comp. Dec., 824; 87 S. & A. Memo., 713.) *See* General Order No. 121, paragraph 13.
3. **Civilian attorney's attention**—Invited to. C. M. O. 31, 1915, 6.
4. **Commanding officer must notify department and await instructions**—In no case will commanding officers of vessels or shore stations of the Navy or Marine Corps deliver to the civil authorities, State or Federal, any person in their custody or under their control without first communicating with the Secretary of the Navy and awaiting his instructions in the premises. The Secretary of the Navy will promptly issue the necessary orders in the case or make request upon the Attorney General, in accordance with Title VIII of the Revised Statutes of the United States, to furnish such legal assistance to the commanding officer concerned as the interests of the United States involved in such case may demand. (*See* par. 7 of G. O. 121.)

Digitized by Google

The words "in no case," as used in the above paragraph, are intended to refer to every case in which the civil authorities, Federal or State, request or demand the delivery to them of any officer or enlisted man in the Navy or Marine Corps, whether for the purpose of determining the legality of his detention by the naval authorities, or of trying him for a violation of the Federal or State laws, or of securing the testimony of a naval prisoner as a witness in a civil court. The instructions contained in the above paragraph accordingly apply to and include all cases in which writs of habeas corpus, requisitions of the governor or chief executive of any State, warrants, *ad testificandum*, or other civil process of any kind are served on commanding officers of the Navy or Marine Corps, afloat or ashore, for the purpose of securing the delivery of any person under their control to such civil authorities. (*See* par. 10 of G. O. 121.)

In such cases, occurring outside of the District of Columbia, the report to the Secretary of the Navy will be telegraphic, to be followed immediately by letter containing full statement of the facts. In order to expedite action, the telegraphic report will be addressed to the Secretary of the Navy direct, and the first words in the message will be "For Judge Advocate General." (C. M. O. 29, 1915, 7; file 26524-183, J. A. G., Oct. 14, 1915; 26524-185, Sec. Navy, Oct. 2, 1915.) *See* General Order No. 121, paragraphs 1, 2, 3.

5. **Delivery of men to State authorities for trial**—In every case in which the Secretary of the Navy authorizes the delivery of any person in the Navy or Marine Corps to the civil authorities of a State *for trial*, the senior officer present will, before making such delivery, obtain from the governor or other duly authorized officer of such State assurance that the person so delivered will be returned to the naval authorities at the place of his delivery without expense to the United States, immediately upon the completion of his trial for the alleged misconduct which occasioned his delivery to the civil authorities in the event that he is acquitted upon said trial, or immediately upon satisfying the sentence of the court in the event that he is convicted and a sentence imposed, or upon other disposition of his case, provided that the naval authorities shall then desire his return. (Instructions of the Secretary of the Navy, Mar. 7, 1908, file 425-2; Apr. 1, 1908, file 2928-8; June 19, 1912, file 26524-45; Feb. 12, 1914, file 26524-57; June 26, 1914, file 26524-61; 26524-259: 1, Sec. Navy, Apr. 25, 1916. *See also* File 26524-64; 1579-03; G. O., No. 18, U. S. M. C., Mar. 29, 1909.) (*See* par. 12 of G. O. 121.)

The instructions contained in paragraphs 1 and 9 of G. O. 121 include cases where the delivery of a person in the Navy or Marine Corps attached to a navy yard or station, or serving on board a vessel at such yard or station, is demanded by the civil authorities of the State in which such navy yard or station is located, although such State has expressly retained jurisdiction to serve civil or criminal process within the limits of the navy yard or station in question. (File 26524-57, Sec. Navy, Feb. 12, 1914.) *See* General Order No. 121, paragraphs 9, 10.

6. **Exact compliance with directed**—The attention of commanding officers is called to the requirement of paragraph 3 of General Order No. 121, September 17, 1914, concerning the "letter containing full statement of the facts" which should immediately follow the telegraphic report to the Secretary of the Navy when the delivery of men to the civil authorities is requested. Attention is also called to the fact that the first words in the telegraphic report should be "For Judge Advocate General." C. M. O. 29, 1915, 7. *See also* File 26524-183, J. A. G., Oct. 14, 1915; 26251-9965: 21, J. A. G., Oct. 4, 1915.
7. **Expedition**—Of cases coming under. File 26524-186, J. A. G., Oct. 21, 1915, Oct. 29, 1915,
8. **Extradition.** *See* GENERAL ORDER NO. 121, SEPT. 17, 1914, 10.
9. **Forms of agreement.** *See* GENERAL ORDER NO. 121, SEPT. 17, 1914, 1.
10. **Governor's requisition necessary in certain cases**—In cases in which the delivery of any person in the Navy or Marine Corps for trial is desired by the civil authorities of a State, and such person is not attached to or serving at a navy yard or other place within the limits of said State, requisition for the delivery of the party must be made by the governor or chief executive of such State, addressed to the Secretary of the Navy, showing that the party desired is charged with a crime in that State for which he could be extradited under the Constitution of the United States, the enactments of Congress, and the laws of the State desiring his delivery. (File 26524-61, June 1, 1914; 26524-62, June 22, 1914; 26254-237, J. A. G., Apr. 20, 1916; 26254-260, J. A. G., Apr. 25, 1916; 26524-261: 1, Sec. Navy, June 5, 1916; 26524-262, J. A. G., Apr. 27, 1916; 26524-144, Sec. Navy, May 11, 1915; 26524-171, Sec. Navy, Aug. 2, 1915; 26524-180, Sec. Navy, Sept. 16, 1915; 26524-190, Sec. Navy, Oct. 16, 1915; C. M. O. 35, 1915, 8; 2 Op.

Digitized by Google

Atty. Gen., 10.) Such requisition may be forwarded to the Secretary of the Navy by mail for preliminary examination, together with the appointment of the agent of the State to whom it is desired that delivery be made. Thereupon, if the papers are found to be in due form, the Secretary of the Navy will send the necessary authorization to the designated agent permitting him to take the party into custody upon compliance with par. 9 of G. O. 121. (File 26524-64-69-83; 26524-137, Sec. Navy, Apr. 21, 1915.) *See* General Order No. 121, paragraph 14.

11. **Habeas corpus proceedings, Federal courts**—In this connection there is quoted for the information of the service section 756 of the Revised Statutes of the United States, which prescribes the time allowed for making return to writs of habeas corpus issued by Federal courts:

"Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond that distance and not beyond a distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days."

The officer upon whom such a writ of habeas corpus is served can not be required to obey same in any shorter period after the service of the writ than that specified in the above section of the Revised Statutes, even though the writ should in terms require that the person named therein be produced "forthwith," or "immediately," or at a specified time. (Ex parte Baez, 177 U. S., 389; United States *v.* Bollman, 24 Fed. Cas., 1190.)

The United States Revised Statutes contain the following further provisions concerning habeas corpus proceedings instituted in the Federal courts:

"SEC. 757. The person to whom the writ is directed shall certify to the court or justice or judge before whom it is returnable the true cause of the detention of such party.

"SEC. 758. The person making the return shall at the same time bring the body of the party before the judge who granted the writ.

"SEC. 759. When the writ is returned a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time."

In accordance with the foregoing sections of the Revised Statutes, should instructions for any reason not be received by the commanding officer from the Secretary of the Navy by the last day of the period allowed by law for making return to a writ of habeas corpus issued by a Federal court, the commanding officer will certify to the court or justice or judge before whom the writ is returnable the true cause of the detention of the party, if in his custody, and will at the same time bring the body of the said party before the judge who granted the writ, and request the court to delay the hearing of the cause for the full period of five days allowed by law, so that further opportunity may be afforded for the receipt of instructions in the premises from the Secretary of the Navy. If the party is not in the custody of the officer to whom the writ is directed, he will so state in his return. (*See* File 26262-1625, Inc. 1, p. 26.) (As to definition of "custody," *see* Wales *v.* Whitney, 114 U. S., 564.) *See* General Order No. No. 121, paragraphs, 4-7.

12. **Habeas corpus proceedings, State courts**—State courts have no jurisdiction in habeas corpus proceedings to order the discharge of any person held by an officer of the Navy or Marine Corps by authority of the United States; however, in the event that a writ of habeas corpus should be issued by a State court to a commanding officer of the Navy or Marine Corps, afloat or ashore, the Secretary of the Navy will be communicated with immediately in accordance with paragraph 3 of G. O. 121; and should instructions not be received by the commanding officer from the Secretary of the Navy by the time specified in the writ, or if no definite time be specified therein within three days after the service of the writ (United States *v.* Bollman, 24 Fed. Cas., 1190) the officer upon whom the writ is served will make return thereto in accordance with "Forms of Procedure for Courts and Boards in the Navy and Marine Corps" (p. 76), without producing the body of the party in court. *See* General Order No. 121, paragraph 8.

13. **Hawaii**—The following instructions were issued to the Commandant, Naval Station, Hawaii, with regard to General Order No. 121, September 17, 1914:

"It is directed that the commandant communicate to the Secretary of the Navy in advance of the delivery of persons to the civil authorities only in cases where the circumstances are such as, in his judgment, make such action desirable." File 26524-172, Sec. Navy, Nov. 23, 1915; C. M. O. 42, 1915, 10.

Digitized by Google

14. **Leave of absence may be granted to appear for trial**—Where a person in the Navy or Marine Corps is arrested by the Federal or State authorities for trial and returns to his ship or station on bail, the commanding officer may grant him leave of absence to appear for trial on the date set upon an official statement by the judge, prosecuting attorney, or clerk of the court, reciting the facts, giving the date on which the appearance of the man is required, and the approximate length of time that should be covered by such leave of absence. (File 5322, May 23, 1906; 26524-45, June 19, 1912.) *See* General Order No. 121, paragraph 17.

15. **Naval prisoners as witnesses or parties in civil courts**—If the Federal or State authorities desire the attendance of a naval prisoner (see par. 15) as a *witness* in a criminal case pending in a civil court, upon the submission of such a request to the Secretary of the Navy authority will be given in a proper case for the production of the man in court without resort being had to a writ of *habeas corpus ad testificandum*. (File 26251-8684:2, June 10, 1914; 26276-93, May 29, 1914; 26276-40, June 10, 1912; 26276-33, June 5, 1911; 26276-17, Nov. 10, 1909; 26251-11233:1-, Sec. Navy, Dec. 7, 1915; 26251-11252:2, Sec. Navy, June 2, 1916; Army Digest, 1912, 221 a.) The department, however, will not authorize the attendance of a naval prisoner in a Federal or State court, either as a party or as a witness in private litigation pending before such court, as in such cases the court may grant a postponement or a continuance of the trial; but the department will allow the deposition of such naval prisoner to be taken in the case. (File 26251-4913:1, Oct. 12, 1911; 26276-36, Dec. 9, 1911; 26276-121, J. A. G., Nov. 19, 1915.) *See* General Order No. 121, paragraph 16. *See also* WITNESSES, 86.

16. **Naval prisoners wanted by civil authorities for trial**—In any case in which the delivery of a person in the Navy or Marine Corps *for trial* is desired by the civil authorities, Federal or State, and such person is a naval prisoner (which includes any person serving sentence of court-martial or in custody awaiting trial by court-martial or disposition of charges against him), he will not in general be delivered to the Federal or State authorities until he has served the sentence of the naval court-martial, or his case has otherwise been finally disposed of by the naval authorities. (File 26251-164, June 4 and Oct. 19, 1908; 26251-5546:1, Jan. 20, 1912; 26251-6397:1, Aug. 28, 1912; 26524-217, J. A. G., Dec. 28, 1915; letter of Attorney General to Secretary of the Navy, Apr. 16, 1907, No. 99858, N. D. file 6674-33; 7538-142, Dec. 3, 1913; 7538-74, Oct. 4, 1909; Army Digest, 1912, 135 D.) However, if the Federal or State authorities desire the surrender of the party under the above circumstances upon a serious charge, such as felonious homicide, and the interests of justice would be better subserved by his delivery, the Secretary of the Navy may, in his discretion, discharge the man from naval custody and from his contract of enlistment and deliver him to the civil authorities for trial. (File 26251-2798:2, Jan. 24, 1910; Army Digest, 1912, 135 D, 136.) *See* General Order No. 121, paragraph 15.

In general, a prisoner serving sentence will not be delivered. (File 26251-1212:71, Sec. Navy, July 26, 1916.)

17. **Panama**—General Order No. 121, September 17, 1914, does not apply to Panamanian authorities. The department's instructions must be requested in specific cases as they arise, giving particulars. (File 26524-182, Sec. Navy, Sept. 17, 1915; C. M. O. 31, 1915, 6.)

18. **Prisoners.** *See* GENERAL ORDER NO. 121, SEPT. 17, 1914, 15, 16.

19. **Process, service of.** *See* GENERAL ORDER NO. 121, SEPT. 17, 1914, 23.

20. **Records**—Desired by civil courts. *See* GENERAL ORDER NO. 121, SEPT. 17, 1914, 23.

21. **Requisitions.** *See* GENERAL ORDER NO. 121, SEPT. 17, 1914, 10.

22. **Samoa**—General Order No. 121, September 17, 1914, does not apply to persons in the naval service at Samoa, and there are no "civil authorities" at Samoa within the meaning of this general order. (File 26524-125, Sec. Navy, Apr. 1, 1915; C. M. O. 16, 1915, 5.)

23. **Service of subpœnas**—Leave of absence granted—Production of records in court—Preliminary examination of records—In cases in which the Federal or State authorities desire to subpœna any person in the Navy or Marine Corps other than a naval prisoner as a witness, the following instructions will govern:

(*a*) Commanding officers afloat or ashore are authorized to permit the service of such process upon the person named therein, but service will not be allowed without such permission of the commanding officer first being obtained. In cases in which service by mail is legally sufficient, the papers may be addressed to the commanding officer with request that they be delivered to the man named therein. (File 6769-21, July 19, 1911; 26524-59, May 1, 1914; 26524-275:5, Sec. Navy, Aug. 8, 1916; 26524-163, J. A. G., July 9, 1915; 26276-112, Sec. Navy, Sept. 16, 1915; 26251-11233:1, Sec. Navy, Dec. 7, 1915; C. M. O. 31, 1915, 5.)

Digitized by Google

(*b*) In such cases the commanding officer is authorized to grant leave of absence to the person subpœnaed in order to permit him to obey such subpœna, unless the public interests would be seriously prejudiced by his absence, in which case full report of the matter should be made to the department. (File 26276, Apr. 27, 1908, May 19, 1908, June 9, 1908; 26276-118, Sec. Navy, Oct. 6, 1915; 26276-117, Sec. Navy, Oct. 9, 1915; 26251-11233:1, Sec. Navy, Dec. 7, 1915; 26276-137, Sec. Navy, May 2, 1916.) This includes cases in which the party is subpœnaed as a witness before a general court-martial of a State. (File 7022-3, Oct. 12, 1907.)

(*c*) Officers of the Navy or Marine Corps are prohibited from producing official records or copies thereof in a State court in answer to subpœnas *duces tecum*, or otherwise, without first obtaining authority therefor from the Secretary of the Navy. (File 26276-26, June 16, 1910; Boske *v.* Comingore, 177 U. S., 460.) In all cases where copies of records are desired by or on behalf of parties to a suit, whether in a Federal or State court, such parties will be informed that it has been the invariable practice of the Navy Department to decline to furnish in the case of legal controversies, at the request of the parties litigant, copies of papers or other information to be used in the course of the proceedings, or to grant permission to such parties or their attorneys to make preliminary or informal examination of the records; but that the department will promptly furnish copies of papers or records in such cases upon call of the court before which the litigation is pending. (File 5467-8, Mar. 27, 1907; 12475-46, July 12, 1913; 12475-80, J. A. G., June 7, 1916; 26251-11401:3, J. A. G., June 10, 1916; 12475-75, Sec. Navy, Apr. 11, 1916; 12475-74, Sec. Navy, Mar. 30, 1916; Boske *v.* Comingore, 177 U. S., 461; file 12475-52:1, Aug. 7, 1914.) *See* General Order No. 121, paragraph 18.

24. **Subpœnas.** *See* GENERAL ORDER No. 121, SEPT. 17, 1914, 23.
25. **Witnesses desired.** *See* GENERAL ORDER No. 121, SEPT. 17, 1914, 15, 16.

GENERAL ORDER NO. 150, JUNE 14, 1915. *See also* NAVAL MILITIA.

1. **Oath**—The Naval Militia should adhere strictly to the form of oath provided in General Order No. 150, June 14, 1915. If each State were permitted to change the oath prescribed, in various ways which it might think still met the requirements, uniformity would at once be gone and there would be irreconcilable chaos. (File 3973-109:4, Sec. Navy, Aug. 31, 1915; C. M. O. 29, 1915, 8.)
2. **Physical examination.** *See* NAVAL MILITIA, 29.

GENERAL STOREKEEPER, ASSISTANT.

1. **Drunkenness on duty**—Tried by general court-martial. (C. M. O. 5, 1915.)

GENERAL SUMMARY IN COURT-MARTIAL ORDERS.

1. **Explained**—Commencing with Court-Martial Order No. 35, 1915, the arrangement of the "General summary" following the principal tabulation of general court-martial cases reviewed by the department during the month has been changed.

The first column, as theretofore, represents the principal offenses. These offenses are in most cases abbreviations of the charges and therefore their phraseology should not be followed by convening authorities in preparing charges for trials.

The figures opposite each offense represent the number of cases in which men were tried for that offense. It will be noted that the total of these figures is greater than the total number of cases tried. This is explained by the fact that some men were tried on more than one charge. (C. M. O. 42, 1915, 7.)

GIFTS TO GOVERNMENT.

1. **Congress must authorize**—Without an act of Congress authorizing it, a gift of pay (or half pay) of an officer can not be accepted by the Government. Same, in case of gift of sailboat to Naval Academy, and of yawl presented for use of midshipmen at Naval Academy. (File 13673-1442:1, J. A. G., Jan. 13, 1912. *See also* File 3442-3, Oct. 22, 1906; 1742-9, April 18, 1907.)
2. **Pay**—Gift of pay or half pay. *See* GIFTS TO GOVERNMENT, 1.
3. **Prizes, cash**—To be competed for by enlisted men on duty in Canal Zone. Accepted, but regarded as "informal and unofficial." (File 1742-9, Sec. Navy, Apr. 18, 1907.)
4. **Sailboat**—To Naval Academy—Sailboat of the Boston "Knock-about" type. (File 3442-3, J. A. G., Oct. 22, 1906.) *See also* GIFT TO GOVERNMENT, 1.
5. **Silver service**—The act of May 20, 1908 (35 Stat., 171), provides for the acceptance by the Secretary of the Navy of silver service, etc., for ships presented by States.
6. **Yawl.** *See* GIFTS TO GOVERNMENT, 1.

GIN. *See* C. M. O. 56, 1880.

Digitized by Google

GIST. *See also* WORDS AND PHRASES.
1. **"Absence from station and duty without leave."** *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 19.
2. **Desertion.** *See* DESERTION, 54.
3. **Embezzlement.** *See* EMBEZZLEMENT.
4. **Perjury.** *See* PERJURY, 4.

GOLD.
1. **Transportation of**—In Government ships. File 27673-342, J. A. G., Dec. 23, 1915; 6739-185, J. A. G., Oct. 9, 1915.

GOOD-CONDUCT MEDALS.
1. **Extension of enlistments**—Marine Corps. File 3980-1255, August, 1916. *See also* MARINE CORPS, 37; R-4172 (1) as amended.

GOOD NAME OF NAVAL SERVICE. C. M. O. 7, 1912, 3; 5, 1913, 4.

GOUGING.
1. **Fraudulently obtaining examination papers in advance**—The accused (officer under instruction) was tried under "Scandalous conduct tending to the destruction of good morals" for obtaining without permission from proper authority, and by corrupting and bribing with money an employee in printing office, a copy of the questions to be propounded to the members of the class at examination, and willfully and fraudulently retaining the copy, thereby obtaining an unfair advantage of the other members of the class. C. M. O. 56, 1888. *See also* 13 J. A. G. 458, Aug. 18, 1905; BLOTTER.
2. **Gunner**—Cheating while undergoing a written professional examination—Tried by general court-martial and dismissed. *See* BLOTTER, 1.
3. **Midshipmen**—Obtaining a copy of examination questions in advance. File 5252-73, J. A. G., Oct. 1, 1915, Sec. Navy, Oct. 2, 1915. *See also* MIDSHIPMEN, 22.
4. **Officer.** *See* GOUGING, 1; OFFICERS, 13.

GOVERNMENT CONTRACTORS.
1. **Bonds**—Recommending the adoption of the system of annual bonds to accompany contracts for the furnishing of naval supplies in cases where such procedure is deemed advantageous to the Government. File 17271-4, J. A. G., May 22, 1908.
2. **Chief commissary steward**—Tried by general court-martial for receiving a commission from. C. M. O. 69, 1903.
3. **Chief Sailmaker**—Tried by general court-martial for recommending acceptance of supplies delivered by a contractor, which said supplies were not in accordance with the specifications governing purchase. C. M. O. 4, 1908.
4. **Illegal and unauthorized agreement with**—By inspector of machinery. C. M. O. 41, 1915.
5. **Investigation**—An officer was detailed by Secretary of the Navy to investigate and ascertain whether any person in the naval service had originated or circulated reports or rumors by means of the public press concerning the relations between an officer and Government contractors, and was authorized to administer oaths to witnesses under R. S. 183. File 26251-8827:5; 16711-3, July 12, 1911. *See also* OATHS, 25.
6. **Officers**—Employment by. *See* RETIRED OFFICERS, 28, 31, 34-37.

GOVERNMENT HOSPITAL FOR THE INSANE.
1. **Allotments by patients.** *See* ALLOTMENTS, 3, 4.
2. **Allowances for prisoners and patients at**—Where certain articles are essential for the comfort and welfare of general court-martial prisoners confined in the Government Hospital for the Insane, the naval medical officer is authorized to forward a certificate, setting forth the articles desired, to the commandant, navy yard, Washington, D. C. The commandant has authority to approve the purchase of these articles not to exceed three dollars per month, the amount excepted by the court-martial sentence for "necessary prison expenses"; if there is no money due such prisoners these articles will be charged to "Pay, miscellaneous," in accordance with the act of February 16, 1909, section 13 (35 Stat., 622).

   Naval patients not undergoing punishment when competent to sign pay receipts for such articles will be allowed to draw the same from pay due, and the commandant is authorized to approve such purchases upon certification of the naval medical officer that such patients are competent to sign pay receipts for nominal amounts necessary to the comfort and welfare of such patients.

Digitized by Google

There is no authority whereby patients not undergoing sentence and who are legally incompetent to sign such pay receipts can draw such sums unless a guardian or committee has been appointed. File 10060-61, Sec. Navy, June 3, 1915. *See also* File 8528-410, J. A. G., June 4, 1914; 10060-14, Sec. Navy, Jan. 30, 1911; 10060-46, Sec. Navy, June 12, 1914; C. M. O. 22, 1915, 8.

3. **Discharge.** *See* DISCHARGE, 25.
4. **Officers**—The department has authority under the law to recommit an officer to the Government Hospital for the Insane after his discharge therefrom has been ordered by the Supreme Court of the District of Columbia in accordance with the finding of a jury that he is of sound mind. However, to avoid placing itself in the position of disregarding the court's action sufficient time should elapse and new evidence be obtained, so that a second habeas corpus proceedings could be successfully met. File 8528-327, Apr. 18, 1911. *See also* R. S., 761.
5. **Same**—Where the Supreme Court of the District of Columbia decided that an officer of the Navy was entitled to his discharge from the Government Hospital for the Insane, but the Chief Justice agreed to withhold the signing of an order until the Navy Department could be communicated with and be heard on the subject, the Navy Department ordered the officer in question to a naval hospital for treatment, and decided to take no further action in the case. (File 8528-327:2, Jan. 31, 1911. *See also* R. S., 761.)

Insane persons in the Navy lawfully committed by the Secretary of the Navy to the Government Hospital for the Insane should continue to be held by the superintendent of that hospital until the court orders otherwise or until they are cured. File 26251-4927:10, July 8, 1911, quoting letter from Department of Justice to the Interior Department, dated Mar. 28, 1912.

6. **Pay while at.** File 10060-74:2, Sec. Navy, June 19, 1916.

GOVERNMENT RESERVATIONS.

1. **Jurisdiction.** *See* JURISDICTION, 12, 13, 22, 23, 83-85, 91, 95, 96, 105, 108, 117, 119-122.

GOVERNORS OF STATES.

1. **Requisition**—Necessary in certain cases. *See* GENERAL ORDER No. 121, Sept. 17, 1914, 10.

GRADE.

1. **Additional number in**—Date of promotion. *See* ADDITIONAL NUMBERS.
2. **Office of Chief of Bureau**—Is not a grade. *See* BUREAU CHIEFS.

GRADE AND RANK.

1. **Distinguished.**—"The distinction between rank and grade in both the Army and Navy" is well understood. (26 Op. Atty. Gen. 59.)

"Grade expresses one of the divisions or degrees in the particular department or branch of the service according to which officers therein are classified or graded; and rank, which originally signified that which determines the right to command, and is still an inseparable incident to such right, expresses the position of officers of different grades, or of the same grade in point of authority, precedence, or the like of one over another." (16 Op. Atty. Gen. 416.)

The words "office" and "grade" have been construed as synonymous and as something different from "rank" (20 Op. Atty. Gen. 358; 19 Op. Atty. Gen. 169), although it has been judicially held that "grade" may refer to a step or degree in either "office" or "rank," and it has also been given other interpretations, as for example, that it refers to steps or degrees in the pay attached to an office or rank.

The words "grade" and "rank" are sometimes used synonymously (16 Op. Atty. Gen. 416), and the precise meaning thereof in any case may be governed by other language in connection with which used, or surrounding circumstances from which the legislative intent may be plainly gathered.

Thus, in the same statute, the word "grade" where used in different connections has been held to mean "rank" in one instance and "office" in another. (*See* 22 Op. Atty. Gen. 47, construing R. S. 422.)

For twenty-four years the word "grade" as used in the Act of July 28, 1892 (27 Stat., 321) has been construed in practice by the Navy Department as synonymous with "rank." File 26521-144:1, Sec. Navy, July 10, 1916.

GRAFT.

1. **Chief commissary steward**—Receiving bribes from Government contractors. C. M. O. 69, 1903.
2. **Civil employees**—Pay roll. C. M. O. 129, 1898.
3. **Petty officer,** by—Ship's store. C. M. O. 28, 1914.

Digitized by Google

GRAND JURY.

1. **Presentment and indictment by grand jury.** *See* CONSTITUTIONAL RIGHTS OF ACCUSED, 13.
2. **Secrecy**—By the policy of the law the investigations and deliberations of the grand jury are conducted in secret, and in the absence of statutes the grand jury is not bound to keep a record of the evidence before it. File 14625-183:17, Sec. Navy, Apr. 14, 1913.

GRATUITY, DEATH. *See* DEATH GRATUITY.

GRATUITY, FOUR MONTHS. *See* File 28550-20.

GRATUITY, ON DISCHARGE. *See* EXEMPTIONS IN SENTENCES.

GRAVAMEN.

1. **"Culpable"**—Not gravamen of charge of "Culpable inefficiency in the performance of duty." C. M. O. 4, 1914; G. O. 68, Dec. 6, 1865. *See also* CULPABLE.
2. **Desertion.** C. M. O. 31, 1915, 15. *See also* DESERTION, 54.
3. **Eliminated by court.** *See* FINDINGS, 40.
4. **Fraudulent enlistment.** *See* FRAUDULENT ENLISTMENT, 23, 49.
5. **Referred to.** C. M. O. 17, 1910, 4; 21, 1910, 8; 7, 1912, 2; 8, 1912, 3; 20, 1912, 4.

GROG.

1. **Grog ration abolished**—Grog, spirit ration, abolished from September 1, 1862, by act of July 15, 1862, sec. 4. (12 Stat. 565.) *See also* Marine Corps Gazette, March, 1916, pp. 52-53.

GROUNDING SHIP.

1. **Officers**—Tried by general court-martial. C. M. O. 20, 1883; 15, 1905; 17, 1913; 32, 1913; 2, 1914; 3, 1914; 2, 1915; 3, 1915; 26, 1916; 27, 1916; 31, 1916. *See also* 13 J. A. G., 96. File 7893-03, J. A. G., Sept. 22, 1903.

GUAM.

1. **Acting governor**—An officer having been "duly appointed to act" as governor is, while serving under such appointment, entitled to the honors due to that office. File 4451. *See also* ACTING APPOINTMENTS, 1.
2. **Banishment**—Sentence of banishment imposed by civil court. *See* BANISHMENT, 1.
3. **Citizenship**—*See* ALIENS, 7; CITIZENSHIP, 20.
4. **Customs.** File 10304-03, J. A. G., Jan. 25, 1904.
5. **Governor**—Powers of—The naval governor of Guam "exercises plenary powers, subject to the supervision of the Secretary of the Navy, and, of course, of the President, over all public affairs of the island of Guam, including the organization and procedure of the local courts in civil and criminal matters"; his authority extends "to the granting of reprieves and pardons, one of the highest prerogatives of sovereignty, and executive power;" and includes "the modification of laws and the abolition and institution of courts"; he "has authority to prescribe the form of penal code to be administered and to modify said code at his pleasure, subject to the approval of his superiors." File 9351-976, Dec. 3, 1910.
6. **Same**—Powers of—In the absence of congressional legislation, authority of the naval governor of Guam is supreme. He is accordingly authorized to designate place of confinement for prisoners of the naval government of Guam, within territory under sovereignty of the United States. His action in designating a prison in the Philippine Islands as a place of confinement meets with the approval of the Secretary of the Navy in the case of a civilian convicted by the civil court of Guam of misappropriation of public funds while postmaster at Guam. File 9351-1436: 4, June 3, 1915.
7. **Jurisdiction**—Of naval and civil courts. *See* File 9463—03, J. A. G., Dec. 19, 1903.
8. **Laws.** *See* File 9351-976; 15 J. A. G. 42; GUAM, 6.
9. **Postmaster**—Convicted by civil courts and imprisoned in the Philippine Islands. *See* GUAM, 6.
10. **Reports**—An Executive order of May 11, 1907, directed that on and after June 1, 1907, all official communications from and to executive officers of Samoa and Guam shall be transmitted through the Secretary of the Interior in such manner and under such regulations as he may prescribe. It will be entirely satisfactory to the Interior Department to receive copies of the official reports relative to Guam and Samoa instead of the originals direct. (File 21393-26, June 4, 1907.)

Digitized by Google

The governors of Guam and of Tutuila, Samoa, are directed to forward all reports, etc., relating to territorial matters, as distinguished from matters of purely naval administration, to the Navy Department in duplicate in order that one copy may be forwarded to the Secretary of the Interior. File 21393-26, June 6, 1907.

GUARANTY.

1. **Lost**—Made by Government contractor to Inspector of Machinery. C. M. O. 41, 1915.

GUARD.

1. **Duty**—Of member of guard when prisoner attempts to escape. *See* MANSLAUGHTER, 9.

GUARD DUTY.

1. **Army.** *See* MANSLAUGHTER, 9.
2. **Marine Corps.** *See* MANSLAUGHTER, 9.
3. **Sentence**—Under no circumstances shall an offender [marine] be placed on guard, or required to perform extra guard duty, as a punishment whether serving afloat or on shore. (R-4184.) In a case where a general court-martial, among other things, sentenced a marine to "perform extra guard duty" the department remitted that part of the sentence "for the reason that the imposition of extra tours of guard duty as a penalty is inconsistent with the importance of such service, and tends to degrade that honorable and responsible duty of the soldier." Extra duty of that character should not, under any circumstances, be imposed as a punishment. C. M. O. 26, 1882.

GUARDIAN.

1. **Ad litem**—Appointment of guardian *ad litem* not necessary in a criminal case. File 26251-6020; 11, Sec. Navy, July 7, 1913.
2. **Death gratuity.** *See* DEATH GRATUITY, 13.
3. **Government Hospital for the Insane**—Patient at. *See* GOVERNMENT HOSPITAL FOR THE INSANE, 2.
4. **Infants**—Allotments should be made to guardians. *See* ALLOTMENTS, 5.
5. **Same**—Consent of guardian for enlistment of. C. M. O. 22, 1915, 9; 49, 1915, 25. *See also* FRAUDULENT ENLISTMENT, 57; MINORS, 10, 11.

GUEST.

1. **Drunk**—Drunkenness is aggravated by fact that one is an invited guest at a club. C. M. O. 9, 1906, 1.
2. **Invited guest**—In a navy yard should be treated with courtesy. C. M. O. 53, 1910, 2.

GUILTY.

1. **Evidence**—Inconsistent with plea of "guilty." *See* STATEMENT OF ACCUSED, 15-16.
2. **In a less degree than charged.** *See* GUILTY IN A LESS DEGREE THAN CHARGED.
3. **Judge advocate**—Not to suggest that accused plead "Guilty." *See* JUDGE ADVOCATE, 34.
4. **Plea of**—Precludes a regular defense. *See* ACCUSED, 38; EVIDENCE, 50-51.
5. **Same**—Waives defects in specifications. *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 29; ACCUSED, 56.
6. **Statement of accused**—Inconsistent with his plea of guilty. *See* STATEMENT OF ACCUSED.
7. **Waiver**—Of defects by plea of guilty. *See* G. C. M. Rec. 21478a, p. 11; GUILTY, 5.

GUILTY KNOWLEDGE. *See* C. M. O. 129, 1898, 6.

GUILTY IN A LESS DEGREE THAN CHARGED.

1. **"Absence from station and duty after leave had expired"**—On charge of "Desertion." C. M. O. 49, 1915, 11. *See also* C. M. O. 53, 1914, 5.
2. **"Absence from station and duty without leave"**—Charged with "Scandalous conduct tending to the destruction of good morals" and found guilty of. C. M. O. 11, 1905, 2.
3. **"Assaulting with a deadly weapon and wounding another person"**—Found proved except "willfully and maliciously" and "assault." *See* ASSAULT, 28.
4. **Assault and striking, charged with**—Court found proved except "maliciously" and "assault." *See* ASSAULT, 28.

Digitized by Google

5. **"Being under the influence of liquor on guard"**—As a less degree finding upon charge of "Drunkenness on guard," is to be regarded as substantially a finding upon the charge of "Drunkenness on guard." C. M. O. 209, 1901, 3. *But see* C. M. O. 26, 1905, 1. *See also* GUILTY IN A LESS DEGREE THAN CHARGED, 23.
6. **"Conduct to the prejudice of good order and discipline"**—Is lesser degree of the offense of "Assaulting with a deadly weapon and wounding another person in the service." File 26251–6151:3, J. A. G., May 24, 1912.
7. **Same**—Is a lesser degree than "Refusing to obey the lawful order of his superior officer." C. M. O. 37, 1909, 3.

   NOTE.—Limitation of punishment for "Conduct to the prejudice of good order and discipline" has since been raised to 15 years, etc.
8. **Conniving in an attempt to lay plans toward the escape of a prisoner, and not representing same to his commanding officer"**—Charged with "Enticing a prisoner to escape" and found guilty of. C. M. O. 48, 1889.
9. **Court is not obliged to accept plea**—Court is not obliged to accept plea of guilty in less degree than charged, but may proceed to try for charge, and all matters of evidence relating to the charge and specification should be admitted as though such plea had not been made. However, where court decides to proceed with trial for the greater offense, the plea of guilty in less degree than charged should be rejected, and the accused advised by the judge advocate to substitute plea of "Not guilty," and if he desires to do so, the court shall direct the trial to proceed as if he had offered the latter plea, thus putting the prosecution to the proof of every allegation contained in the specification. File 9919–03, Nov. 30, 1903. *But see* C. M. O. 25, 1902, 1.
10. **Same**—Should the accused plead "guilty in a less degree than charged," the president shall warn him that he thereby precludes himself from the benefits of a regular defense as to the acts confessed by such plea. (Forms of Procedure, 1910, p. 22.) *See* WARNING, 2.
11. **Same**—Save in exceptional cases, a court-martial should try the accused for the offense as charged—The court, in general, should reject the plea of "guilty in a less degree than charged" and try the accused for the offense as charged. C. M. O. 22, 1903; 8, 1905, 3; 37, 1909, 8; 14, 1910, 6; 30, 1910, 5; 1, 1911, 4; 10, 1912, 7; 26, 1912, 4; 16, 1913, 4.
12. **"Culpable inefficiency in the performance of duty"**—Negligence in performance of duty" is a lesser degree of. C. M. O. 12, 1910, 1; 14, 1912, 2; 4, 1913, 54.
13. **Same**—"Negligent in obeying orders" is a lesser degree of. C. M. O. 12, 1904, 3.
14. **Same**—Found guilty of "Inefficiency in the performance of duty." C. M. O. 5, 1906, 1.
15. **"Culpable negligence and inefficiency in the performance of duty"**—Found guilty of "Neglect of duty." C. M. O. 6, 1911, 3; 8, 1914, 2.
16. **Same**—Charged with "Culpable inefficiency in the performance of duty," found guilty of "Inefficiency in the performance of duty." C. M. O. 4, 1914, 2.
17. **Desertion**—In case the charge is "Desertion" and the accused desires to admit the offense of "Absence from station and duty without leave" or "Absence from station and duty after leave had expired" only, the proper form of pleading, if the facts set forth in the specification are true except as to intent and the accused desires to admit them without proof, is as follows: To the specification—Guilty except to the words "desert" and "in desertion," and to those words, not guilty; and for the excepted words should be substituted, respectively, the words "absent himself without leave," and "so absent" and to such words, guilty. To the charge—Guilty in a less degree than charged, guilty of "Absence from station and duty without leave" or "Absence from station and duty after leave had expired."
18. **Same**—Upon examination of the record of proceedings of a general court-martial in the case of an enlisted man, it appears that the accused pleaded as to the specification of the first charge "guilty except to the words implying desertion, and to such words not guilty," and to the first charge "guilty in a less degree than charged, guilty of absence without leave." The court accepted this plea and then proceeded to the examination of a witness to prove the offense of desertion. The court erred in accepting this plea and yet proceeding with the trial upon the charge as preferred. When the court decided to proceed with the trial of the accused for the greater offense of "Desertion," admissions previously made in his plea should have been regarded as withdrawn, thus putting the prosecution to the proof of every allegation contained in the specification, and the judge advocate should then have advised the accused to substitute for his plea that of "not guilty," and had he declined to do so, the court should have directed the trial to proceed as if he had offered the latter plea. C. M. O. 13, 1903, 4.

Digitized by Google

19. **Same**—The court should not, except in exceptional cases, accept plea of guilty in a less degree than charged. C. M. O. 22, 1903.
20. **Same**—Charged with "Desertion" found guilty of "Unauthorized absence." *See* GENERAL ORDER No. 110, JULY 27, 1914, 8; FINDINGS, 2.
21. **Same**—Charged with "Desertion"—Found guilty in a less degree than charged. *See* GUILTY IN A LESS DEGREE THAN CHARGED, 1, 17, 18.
22. **"Disobeying the lawful order,"** etc.—Charged with, and found guilty of "Failure to obey the lawful order," etc. C. M. O. 3, 1912, 3.
23. **"Drunkenness on guard"**—"Being under the influence of liquor on guard" is regarded substantially as a finding upon. C. M. O. 209, 1901, 3. *But see* C. M. O. 26, 1905, 1.
24. **"Enticing a prisoner to escape"**—Charged with and found guilty of "Conniving in an attempt to lay plans toward the escape of a prisoner, and not representing same to his commanding officer." C. M. O. 48, 1889.
25. **"Failure to obey the lawful order,"** etc.—Found guilty of, when charged with "Disobeying the lawful order," etc. C. M. O. 3, 1912, 3.
26. **"Improperly hazarding the vessel under his command, in consequence of which she was run upon a shoal and seriously injured"**—Charged with and found guilty of "Improperly hazarding the vessel under his command, in consequence of which she was run upon a shoal and injured." C. M. O. 2, 1914, 2.
27. **"Inefficiency in the performance of duty"**—Found guilty of, when charged with "Culpable inefficiency in the performance of duty." C. M. O. 5, 1906, 1.
28. **Judge advocate**—Should not advise court to accept plea of guilty in a less degree than charged. C. M. O. 29, 1914, 6-7. *See also* JUDGE ADVOCATE, 123, 124.
29. **Kindred nature**—It is well settled that a court-martial may find a prisoner guilty in a less degree than charged, but this is only in cases where there is a kindred nature between the offense charged and the offense found proved; as, for instance, between "Murder" and "Manslaughter," or between "Desertion" and "Absence from station and duty without leave." G. O. 68, Dec. 6, 1865.
30. **"Malingering"**—Is not lesser degree of "Refusing to obey the lawful order of his superior officer." C. M. O. 37, 1909, 3.
31. **Manslaughter**—Found guilty on charge of "Murder." C. M. O. 12, 1911, 5.
32. **"Murder"**—Charged with and found guilty of "Manslaughter." C. M. O. 12, 1911, 5.
33. **"Neglect of duty"**—Charged with and found guilty of "Remissness in the performance of duty." C. M. O. 10, 1906, 1.
34. **Same**—Found guilty of "Violating a lawful regulation," etc., when charged with "Neglect of duty." (Returned to court which found guilty of offense as charged.) C. M. O. 9, 1913, 1.
35. **Same**—Found guilty of "Neglect of duty," on a charge of "Culpable negligence and inefficiency in the performance of duty." C. M. O. 6, 1911, 3.
36. **"Neglect of duty while on guard"**—Charged with "Sleeping on guard" and found guilty of. C. M. O. 11, 1889.
37. **"Neglecting to discharge a pecuniary obligation"**—Charged with "Scandalous conduct tending to the destruction of good morals" and found guilty of. C. M. O 12, 1899, 3.
38. **"Negligence in performance of duty"**—Is a lesser degree of "Culpable inefficiency in the performance of duty." C. M. O. 12, 1910, 1; 14, 1912, 2; 4, 1913, 54.
39. **"Negligent in obeying orders"**—Charged with "Culpable inefficiency in the performance of duty" and found guilty of. C. M. O. 12, 1904, 3.
40. **Refusing to obey the lawful order of his superior officer**—Irregular where court found accused guilty of "Malingering" on a charge of "Refusing to obey the lawful order of his superior officer." It would have been proper for the court to have found the accused guilty of "Conduct to the prejudice of good order and discipline." C. M. O. 37, 1909, 3.

    NOTE.—The limitations of punishment for "conduct to the prejudice of good order and discipline" has been increased to 15 years.
41. **"Remissness in the performance of duty"**—Charged with "Neglect of duty" and found guilty of. C. M. O 10, 1906, 1.
42. **"Scandalous conduct tending to the destruction of good morals"**—Charged with and found guilty of "Absence from station and duty without leave." C. M. O. 11, 1905, 2.
43. **Same**—Charged with and found guilty of "Neglecting to discharge a pecuniary obligation." C. M. O. 12, 1899,3

Digitized by Google

44. **"Sleeping on guard"**—Charged with and found guilty of "Neglect of duty while on guard." C. M. O. 11, 1889.
45. **Specifications**—"Circumstances which are embodied in the charges and upon which constructive guilt is charged, are necessarily dependent upon motive, by which the degree of criminality is determined. It consequently rests with the court to ascertain this particular degree, and declare it by their finding; and the verdict may be special, as it is not necessary that it be general, as to the guilt or acquittal of the prisoner. That is, a portion of the specification may be found, and other points declared void of criminality, or the entire circumstances set forth be proved, and yet the prisoner be declared without guilt." (De Hart, p. 180.) C. M. O. 5, 1912, 11. *See also* FINDINGS, 27.
46. **"Through inattention and negligence suffering a vessel of the Navy to be run upon a shoal and seriously injured"**—Charged with, and found guilty of "Through inattention and negligence suffering a vessel of the Navy to be run upon a shoal and injured." C. M. O. 2, 1914, 2.
47. **"Through negligence suffering a vessel of the Navy to be run upon a reef and stranded," and found guilty of**—"Through negligence due to error of judgment, suffering a vessel of the Navy to be run upon a reef and stranded." C. M. O. 29, 1903.
48. **"Unauthorized absence"**—Charged with "Desertion" found guilty of "Unauthorized absence." *See* GENERAL ORDER NO. 110, JULY 27, 1914, 8; FINDINGS, 2.
49. **"Violating a lawful regulation," etc.**—Found guilty of, when charged with "Neglect of duty." Returned to court which found guilty of offense as charged. C. M. O. 9, 1913, 1.
50. **"Willful injury"**—Charged with "Willful destruction" and court found "Willful injury" proved instead. C. M. O. 37, 1912, 1.

GUILTY BUT WITHOUT CRIMINALITY. *See* DESERTION, 77; FINDINGS, 69.

GUILTY BUT WITHOUT CULPABILITY. *See* ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED, 9; FINDINGS, 44; File 26251-12159, Sec. Navy, Oct. 30, 1916, p. 4.

GUN POINTER.
1. **Loss of pay**—For both summary courts-martial and deck courts should be based upon the actual pay, not including extras for mess cook, gun pointer, acting coxswain, etc. C. M. O. 24, 1909, 3.

GUNBOATS.
1. **Asiatic station**—Commander in chief stated he did not wish to discourage commanding officers of small gunboats of Asiatic Fleet from taking such risks in the navigation of the rivers on which they are employed as are necessary and justifiable, but, on the contrary, desired to encourage their familiarizing themselves as far as possible with all the difficulties of navigation they might be called upon to surmount. C. M. O. 19, 1910, 3. *See also* NAVIGATION, 86, 88.

"GUNBOAT COMMISSIONS." *See* COMMISSIONS, 23, 29.

GUNNERS.
1. **Acting gunner.** *See* ACTING GUNNER, 1.
2. **Cheating during examination**—Tried by general court-martial and dismissed. *See* BLOTTER, 1.
3. **Command**—Exercise of. *See* COMMAND, 21.
4. **Drunk on duty.** C. M. O. 7, 1879.
5. **Gouging.** *See* BLOTTER, 1.
6. **Promotion**—To ensign. *See* APPOINTMENTS, 18.
7. **Theft.** C. M. O. 8, 1879.

HABEAS CORPUS. *See also* FRAUDULENT ENLISTMENT; JURISDICTION.
1. **Appeals.** *See* HABEAS CORPUS, 18.
2. **Arrest of petitioner**—After discharge—An enlisted man discharged on habeas corpus proceedings was afterwards arrested on charge of "Perjury," in connection with sworn statements when enlisting, and held for trial in civil courts of the United States at the instance of the department. (File 5939-1, Oct. 12, 1906.) Later prosecution was discontinued because of the peculiar circumstances of hardship it involved, the Secretary of the Navy concurring in the United States attorney's action to this effect. (File 5939-7, Feb. 18, 1907.) *See also* U. S. *v.* Churg Shee, 71 Fed. Rep. 277.
3. **Charges and specifications**—Sufficiency of can not be reviewed. (Ex parte Dickey, 204 Fed. Rep. 322.)

Digitized by Google

4. **Contempt of civil court**—Enlisted man failing to make a return to writ of habeas corpus. *See* CIVIL AUTHORITIES, 11.
5. **Desertion.** *See* DESERTION; HABEAS CORPUS, 16.
6. **Drunk at time of enlistment**—An enlisted man arrested by a civil officer as a deserter from the Navy will not be discharged on habeas corpus upon the allegation that he was intoxicated at the time of enlistment. "It seems to me illogocal to say that a man can commit a crime and when arrested obtain a discharge on the ground that the original enlistment was not regular or proper." (In re Hamilton and Carroll, Superior Court, Fulton County, Ga., Atlanta Circuit, File 7969-04; 7988-04. *See also* In re McVey, 23 Fed. Rep. 878; In re Grimley, 137 U. S. 147.)
7. **Errors in procedure**—Can not be reviewed by civil courts. (In re McVey, 23 Fed. Rep. 878.)
8. **Federal Courts.** *See* GENERAL ORDER NO. 121, SEPT. 17, 1914, 11.
9. **Fraudulent enlistment**—Concealing discharge obtained by habeas corpus proceedings. *See* FRAUDULENT ENLISTMENT, 17.
10. **Same**—*De facto* enlistment—A fraudulent enlistment is an enlistment and subject to jurisdiction of naval courts-martial. *See* FRAUDULENT ENLISTMENT, 22, 35.
11. **Same**—Drunk when enlisting. *See* HABEAS CORPUS, 6.
12. **Ineffective though discharged.** *See* JURISDICTION.
13. **Judge advocate**—Present in closed court. *See* JUDGE ADVOCATE, 105.
14. **Military guard**—Charged with "Manslaughter." (U. S. *v.* Lipsett, 156 Fed. Rep. 71; U. S. *v.* Clark, 31 Fed. Rep. 710.) *See* MANSLAUGHTER, 9.
15. **Minors**—Fraudulently enlisting by misrepresenting age, can not set up their fraud as a defense and civil courts will not interfere. *See* FRAUDULENT ENLISTMENT, 57, 60.
16. **Same**—An enlisted man on his trial for "Desertion"—Admitted all the facts as to desertion and the evidence showed that he was enlisted when only 16 years of age without his parents' consent or knowledge. The accused contended that his enlistment was illegal and void. Such a man if found guilty and sentenced would not be released on habeas corpus proceedings. C. M. O. 217, 1902, 3-4.
17. **Officer**—Acting as counsel for accused should not institute habeas corpus proceedings or a suit for damages against members. File 8464-03. *See also* COUNSEL, 29, 36.
18. **Opinion**—Of the court should be forwarded to Judge Advocate General—The Forms of Procedure, 1910, page 76, provides: "Should the court order the discharge of the party, the officer making the return, or counsel, should note an appeal pending instructions from the Navy Department, and he shall report to the Judge Advocate General of the Navy, the action taken by the court and forward a copy of the opinion of the court as soon as it can be obtained."

    The above instructions, which "have full force and effect as regulations" (Navy Regulations, 1913, R-901 (3)), should be followed strictly in every case in which a decision adverse to the United States is rendered in habeas corpus cases. File 26251-9965:21, J. A. G., Oct. 4, 1915; C. M. O. 35, 1915, 9.
19. **Procedure, errors in.** *See* HABEAS CORPUS, 7.
20. **Review of courts-martial by civil courts.** *See* JURISDICTION, 18, 28, 35-39.
21. **Sentences**—If sentence imposed is not legally void civil courts will not review.
22. **Service of writs.**—*See* GENERAL ORDER NO. 121, SEPT. 17, 1914, 11, 12.
23. **State courts.** *See* GENERAL ORDER NO. 121, SEPT. 17, 1914, 12.

HAGUE CONFERENCE. *See* RETIRED OFFICERS, 38.

HAIR OF PRISONERS CLIPPED. *See* PRISONERS, 4.

HAITI.

1. **Captains of the port**—Detail of chief pay clerks and pay clerks. File 5460-84, Aug. 16, 1916.
2. **Collectors of custom**—Detail of chief pay clerks and pay clerks. File 5460-84, Aug. 16, 1916.
3. **Enlisted man**—Tried by general court-martial for offense committed while on shore duty. C. M. O. 10, 1915, 3. *See also* C. M. O. 49, 1915, 12.
4. **Gendarmerie.** *See* OFFICERS OF THE UNITED STATES, 1.
5. **General court-martial**—Convening of, on foreign territory. C. M. O. 42, 1915, 10. *See also* C. M. O. 48, 1915; JURISDICTION, 53.
6. **Loss of property**—Claim of the director general of the Haitien Wharf Company for certain packages claimed to have been lost by said company during the landing of U. S. Naval Forces at Port-au-Prince, Haiti, on or about August 13, 1915. File 26893-206, Sec. Navy, Nov. 16, 1915.

Digitized by Google

7. **Military commissions.** *See* MILITARY COMMISSIONS; PROVOST, 1.
8. **Officer**—Tried by general court-martial at Marine Barracks, La Caserne, Port-au-Prince, Haiti. C. M. O. 48, 1915. *See also* C. M. O. 42, 1915, 10.
9. **Pay clerks, etc.**—On duty in Haiti. C. M. O. 30, 1916, 8.
10. **Provost.** *See* MILITARY COMMISSIONS; PROVOST, 1.

HALF-WITTED. C. M. O. 49, 1910, 17. *See also* INSANITY, 19.

HANDWRITING.

1. **Acquittal**—Should be recorded in handwriting of judge advocate. *See* ACQUITTAL, 17.
2. **Expert witness.** *See* EXPERT WITNESSES, 3.
3. **Findings**—To be in handwriting of judge advocate. *See* FINDINGS, 48–50; JUDGE ADVOCATE, 81.
4. **Genuineness of.** *See* HANDWRITING, 6.
5. **Identification of**—Handwriting of accused to prove him guilty of "Theft." C. M. O., 1, 1913, 6.
6. **Proof of**—In any proceeding before a court or judicial officer of the United States where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, court, or officer conducting such proceeding, to prove or disprove such genuineness. (Act, Feb. 26, 1913, 37 Stat. 683.)
7. **Sentences**—To be in handwriting of judge advocate. *See* SENTENCES, 52.
8. **Same**—In revision—To be in handwriting of judge advocate. *See* REVISION, 18, 33–36; SENTENCES, 92.
9. **Same**—Not to be typewritten. G. C. M. Rec. 22105; 22149.

HANGAR, DIRIGIBLE. *See* File 26842–8:4, Sec. Navy, July 15, 1916.

HARD LABOR.

1. **Confinement**—In all cases where the limitations of punishment for general courts-martial provide for confinement, hard labor during such confinement shall be included. (R–900 (8).) *See also* CONFINEMENT, 16.
2. **Extra police duties**—All sentences of general court-martial involving confinement should contain a provision that such confinement shall be at *hard labor* instead of involving the performance of extra police duties. C. M. O. 6, 1909, 2; 42, 1909, 6; 47, 1910, 4. *See also* CONFINEMENT, 17.
3. **Same**—Where a court-martial sentenced an accused to confinement at hard labor and also adjudged extra police duties the department remitted the performance of extra police duties stating in part, the inclusion of extra police duties "being manifestly inappropriate, as its execution in conjunction with confinement at hard labor would be both unnecessary and impracticable." C. M. O. 46, 1902, 1.
4. **Mandatory**—Sentences of general courts-martial including confinement shall contain a provision requiring that the person sentenced shall perform hard labor while so confined. C. M. O. 47, 1910, 4; 23, 1912, 4; G. C. M. Rec. 21161; 22745.
5. **Officers**—Imprisonment of dismissed officer in a penitentiary at hard labor. C. M. O. 173, 1902; 50, 1914. *See also* CONFINEMENT, 18. *See also* C. M. O. 10, 1916, where a Paymaster's Clerk, U. S. M. C., was sentenced to confinement in a prison or penitentiary without hard labor.
6. **Same**—Officer confined in penitentiary without hard labor. C. M. O. 15, 1908, 3.
7. **Pay clerk**—A pay clerk was sentenced by general court-martial to be dismissed and imprisonment at hard labor. Since the Limitation of Punishment did not provide for *hard labor* for the offense of which the accused had been convicted, the department remitted that part. C. M. O. 173, 1902.

"HAULING FIRES." C. M. O. 37, 1915.

HAVING LIQUOR IN HIS POSSESSION.

1. **Enlisted man**—Charged with. C. M. O. 63, 1892; 64, 1892.

HAWAII.

1. **Citizenship.** *See* CITIZENSHIP, 21.
2. **Customs**—Right of a collector of customs to enter upon a naval reservation without assent of commandant. File 3312–04, 3377–04, J. A. G., Apr. 14, 1904.
3. **General Order 121.** *See* GENERAL ORDER No. 121, SEPT. 17, 1914, 13.
4. **Woman**—Chief carpenter tried by general court-martial for improper relations with a Hawaiian woman. C. M. O. 21, 1915.

Digitized by Google

HAZING. *See also* MIDSHIPMEN.

1. **"Board of inquiry"**—Finding by—As to the issues of fact. *See* "BOARD OF INQUIRY," 1; HAZING, 6.
2. **"Brutal" hazing**—"Court-martial" may adjudge imprisonment. *See* HAZING, 6.
3. **"Court-martial"**—Of midshipmen—Discretion of superintendent and "approval" of Secretary of the Navy. *See* HAZING, 6; MIDSHIPMEN, 27.
4. **Same**—Composed of "not less than three commissioned officers." C. M. O. 31, 1915, 11. *See also* HAZING, 6; MIDSHIPMEN, 27.
5. **"Cruel" hazing**—"Court-martial" may adjudge imprisonment. C. M. O. 31, 1915, 11.
6. **Defined and discussed**—The policy of Congress is to leave the internal administration and discipline of the Naval Academy largely in the hands of the officials at the Academy.

   In this respect, no distinction is made by existing law between hazing and other offenses committed by midshipmen against good order and discipline, except that no midshipman may be dismissed for a single act of hazing without trial by "court-martial."

   No midshipman is to be tried by "court-martial" for hazing, except in the "discretion" of the Superintendent and with the "approval" of the Secretary of the Navy.

   The "court-martial" is to be ordered by the Superintendent of the Naval Academy, in cases of hazing, and is to be composed of "not less than three commissioned officers."

   The "court-martial" has discretion as to the sentence to be imposed upon conviction. While it may sentence the accused to dismissal in any case, and to imprisonment also in cases of "brutal or cruel" hazing, it is not mandatory to impose a sentence of dismissal or imprisonment in any case.

   The "court-martial's" finding and sentence are subject to review by the convening authority and the Secretary of the Navy, "as in the cases of other courts-martial." Although, perhaps, not necessary, it is advised that a sentence of suspension or dismissal be submitted to the President for confirmation.

   If the Superintendent does not desire to bring midshipmen to trial for hazing, then under the law no trail may be had, but the offense may be dealt with by the Superintendent without the intervention of a "court-martial." In that event, no midshipman could be dismissed for hazing except upon written charges by the Superintendent, an opportunity for written reply by the accused, a finding by a "board of inquiry" as to the issues of fact, and a decision by the Secretary of the Navy to dismiss the accused, which decision must have the "written approval of the President."

   Proceedings for dismissal without trial by "court-martial" can not be had for "a single act of hazing." The accused in such case must either be tried by "court-martial" or punished otherwise than by dismissal. The words "a single act of hazing" are to be taken in their literal sense. If an accused was guilty of but one "act" of hazing, he can not be dismissed without trial by "court-martial," notwithstanding that several different persons may have been victims of the "single act." Thus, one order obeyed by several midshipmen would be only a single "act" of hazing, although it might legally be more than one "offense." On the other hand, if one midshipman, in hazing another, gives several orders which are obeyed, this would constitute several "acts" of hazing although there was only one victim and the several distinct transactions occurred at the same place and very near each other in one continuing attempt to defy the law. (In connection with the above conclusions see act of June 23, 1874, 18 Stat. 203; act of Mar. 2, 1895, 28 Stat. 838; act of Mar. 3, 1903, 32 Stat. 1198; act of Apr. 9, 1906, 34 Stat. 104.) File 26223-925, J. A. G., Sept. 4, 1915; C. M. O. 31, 1915, 10-12. *See also* File 5252-43, J. A. G., Oct. 5, 1911. For the act of Apr. 9, 1906 (34 Stat. 104), *see* 14 J. A. G. 160.
7. **Midshipman**—Charged with. C. M. O. 12, 1913, 1-3; G. C. M. Rec. 25933 (1912).

   In the fall of 1885, a cadet at the Naval Academy was dismissed after trial by court-martial, for the offense of hazing (*see* 39 Executive Let. Book, 207). Subsequently, however, he was restored to the Naval Academy, it having been shown that his offense consisted in maltreating a candidate for admission to the Academy who had not at that time entered the fourth class, but was a visitor in the Academy grounds, and that such conduct was not "the offense commonly known as hazing" within the meaning of the act of June 23, 1874 (18 Stat. 203). File 10316-04, J. A. G., Jan. 12, 1905. *See also* 18 Op. Atty. Gen. 292.

   Midshipmen dismissed under the act of June 23, 1874 (18 Stat. 203). Act of Mar. 3, 1903 (32 Stat. 1198) construed with reference to the foregoing statute. File 8585-04, J. A. G., Oct. 13, 1904.

Digitized by Google

8. **Naval Academy, at.** *See* HAZING, 6.
9. **Powers of Secretary of Navy**—To dismiss. *See* MIDSHIPMEN, 80.
10. **Reappointment of midshipman dismissed for hazing.** *See* MIDSHIPMEN, 5, 70.
11. **"Single act of hazing"**—No dismissal without trial by "court-martial." *See* HAZING, 6.
12. **Same**—May be punished otherwise than by dismissal if no "court-martial." *See* HAZING, 6.
13. **Same**—The words "a single act of hazing" are to be taken in their literal sense. *See* HAZING, 6.

HEALTH RECORD. *See* C. M. O. 42, 1915, 2; File 4778-95, Sec. Navy, Dec. 9, 1916.

"HEREAFTER."

1. **Statutes**—While the word "hereafter" used in the provisions contained in appropriation acts is commonly indicative of permanent legislation, other language may have the same effect, where the purpose is clear. File 5942-192, Sec. Navy, March 12, 1915; C. M. O. 12, 1915, 12. *See also* Memo. J. A. G., March 5, 1915.

HERNIA.

1. **Operation for**—Not compellable. *See* SURGICAL OPERATIONS, 3, 6.

HEROISM.

1. **Officers**—Promotions. *See* PROMOTION.

HEARSAY EVIDENCE.

1. **Certificate of civil officer as.** *See* CERTIFICATES, 3-5.
2. **Court.**—Criticized for admitting evidence, which was clearly hearsay, over the objection of counsel for the accused. C. M. O. 41, 1909, 1. *See also* C. M. O. 65, 1907; 17, 1910, 11; 21, 1910, 16; 7, 1911, 9; 11, 1912, 2; 98, 1894, 2; 57, 1897, 2; 54, 1898; 19, 1915, 4.
3. **Defined and discussed**—The accused was charged with "Desertion" and pleaded not guilty to the charge and specification thereof. While a witness on the stand in his own behalf he testified that he left the service in order to go to North Wales for the purpose of claiming an inheritance left him upon the recent death of his mother, and that he intended returning to the United States and to the Marine Corps as soon as he might be able to adjust his affairs in North Wales. It is observed that he was asked the following question by the court:

"34. Q. Have you in your possession any papers to substantiate the evidence you have given?

"A. I have one here that is not much, but it will give some light on the subject."

The judge advocate objected to the introduction in evidence of the "paper" in question on the ground that it was not subject to cross-examination, but the record shows that the court overruled the objection and admitted the paper in evidence. This "paper" was a letter addressed to the accused. In the opinion of the department the court erred in its ruling upon the objection interposed by the judge advocate. As stated by the judge advocate in his objection, the paper was not subject to cross-examination and its admission was a clear violation of the rule against the admission of hearsay evidence. As stated in Greenleaf in his work on Evidence, sixteenth edition, Volume I, pages 182 and 183:

"The term 'hearsay' is used with reference to that which is written, as well as to that which is spoken, and in its legal sense it denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also in part on the veracity and competency of some other person. Hearsay evidence as thus described is uniformly held incompetent to establish any specific fact which in its nature is susceptible of being proved by witnesses who can speak from their own knowledge. That this species of testimony supposes something better which might be adduced in the particular case is not the sole ground of its exclusion. Its extrinsic weakness, its incompetency to satisfy the mind as to the existence of the fact, and the frauds which may be practiced under its cover combine to support the rule that hearsay evidence is totally inadmissible.

"Hearsay rule, then, is encountered whenever a testimonal assertion is offered in evidence without being subjected to oath and cross-examination. Thus three distinct groups of questions present themselves in connection with the hearsay rule, viz: (*a*) Is the hearsay rule applicable to the case in hand, i. e., is the evidence offered as a testimonial assertion? (*b*) Is there any exception to the hearsay rule to be made for the evidence offered? (*c*) If the hearsay rule is applicable, and if no recognized

Digitized by Google

exception covers the case in hand, is the hearsay rule satisfactory, i. e., has there been in fact, an oath and cross-examination? The first of these groups of questions is treated in the ensuing sections 100-114; the second in sections 114a to 162; the third, in sections 163 to 168."

While it is true that there are real and apparent exceptions to the hearsay rule, the case under discussion does not fall within either of the classes of exceptions. Courts-martial are bound, in general, to observe the rules of the law of evidence by which the United States courts of criminal jurisdiction are governed (Forms of Procedure, 1910, p. 135), and neither the letter in question nor the second letter which the court permitted the accused subsequently to introduce should have been admitted. It is to be noted, however, that the judge advocate did not object to the introduction of the second letter. C. M. O. 30, 1912, 3-5. *See also* C. M. O. 17, 1910, 12; File 26251-9019, Sec. Navy, May 21, 1914.

4. **Same**—Greenleaf states that hearsay evidence is "That form of evidence which does not derive its value solely from the consideration to be given to the witness himself, but rests in part on the veracity and competency of some other person."

Hearsay evidence is objectionable, (1) because it is secondary evidence and the law requires primary evidence; (2) the real witness is not testifying in court under the sanction of an oath; and (3) the opposite party, and especially the defendant in a criminal case, has no opportunity to be confronted with a witness against him, or to exercise his right of cross-examination. There are, of course, exceptions to this rule of exclusions; and again there are some exceptions which, upon examination, will be found to relate to relevant facts and to be, as such, not liable to objection as hearsay. Thus, where the question at issue is whether certain words were actually spoken by a person other than the witness, a recital of the words by the witness is original testimony and admissible.

The principal exceptions to the inadmissibility of hearsay evidence are: (1) Confessions or admissions against interest; (2) dying declarations; (3) res gestae. (Forms of Procedure, 1910, p. 138.)

5. **Example of**—A witness was permitted to testify to a statement made to him by the corporal of the guard to the effect that the accused had been stationed as orderly at the cabin door, which statement was not made in the presence of the accused. C. M. O. 97, 1898. *See also* G. C. M. Rec. 30485, pp. 78, 178-180, 683; DESERTION, 111 (p. 178).

6. **Same**—In general court-martial proceedings against commanding officer of U. S. S. Culgoa for collision with a schooner, testimony was admitted to the effect that "it was a matter of common report on the Culgoa subsequent to the collisoin with the 'Wilson & Hunting' that the latter was in the habit of having her lights ready but not lit." *Held*: That this testimony should have been excluded as hearsay. C. M. O. 38, 1905, 2-3.

7. **Same**—During the direct examination of the first witness for the prosecution, he testified to statements made to him by a sentry soon after the escape of the accused from the ship (one of the offenses with which he was charged). This testimony was properly objected to by the counsel for the accused as being hearsay, but the court overruled the objection and permitted the introduction of said evidence. This decision was entirely erroneous, but it did not result in injury to the accused, as the sentry referred to was subsequently called as a witness, and substantially the testimony in question was given by him. C. M. O. 74, 1903, 1.

8. **Same**—The record discloses no substantial defense. The direct and positive evidence adduced for the prosecution stands uncontradicted except in one particular, the exception referred to being the admission by the court of the testimony of a reporter on the Providence Journal, who stated that one member of the firm of * * * had told him (the witness) that the firm had paid no commissions to the accused. This evidence was objected to by the judge advocate, very properly, upon the ground that it was hearsay. Its admission by the court, however, does not constitute material error, since in so far as it had weight, it was in favor of the accused. C. M. O. 69, 1903, 2.

9. **Same**—The court erred when it asked a witness to repeat unsworn statements made to him (during his investigation) by another witness who had been before the court and testified for the prosecution. C. M. O. 19, 1915, 4.

10. **Statements in presence of accused.** *See* ACCUSED, 58; DESERTION, 123, 125.

Digitized by Google

HIRE.

1. **Definition**—The term "hire" has application to the more menial, manual, or mechanical employments, and commonly implies employment for short periods, as a day or a week; and is distinguished from the word "salary," in that the latter has reference to the more mental forms of employment and implies greater permanence of employment and payment at long intervals. Hire is more on the plane of wages than of salary though in a sense it comprehends both. (2 W. & P. (2d ed.) 888). File 4924-435, J. A. G., June 20, 1916.

HOLIDAY.

1. **Court**—May not adjourn over holiday without permission. *See* ADJOURNMENT OF COURTS-MARTIAL.

HOMESTEAD ENTRY.

1. **Information concerning.** *See* File 5166-6 (1907).

HOMICIDE. *See* MANSLAUGHTER; MURDER.

"HOMICIDE BY MISADVENTURE." *See* MANSLAUGHTER, 12, 13.

HONOR.

1. **"Code of honor" in military life**—"In military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army [Navy] shall come down to the requirements of a criminal code." (Swaim *v.* U. S., 28 Ct. Cls. 173.) *See* G. C. M. Rec. 30485, p. 767; CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN, 12.

HONORS.

1. **Acting governor of Guam.** *See* GUAM, 1.

"HONORABLY ACQUIT." *See* ACQUITTAL, 18.

HONORABLE DISCHARGE.

1. **Blanks**—Stolen. File 26283-977.
2. **Same**—Sale of. File 26509-163:2, July, 1916.
3. **De facto enlistment having been served**—When not regularly enlisted, a man is nevertheless entitled to an honorable discharge where he serves out a *de facto* enlistment. File 5839-04, J. A. G. *See also* DE FACTO, 2.

HOPE.

1. **Confessions.** *See* CONFESSIONS, 16.

HOSPITALS.

1. **Army**—Enlisted men of naval service under treatment in. *See* File 2642-03.
2. **Commanding officers of naval hospitals**—Punishments by—When so empowered by the Secretary of the Navy to order summary courts-martial, the commanding officer of a naval hospital or hospital ship shall be empowered to order such courts and deck courts, and inflict the punishments which the commander of a naval vessel is authorized by law to inflict, upon all enlisted men of the naval service attached thereto, whether for duty or as patients. (Act, Aug. 29, 1916, 39 Stat. 586.) *See* C. M. O. 30, 1916.
3. **Deck courts**—Convening of, at. *See* DECK COURTS, 10, 14; HOSPITALS, 2; SUMMARY COURTS-MARTIAL, 21, 22.
4. **Fund.** *See* HOSPITAL FUND.
5. **Government Hospital for the Insane.** *See* GOVERNMENT HOSPITAL FOR THE INSANE.
6. **Patients**—Punishment of. *See* HOSPITALS, 2.
7. **Punishments**—By commanding officers. *See* HOSPITALS, 2.
8. **Summary courts-martial**—Convening of, at. *See* HOSPITALS, 2; SUMMARY COURTS-MARTIAL, 21, 22.

HOSPITAL APPRENTICES.

1. **Clothing outfits for.** *See* CLOTHING OUTFITS, 1.

HOSPITAL FUND.

1. **Checkage of 20 cents per month—For support of hospital fund is authorized by** Sections 1624, 4808, Revised Statutes. File 3980-452:2, J. A. G., Dec. 8, 1909, p. 6; 22465-5, J. A. G., Sept. 30, 1915.

Digitized by Google

2. **Same**—20 cents per month is credited to hospital fund if person is under sentence of general court-martial to forfeit pay. (45 S. and A. Memo. 662; 58 S. and A. Memo, 42; 106 S. and A. Memo, 1305.)
3. **Same**—Can not be made if no pay is earned. (116 S. and A. Memo, 3475.) File 22465-5, J. A. G., Sept. 30, 1915.
4. **Expenditure**—History of. *See* 14 Comp. Dec. 602; 121 S. and A. Memo. 1697.
5. **Fleet Naval Reserve**—File 28350-23, p. 2.
6. **Naval auxiliary service**—"Deductions" can not be made where person is under treatment for venereal disease, no pay being earned. (*See* Regulations for the Naval Auxiliary Service, 1914, pars. 109, 95.) File 22465-5, J. A. G., Sept. 30, 1915.

HOSPITAL RECORDS.

1. **Copy requested**—Policy of department. File 5195-61:1, J. A. G., Mar. 21, 1912. *See also* MEDICAL RECORDS, 1.

HOSPITAL SHIPS.

1. **Command of.** *See* File 15285-59:3.
2. **Deck courts**—Convening of by commanding officer. *See* HOSPITALS, 2, 3.
3. **Pay officer**—Assignment to. *See* File 7036-279, J. A. G., Jan. 18, 1913.
4. **Punishments by commanding officer.** *See* HOSPITALS, 2.
5. **Summary courts-martial**—Convening of by commanding officer. *See* HOSPITALS, 2.

HOUSEHOLD GOODS. *See* CLAIMS, 2.

HUSBAND AND WIFE. *See* WIFE.

HYDROGRAPHIC OFFICE. *See* File 24501-16, Apr. 19, 1910; 24501-19, Aug. 2, 1910; 24501-19, Aug. 3, 1910; 24501-22, Dec. 20, 1910; 24501-23, Jan. 31, 1911; 24501-24, Mar. 8, 1911; 24501-26:1, Jan. 25, 1912; 24501-31, Aug. 14, 1913; 5381-00, J. A. G., Apr. 2, 1904; 9386-14:18, J. A. G., Jan. 20, 1916.

HYDROGRAPHIC OFFICE CHART.

1. **No. 967.** *See* C. M. O. 2, 1914, 2; 3, 1914. *See also* CHARTS, 3.

HYPOTHETICAL QUESTIONS.

1. **Answers to**—Department's policy—It is the established practice of the department not to answer hypothetical questions. (File 26504-192, Sec. Navy, Oct. 28, 1913.) The department has found it necessary to adopt the rule that decisions and legal opinions should not be rendered upon hypothetical questions. The department could not grant the special privilege of corresponding with and giving opinions on hypothetical questions to one of the many officers in the naval service without extending the same courtesy to all other officers; and the current necessary work in the office of the Judge Advocate General is amply sufficient to keep the entire office force therein busy. (File 26252-76, J. A. G., May 16, 1913.) The department has consistently refused to answer hypothetical questions or to decide what would be its action under certain circumstances or to make an advance decision. File 9736-54:1, J. A. G., June 17, 1915; C. M. O. 22, 1915, 8. *See also* File 9736-12; 26287-1776; 26504-195; 27231-66:2, J. A. G., Oct. 21, 1915; 9736-68, J. A. G., June 19, 1916; 26504-197:1, J. A. G., Mar. 16, 1914; 26516-221, J. A. G., Sept. 25, 1916; 3157-03, Apr. 6, 1903; 23, J. A. G., 89.
2. **Evidence**—Since the data to be assumed as the basis are those which it is expected or claimed the jury will subsequently adopt as true, it would be both wasteful of time and misleading to assume data which there is not a fair chance the jury will accept; and a limitation for this purpose is accepted by all courts. The phrasing differs; usually it is said that there must be "some evidence tending to prove" them, or, that they must be "within the possible or probable range of the evidence" or that they must concern facts which "the jury might legitimately find upon the evidence."

   An hypothetical question is supposed to be an accurate synopsis of the testimony that has already been sworn to by the various witnesses who have preceded the appearance of the witness to whom such a question is propounded. It would therefore appear that the hypothetical question and the answer thereto can not properly be considered as evidence in this case. C. M. O. 7, 1911, 16.
3. **Same**—In putting a hypothetical question, facts may be assumed which there is evidence on either side tending to establish; but this rule requires that the facts embraced in the hypotheses must be within the confines of the evidence; otherwise the opinion of the witness will be inadmissible. (Benjamin *v.* Metropolitan St. R. Co., 50 Mo. App., 602.) "Hypothetical questions are allowed to be put to experts, but the hy-

Digitized by Google

potheses upon which they are examined must be based upon facts admitted or established by the evidence, or which, if controverted, the jury might legitimately find on weighing the evidence. Purely imaginary or abstract questions, assuming facts or theories for which there is no foundation in the evidence are not admissible as matter of right." (People *v.* Augsbert, 97 N. Y., 501.) It is well settled that an opinion can not be based on a state of facts of which there is no evidence. This, however, does not mean that the facts upon which the opinion of an expert is sought must be proved. It is sufficient if there is evidence tending to establish the facts. Then the jury must determine whether the evidence submitted proves the facts upon which the opinion is based. (Hurst *v.* Chicago, etc., R. Co., 49 La., 76; *see also* State *v.* Mianni, 20 Ann. Cas., 205 and note; 6 Dec. Dig., pp. 627, 628, sec. 481, 1.) The reason for the rule which limits hypothetical questions to facts actually in evidence is to avoid the opportunity which otherwise would be offered to the ingenuity of counsel to frame questions so as to suggest a state of facts favorable to his case but wholly unsupported by evidence. In the present case the witness had not qualified as an expert, and his testimony related only to facts personally observed by him and which might as well have been testified to by any other person who was present at the time. "On cross-examination such abstract or theoretical questions, not founded upon the facts of the case on trial, may be put for the purpose of testing the knowledge and information of the witness as to the subject upon which he has been examined and his competency to give the opinion which he may have pronounced on his direct examination." (People *v.* Augsbert, 97 N. Y., 501.) Such questions, however, when introducing suppositious statements, must not purport to be based upon the facts of the case on trial, being objectionable for the same reasons as above stated. C. M. O. 5, 1913, 7-8. *See also* EXPERT WITNESSES, 13 (p. 234).

4. **Same**—The precedents of the department are clear that hypothetical questions should be based on facts in evidence. (C. M. O. 7, 1911, pp. 15-16; 5, 1913, pp. 7-8; 24, 1914, 20; 51, 1914, 8; Index-Digest, 1914, p. 23.) C. M. O. 49, 1915, 12, 14.
5. **Form of letter.** *See* File 26504-197:1, Sec. Navy, Mar. 16, 1914.

I-4893. *See* NAVAL INSTRUCTIONS, 1913, I-4893.

IDEALS. C. M. O. 14, 1915, 1; 17, 1915, 3. *See also* OFFICERS, 62.

IDENTITY OF ACCUSED.
1. **Fraudulent enlistment**—Essential in proving fraudulent enlistment. *See* FRAUDULENT ENLISTMENT, 51.

IDIOCY. *See* C. M. O. 16, 1916, 8; INSANITY, 20, 35; WITNESSES, 52 (p. 651).

IDIOSYNCRASY.
1. **Death**—Caused by idiosyncrasy due to anesthetic. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 63.

IGNORANCE OF FACT. *See* C. M. O. 10, 1913, 4.

IGNORANCE OF LAW.
1. **Excuse**—Everyone is presumed to know the law, and ignorance thereof furnishes no exemption from criminal responsibility. *See* COURT, 87; DESERTION, 77, 110; EXCUSE, 3; FRAUDULENT ENLISTMENT, 23.

ILLEGAL ORDERS. *See* ORDERS.

ILLEGAL EXAMINATIONS.
1. **Promotion**—Upon illegal examination—Of no legal effect. *See* COMMISSIONS, 20.

ILLEGAL SENTENCES. *See* SENTENCES.

ILLEGALLY CONSTITUTED COURTS-MARTIAL. *See* COURT, 37-41, 44, 47, 48.

"IMMEDIATE SUPERIOR IN COMMAND." C. M. O. 30, 1916, 6-8; SUMMARY COURTS-MARTIAL, 38.

IMMIGRATION ACTS.
1. **Reference to.** *See* File 26260-697 and 1392, J. A. G., June 29, 1911, p. 20.

IMMORAL HABITS.
1. **Disease**—Contracted by officer in consequence of his immoral habits. C. M. O. 40, 1889.

Digitized by Google

IMMUNITIES.

1. **Accused.** *See* CONSTITUTIONAL RIGHTS OF ACCUSED.
2. WITNESSES. *See* SELF-INCRIMINATION.

IMPEACHMENT.

1. **Answers to irrelevant or collateral matters**—The answers of a witness to irrelevant or collateral matters is conclusive against the party asking the question, who will not be allowed to impeach the witness as to such answers. (Greenleaf, v. 1, 448.)
2. **Character of witnesses.** *See* EVIDENCE, 12–22.
3. **Court of inquiry record**—As evidence to impeach testimony of a witness. *See* COURTS OF INQUIRY, 19, 27.
4. **Degrading questions.** *See* SELF-INCRIMINATION, 11, 12.
5. **Exceptions as to impeachment of one's own witness**—A party may not impeach the credibility of a witness whom he calls (G. C. M. Rec. 30485, p. 610. *See also* C. M. O. 47, 1910, 5; G. C. M. Rec. 28652, p. 19) except (1) when the witness appears to be hostile to the party that calls him; (2) when the party that called him had no option, but was compelled to do so; and (3) when the party that called him is unduly surprised at the evidence elicited. (G. C. M. Rec. 28681, pp. 45–47.)
6. **Former witness sustained**—A former witness may be sustained by proving general bad character of the impeaching witness. If impeached by proof of contradictory statements, he may be sustained by proof of general good character, the effect of the evidence to be determined by the court.
7. **Foundation for impeachment**—To lay the foundation the witness may be recalled at any time. It is not necessary to lay the foundation when the previous statement was made under oath and recorded before an official lawfully empowered to administer an oath. C. M. O. 19, 1915, 5. *See also* G. C. M. Rec. 30485, pp. 125, 149, 176; WITNESSES, 40.
8. **Impeaching a witness**—A witness may be impeached (1) by disproving the facts testified to by him; (2) by proof of contradictory statements previously made by him as to matters relevant to his testimony and to the case; and (3) by evidence as to his general bad character. (G. C. M. Rec. 30485, pp. 410, 412–419.) *See also* C. M. O. 88, 1895, 16; 57, 1897, 2.
9. **Same**—While a witness for the defense was still on the stand and undergoing cross-examination the judge advocate irregularly and improperly introduced his (the witness's) current enlistment record, reading therefrom extracts showing previous convictions by courts-martial; also a letter from the adjutant and inspector, United States Marine Corps, to the commanding officer of the naval prison at the navy yard, Portsmouth, N. H., in reference to the change of the witness's name; all of which was done to discredit his testimony.

   The offenses concerning which extracts from the enlistment record were read, with but one exception, had nothing to do with the credibility of the witness. They were strictly military offenses and in no way affected his general character as to truthfulness. The exception is that of "Fraudulent enlistment," in which false swearing was involved. C. M. O. 47, 1910, 5.
10. **Procedure before contradictory statements can be proved**—Before contradictory statements of a witness can be proved against him his attention must be called with as much certainty as possible to the time, place, attending circumstances, and the person to whom made. If the previous statement was in writing, it should be shown or read to him unless the absence of the writing is accounted for.
11. **Questions to impeaching witness**—The impeaching witness may be asked as to his knowledge of the general character of the witness whose testimony is to be impeached; as to the latter's general character; but particular transactions or opinions can not be inquired into except in seeking for the extent and foundation of the witness's knowledge; as to whether he would believe the latter under oath; and, when desired, he may be asked as to the extent and foundation of his knowledge. These questions are asked only when it is attempted to impeach by evidence of general bad character.
12. **Relationship of witness**—The state of the feelings of the witness and his relationship to the parties may always be proved for the consideration of the court.

IMPERSONATION.

1. **Department of Justice**—In cases in which persons fraudulently impersonate officers and enlisted men of the naval service, the Attorney General causes criminal prosecutions to be instituted where the matter is brought to his attention by the Secretary of the Navy. File 21355.

Digitized by Google

2. **Enlisted man**—Impersonation of an enlisted man and passing worthless checks. File 21355-27: 1, Sec. Navy, Dec. 8, 1915.
3. **Officer**—Impersonation of recruiting officer. File 21355-25, J. A. G., Nov. 1, 1915.
4. **Officer, dismissed**—A dismissed officer impersonated an officer. File 21355-29.
5. **Worthless checks**—Civilian in Navy uniform passing worthless checks. File 21355-77, J. A. G., Dec. 3, 1915.

IMPLICATION, REPEAL BY. *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 109.

IMPLIED INTENT. *See* EMBEZZLEMENT, 25; INTENT, 29.

IMPLIED PARDON. *See* DESERTION, 41; PARDONS, 44.

IMPOSTORS. *See* **IMPERSONATION.**

IMPROPERLY HAZARDING THE VESSEL UNDER HIS COMMAND, IN CONSEQUENCE OF WHICH SHE WAS RUN UPON A SHOAL AND SERIOUSLY INJURED.
1. **Officer**—Charged with. C. M. O. 2, 1914.

IMPROPERLY HAZARDING A VESSEL UNDER HIS COMMAND IN CONSEQUENCE OF WHICH SHE WAS SERIOUSLY INJURED.
1. **Officer**—Charged with. C. M. O. 31, 1916.

IMPROPERLY HAZARDING THE VESSEL UNDER HIS COMMAND IN CONSEQUENCE OF WHICH SHE WAS RUN UPON A ROCK AND LOST.
1. **Officer**—Charged with. C. M. O. 20, 1883.

IMPROPERLY HAZARDING THE VESSEL UNDER HIS COMMAND IN CONSEQUENCE OF WHICH SHE WAS RUN UPON A SHOAL AND SERIOUSLY INJURED.
1. **Officers**—Charged with. C. M. O. 17, 1913; 26, 1916.

IMPROPERLY HAZARDING THE VESSEL UNDER HIS COMMAND IN CONSEQUENCE OF WHICH SHE WAS RUN UPON A SHOAL.
1. **Officer**—Charged with. C. M. O. 32, 1913; 19, 1917.

IMPROPERLY HAZARDING A VESSEL OF THE NAVY, IN CONSEQUENCE OF WHICH SHE WAS RUN UPON A SHOAL AND SERIOUSLY INJURED.
1. **Officer**—Charged with. C. M. O. 27, 1916.

IN JOINDER. *See* JOINDER, TRIAL IN.

INADEQUATE SENTENCES. *See* ADEQUATE SENTENCES.

INCLINING EXPERIMENTS.
1. **Stability of vessel**—An officer was tried by general court-martial for failing to cause result of inclining experiment to be determined and failing to notify commandant of his doubts of the stability of a ship which was sent to sea in an unsafe condition and was lost. C. M. O. 32, 1909.

INCOME-TAX RETURNS.
1. **Oath.** *See* OATHS, 24.

INCOMPETENCY.
1. **Charges of**—Against any rated person—When the offense charged is incompetency, it is essential to set forth the particular acts or neglect upon which the specification is based; and it is necessary that more than one instance of such incompetency be alleged.
   In the case of a person found guilty of incompetency the sentence of disrating is mandatory, and such sentence is the only authorized punishment therefor. *See* File 5710, Sec. Navy, Sept. 18, 1906.
2. **Counsel.** *See* COUNSEL, 37.

INCRIMINATION. *See* SELF-INCRIMINATION.

Digitized by Google

INDEBTEDNESS. *See* DEBTS.

INDECENT ASSAULT.
1. **Paymaster's Clerk**—Charged with. C. M. O. 35, 1913.

INDECENT BEHAVIOR.
1. **Officer**—Charged with. C. M. O. 47, 1906.

INDEMNITY.
1. **Chilean Indemnity Fund.** *See* CHILEAN INDEMNITY FUND.

INDEX.
1. **Board of investigation.** *See* INDEX, 3.
2. **Court of inquiry.** *See* INDEX, 3.
3. **General court-martial**—If a general court-martial case, or that of a court of inquiry, investigation, or board of investigation exceeds 20 pages in length, it shall be preceded by an index showing upon what page each step of the trial and of the examination of the several witnesses, giving their names, may be found; also, in case a witness corrects his testimony, the pages where such correction is referred to and where made. Forms of Procedure, 1910, p. 10. *See also* C. M. O. 7, 1911, p. 13; 8, 1911, p. 4; 21, 1912, p. 4; 28, 1912, p. 3; 36, 1914, p. 6; 20, 1915, p. 5; G. C. M. Rec. 30485.
4. **Insanity**—Claim that the preparation of an index by a naval officer caused insanity and suicide. *See* INDEX, 8.
5. **Interspersed through record**—The judge advocate of a general court-martial of an officer was criticized by the department for not arranging the index properly. The department stated: "The index was interspersed throughout the record, preceding the record of each day's proceedings, thus being of little value as an index." C. M. O. 20, 1915, 5.
6. **Precede case**—In reviewing the records of proceedings of several general courts-martial the department observed that the index was placed after the charges and specifications instead of preceding the case. The index should precede the case and therefore be the first paper beneath the cover. Forms of Procedure, 1910, p. 10. C. M. O. 36, 1914, 6.
7. **Returned for revision**—Record was returned to the court because of the failure to index the record as required by Forms of Procedure, 1910, p. 10.
8. **Suicide**—Claim that the preparation of an index caused insanity which led to suicide. File 26250-230: 24, J. A. G., June 28, 1913.

INDIANS.
1. **Annuity**—Authority of commanding officer to administer oath for an Indian to make application for an annuity or any other sum due him. *See* OATHS, 38.
2. **Clemency**—Extended because accused was an American Indian. In view of the fact that the accused was a full-blooded American Indian and under the conditions at the time of the commission of his offense did not appreciate the full gravity of his acts, the department mitigated the sentence. C. M. O. 114, 1903, 4.
3. **Enlistment of**—An Indian who belonged to the Seneca Nation in the State of New York is prima facie not a citizen of the United States, and should be required to establish his citizenship by satisfactory evidence when he applies for enlistment in the Navy. *Suggested*, however, as there is no law making citizenship a condition precedent to enlistment, the Navy Department is authorized to enlist such Indians, regardless of citizenship, if considered desirable, this being a matter of departmental regulation. File 9212-48, Aug. 3, 1914.
4. **Medical Reserve Corps of the Navy**—An Indian born in Indian Territory and who had resided in Oklahoma after its admission as a State was held to be a citizen of the United States by virtue of the various acts of Congress, and accordingly eligible, if otherwise qualified, for appointment as an assistant surgeon in the Medical Reserve Corps of the Navy. File 26252-99, May, 1915.

INDIAN HEAD.
1. **Jurisdiction.** *See* JURISDICTION, 83, 84.

INDICTMENT.
1. **Certified copy of.** *See also* CIVIL AUTHORITIES, 16.
2. **Common law indictment.** C. M. O. 23, 1911, 5. *See also* MANSLAUGHTER, 13.

Digitized by Google

3. **No existence in naval service**—Counsel for accused, in argument, repeatedly referred to summary court-martial specifications before the court as an "indictment," thus falling into an error scarcely to be expected of a naval officer appearing as counsel before a military court—indictment, as expressly recognized by the Constitution of the United States, having no existence in cases arising in the land and naval forces. File 26287-3475, Sec. Navy, July 5, 1916. *See also* RECORD OF PROCEEDINGS, 31.
4. **Presentment and indictment**—By grand jury. *See* CONSTITUTIONAL RIGHTS OF ACCUSED, 13.

INDORSEMENTS.

1. **Adjutant and inspector, U. S. M. C.**—Indorsement on letter of, as evidence. C. M. O. 47, 1910, 5. *See also* LETTERS, 4, 5.
2. **Bureau of Navigation**—As evidence. C. M. O. 49, 1910, 10.
3. **Same**—Published in Court-Martial Orders. *See* BUREAU OF NAVIGATION, 1.
4. **Commanding officer, Presidio, San Francisco.** C. M. O. 49, 1910, 10.
5. **Letter**—Indorsement on letter to show previous conviction. *See* PREVIOUS CONVICTIONS, 15.
6. **Same**—Indorsement on letter as evidence. C. M. O. 47, 1910, 4.

INEFFICIENCY. *See* C. M. O. 129, 1898, 6.

"INEVITABLE ACCIDENT."

1. **Collision**—As a defense in a collision. *See* COLLISION, 12, 17.

INEXPERIENCE.

1. **Clemency**—Members of court-martial recommended accused to clemency because of inexperience. *See* CLEMENCY, 27.

INFANTS. *See* MINORS.

INK ERADICATOR.

1. **Use of**—Prohibited in Bureau of Supplies and Accounts. File 22590; S. & A. File 99559; 66 S. & A. Memo. 154.

INQUESTS.

1. **Autopsy.** *See* AUTOPSY.
2. **Boards of inquest.** *See* BOARDS OF INQUEST.
3. **Confession.** *See* CONFESSIONS, 10.
4. **Coroners.** *See* CONFESSIONS, 10.
5. **Evidence**—Coroner's inquest record. *See* CONFESSIONS, 10.
6. **Naval reservation**—Right of coroners to hold an inquest in. File 1766-03; 3726-97; 7101. *See also* JURISDICTION, 22-24.

INSANITY.

1. **Absence from station and duty without leave**—Court should not find specification proved but not guilty of charge—From a review of the case of an officer tried by general court-martial on the charge of "Absence from station and duty without leave," the offense alleging an absence after expiration of leave of about three days, it is noted that the court found the specification proved but the accused not guilty of the charge.

   The defense offered in this case was that the accused was irresponsible for his actions on account of mental disorder, and the court apparently accepted this condition as relieving him of responsibility in connection with the offense charged.

   It might be remarked that a more proper finding on the specification would have been "proved but without culpability (or criminality)." C. M. O. 23, 1910, 7. *But see* FINDINGS, 44, 69, 70.
2. **Acquitted**—Because of. C. M. O. 42, 1909, 12. *See also* INSANITY, 1.
3. **Clemency**—Extended to accused because among other things "the infractions of the law and Navy Regulations took place when the accused was under unusual mental strain." C. M. O. 30, 1905, 1.
4. **Same**—The accused was found guilty and sentenced. The recommendation to clemency indicated that the members had some doubt as to the sound mental condition of the accused, in consequence of which a board of medical officers was directed to inquire into his physical and mental condition. In view of the report of the board and further reports no action was taken on the record, but the accused was discharged from the naval service. C. M. O. 86, 1901.

Digitized by Google

5. **Same**—A recommendation to clemency read in part: "It appears to us probable that the condition of the accused on December 30, 1907, was at least in part due to mental disturbance, although also in part due to alcoholic stimulant." C. M. O. 3, 1908, 1.
6. **Same**—A report of a medical board ordered to examine into the mental condition of the accused reported in part as follows: He "is of feeble, untrained mind, and evidently is deficient in will power," and the clemency was accordingly extended by the department. C. M. O. 30, 1892, 1.
7. **Conviction, insane after**—If accused becomes insane after conviction, judgment can not be given or sentence pronounced so long as he is such condition; nor can he be executed if he becomes insane after judgment and sentence. C. M. O. 24, 1914, 4.
8. **Defense**—To establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. C. M. O. 24, 1914, 8.
9. **Definition**—"The terms 'lunatic,' 'insane,' 'of unsound mind,' and *'non compos mentis'* are convertible and generic terms, and include all the specific forms of mental disease recognized by the text writers and medical authorities." (22 Cyc., 1110.) C. M. O. 24, 1914, 3.
10. **Delusion, insane.** *See* C. M. O. 24, 1914, 9.
11. **Drunkenness**—Resulting in insanity. *See* ASSAULT, 17.
12. **Dying declaration**—An insane person can not make an admissible dying declaration. *See* DYING DECLARATIONS, 1.
13. **Excuse**—The law does not excuse criminal acts committed under the impulse of an appetite or passion which, by long indulgence, has acquired mastery over the accused. C. M. O. 24, 1914, 15.
14. **Feeble mind.** *See* INSANITY, 6.
15. **Fraudulent enlistment**—Insanity as a defense. *See* CLEMENCY, 36; FINDINGS, 52, 55; FRAUDULENT ENLISTMENT, 23.
16. **Government Hospital for the Insane**—Allowances for prisoners and patients at. *See* GOVERNMENT HOSPITAL FOR THE INSANE, 2.
17. **Same**—Allotments—By patients at. *See* GOVERNMENT HOSPITAL FOR THE INSANE, 1.
18. **Same**—Discharge of insane prisoners at. *See* File 26251–1927; G. C. M. Rec. 23817. *See also* DISCHARGE, 25.
19. **Half-witted**—If the accused was half-witted and irresponsible at the time of his trial, he was not competent to conduct his defense, and upon the court arriving at such a conclusion it became its duty to suspend the proceedings in the case and inform the department of its opinion in the matter, in which case, if the circumstances warranted, a medical survey would have been ordered to determine his condition C. M. O. 49, 1910, 17; 24, 1914, 5.
20. **Idiocy.** *See* C. M. O. 16, 1916, 8; INSANITY, 35; WITNESSES, 52.
21. **Indexing**—As a cause of insanity and suicide. *See* INDEX, 8.
22. **Irresistible impulse**—Is not a defense to crime where accused had mental capacity to distinguish between right and wrong, and to know that the particular act charged was wrong. The law does not excuse criminal acts committed under the impulse of an appetite or passion which, by long indulgence, has acquired mastery over the accused. C. M. O. 24, 1914, 1. *See also* C. M. O. 51, 1914, 4.
23. **Lunatics.** *See* INSANITY, 9.
24. **Medical test**—Can not be adopted if society is to be protected against crime. Medical science would acquit by the wholesale criminals who did not resist "impulses" which they well knew were wrong. The department has no intention of encouraging any such theories. No such doctrine is recognized as law by the Federal courts nor by the weight of authority in the State courts. C. M. O. 24, 1914, 8, 19. *See also* C. M. O. 51, 1914, 4.
25. **Mental strain.** *See* INSANITY, 1, 3.
26. **Mentally incapacitated.** *See* CLEMENCY, 36. *See also* INSANITY, 1, 5, 6, 27.
27. **Mental irresponsibility**—If intended to mean "insane" courts-martial should use the latter expression, which in law includes all the specific forms of mental disease recognized by text writers and medical authorities. C. M. O. 24, 1914, 1, 5.
28. **Mentally unbalanced.** *See* INSANITY, 1, 5, 6, 27.
29. **Moral obliquity.** *See* INSANITY, 37.
30. **Non compos mentis.** *See* INSANITY, 9.
31. **Partial insanity.** *See* C. M. O. 24, 1914, 9, 17.

Digitized by Google

32. **Procedure**—If the court is of the opinion that accused is insane during trial, its duty is to suspend proceedings and inform convening authority of its opinion, in order that, if the circumstances warrant, a board of medical survey may be ordered. When, instead of doing this, the court proceeds with the trial and records findings on the charges and specifications, it is the duty of the convening authority to decline to accept the court's findings; and the record should be returned to the court in order that such findings may be revoked, as there has been no legal trial, the accused has not been placed in jeopardy, and the status of his case is the same as though he had never been arraigned. C. M. O. 24, 1914, 1. *See also* C. M. O. 42, 1909, 13; 117, 1902, 9; INSANITY, 41.
33. **Rape**—Insanity as defense to. *See* C. M. O. 24, 1914, 16.
34. **Resignation**—Of an officer. *See* RESIGNATIONS, 13.
35. **"Right and wrong" test**—Rule for determining criminal responsibility in law—If a person is incapable, because of idiocy or insanity, of distinguishing between right and wrong as to a particular act at the time he commits it, he is not to be held criminally responsible therefor. C. M. O. 24, 1914, 8; 51, 1914, 4. *See also* RESPONSIBILITY FOR CRIME, 1.
36. **Same**—Legal test—"Right and wrong" test is the test of criminal responsibility laid down by Federal courts, has been adopted by the department, and should be applied by naval courts-martial. C. M. O. 24, 1914, 16; 51, 1914, 4.
37. **Sentence**—Confirmed—The following is the confirmation of the President indorsed thereon:

"WHITE HOUSE,
"*November 26, 1902.*

"The sentence in the case of Ensign '* * *' U. S. Navy, is hereby confirmed.
"* * *."

Subsequently to the action taken as above stated, in the case of Ensign * * *, U. S. Navy, the question having been raised as to his mental condition, the matter was referred to a board of medical officers, which found as follows:

"The board finds that there is evidence of moral obliquity associated with a lack of mental appreciation of the gravity of his acts."

The report of the board was duly submitted to the President, who, under date of the 11th instant, directed that the sentence of the general court-martial in this case be carried into effect. Ensign * * *, U. S. Navy, has accordingly to-day been dismissed from the naval service of the United States. C. M. O. 230, 1902.

38. **Same**—Disapproved because of mental condition of accused—Accused charged with "Desertion," found guilty of "Absence from station and duty without leave." Recommended for clemency because of the evidence "showing some doubt as to his mental condition."

Department approved the proceedings but disapproved the findings and sentence of dismissal, stating in part, "In view of the recommendation to clemency signed by a majority of the court showing that there was a doubt as to the mental condition of the accused *during his absence without leave*, and as, from a careful review of the evidenced adduced, this doubt seems to be a reasonable one, the court should, in my opinion, have found the accused not guilty." C. M. O. 80, 1907. *See also* INSANITY, 32, 41, for correct procedure.

39. **Same**—But in view of the unanimous recommendation of the members of the court that the sentence be remitted for the reason that, in their opinion, the accused (officer) was, at the time the offense was committed, irresponsible for his acts, because of his physical and mental condition, the sentence was remitted. C. M. O. 56, 1889, 2. *See* INSANITY, 32, 41, for correct procedure.
40. **Suicide**—Caused by insanity. *See* INDEX, 8; LINE OF DUTY AND MISCONDUCT CONSTRUED, 89, 91, 96.
41. **Trial**—Insane at time of trial—Procedure—If the court, after hearing the testimony of the doctor, entertained only a doubt as to the sanity of the accused at the time he committed the offense, or if the testimony had conclusively shown that the accused was insane at the time of his trial, in which event he would not have been competent to conduct his defense, the proper procedure would have been to have suspended the proceedings, reported the facts as found to the department, and, if the circumstances warranted, a medical survey would then have been directed. C. M. O. 42, 1909, 13. *See also* INSANITY, 32.

Digitized by Google

42. **"Unsound mind."** *See* INSANITY, 9.
43. **"Untrained mind."** *See* INSANITY, 6.
44. **Weak-minded.** *See* INSANITY, 6.
45. **Will power**—Deficient in. *See* INSANITY, 6.

INSIGNIA OF RANK STRIPPED OFF. *See* C. M. O. 7, 1888, 1.

INSPECTOR OF MACHINERY.
1. **Neglect of duty of.** C. M. O. 41, 1915. *See also* BUREAU OF STEAM ENGINEERING, 1.

INSTRUCTIONS FOR RECRUITING OFFICERS OF THE UNITED STATES NAVY. *See* C. M. O. 12, 1911, 4; FRAUDULENT ENLISTMENT, 78.

INSTRUCTIONS OF DEPARTMENT.
1. **Court-martial orders, in**—Are in such easily accessible form that ignorance of or inattention to them are inexcusable. *See* COURT-MARTIAL ORDERS, 8.

INSUBORDINATE CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE.
1. **Officer**—Charged with. C. M. O. 6, 1883.

INSUBORDINATION.
1. **Enlisted men**—Charged with. C. M. O. 35, 1893; 78, 1893.
2. **Punishment for.** C. M. O. 49, 1915, 17, 19.

INSULAR AUTHORITIES.
1. **Arrests**—Upon naval territory by. *See* ARREST, 20; JURISDICTION, 11, 94, 106, 108.
2. **San Juan, P. R.**—Arrest by service of process. *See* JURISDICTION, 108.

INSURANCE COMPANY.
1. **Blanks**—Signing of by medical officers. *See* MEDICAL RECORDS, 5.

INTENT.
1. **Absence from station and duty without leave**—With intent to desert should be charged as desertion. C. M. O. 23, 1910, 6.
2. **Absence, unauthorized**—Whether absence without leave is of that class of statutory offenses where intent is immaterial is apparently settled, for it has been held by the department (file 26251-3252, Apr. 28, 1910; 26251-4200, Jan. 25, 1911) that—

"Where * * * it appears that the accused 'was fully conscious of what he was doing, in the full possession of his reason, and not acting ignorantly or by mistake' of fact the general criminal intent necessary to conviction is clearly established."

And also (file 26251-4200, Jan. 25, 1911) that—

"Upon a charge like that of absence without leave, where it is not necessary to allege or prove any specific intent, it may very well happen that all the facts alleged in the specification may be found proved, and yet the accused be wholly free from blame; the absence, for example, being entirely involuntary on his part."

The offense of absence over leave, therefore, is one in which no specific intent is required to be shown, but that upon proof of the commission of the act the general intent usually necessary in criminal offenses is presumed. The question here recurs whether this statutory offense is one to which no defense may be interposed beyond denial of the commission of the act charged; whether, for example, the man was engaged in some lawful pursuit while on liberty and while so engaged was placed in such a position or condition not the result of any wrongful or unlawful act of his own volition, whereby he is rendered incapable of returning to his vessel or station at the expiration of his authorized liberty. Under such circumstances can he introduce evidence of the facts and be found "not guilty," or must the proof of such facts merely be considered by the reviewing authorities in deciding whether or not clemency may be extended.

If the Articles for the Government of the Navy be examined, many acts and neglects will be found which are made punishable where only a general intent is necessary; that is, where merely doing the act or omitting to do some duty constitutes the offense, the presumption of a general wrongful intent being raised by proof of such act or omission. Some of these are "Sleeping upon watch," "Leaving his station before being regularly relieved," "Profane swearing," etc., "Negligent or careless in obeying orders," "Violating or refusing obedience to any lawful general order," etc., "Suffering a vessel of the Navy to be stranded," and many others.

Digitized by Google

If, as suggested by the remarks of the reviewing authorities, proof of the mere act or neglect is all that is necessary to render the accused amenable to punishment, and that proof of exculpatory facts should only be made the basis of a recommendation to clemency, then it could very possibly happen in some cases that the reviewing authority might not, for any one of various possible reasons, feel inclined to exercise clemency, with the result that the accused would be punished for something for which he was really excusable. That such view, as above stated, can not be the proper one and that matters of defense may properly be considered in deciding whether the accused is guilty or innocent, in contemplation of law, the following from Felton *v.* United States (97 U. S., 699, 703) may be quoted:

"The law * * * is not so unreasonable as to attach culpability, and consequently to impose punishment, where there is no intention to evade its provisions, and the usual means to comply with them are adopted. All positive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of everyone." Furthermore, absence without leave in the Army is forbidden and made punishable by the thirty-second Article of War, which reads as follows:

"Any soldier who absents himself from his troop, battery, company, or detachment, without leave from his commanding officer, shall be punished as a court-martial may direct."

This is a statutory offense likewise, and yet as to matters of defense thereto, Winthrop, in his Military Law and Precedents (2d ed., p. 939), says:

"It will be a good defense that the party, while absent on pass or furlough, was prevented from returning at the proper time by sickness or other disability, but to establish this excuse medical testimony will generally be required. That the accused was involuntarily detained by the force of the elements, the action of the civil authorities, the operations of the enemy, or by being taken prisoner by the latter, may also constitute a valid defense; but where he has once deliberately absented himself without authority, the fact that he was detained away longer than he had intended by some agency beyond his control, will be no sufficient answer to the accusation."

Referring to the same offense, O'Brien, in American Military Law and Courts-Martial (p. 92), says:

"It is, of course, open to the accused to show by evidence, the causes of his lengthened absence, and if he can satisfy the court that he was innocent of a criminal intention, but unavoidably prevented, in spite of his efforts, from returning at the appointed time, he must be acquitted.

"Though the prosecution may, if possible, negative this excuse by counter-testimony, it can never produce in aggravation of the crime charged, any misconduct, etc., committed during the unauthorized absence. If such matters are to be brought against the accused, they must come under separate charges, the accused being held accountable only for the specific acts alleged against him."

For an absence over leave to be excusable it must have been in some lawful manner unavoidable.

Furthermore, section 879 of the Revised Statutes of the United States provides that a Federal court may, in criminal cases of which it has jurisdiction, "require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, * * *."

And section 881, Revised Statutes, provides that in case of a necessary witness on a trial in which the United States are parties, etc., the court may compel such witness to give a recognizance to appear and testify, and may arrest the witness for that purpose, and further provides that—

"If the person so arrested neglects or refuses to give recognizance in the manner required, the judge may issue a warrant of commitment against him, and the officer shall convey him to the prison mentioned therein. And the said person shall remain in confinement until he is removed to the court for the purpose of giving his testimony, or until he gives the recognizance required by said judge."

The State laws also very generally, and probably universally, provide that necessary witnesses in criminal cases may be required to give a recognisance, with sureties, to secure their attendance at the trial, in default of which they may be committed to jail.

If any person belonging to the naval service is lawfully on shore leave of absence or on liberty and, without any fault whatever on his part, should be a witness to some occurrence for which he could be held by the civil authorities, under authority

Digitized by Google

of law as above shown, it would be manifestly a legal excuse, and the presentation of proper evidence as to the reason for his detention on shore should be sufficient before a court-martial to secure his acquittal of a charge of absence over leave.

As an example of what might very possibly occur to persons in the service, as well as to others, the following instance is quoted from the Review (vol. 1, No. 8; August, 1911), a monthly periodical published by the National Prisoners' Aid Association (p. 13):

"In Springfield some time ago one Giuseppi Ferreri was charged with murder. Two witnesses of the crime alleged, Antonio and Joseph Galetto, were held as witnesses. To assure their presence at the time of trial, these two witnesses were required to furnish bonds in $1,000. Being poor, they were unable to do this and are now languishing in jail. There they will stay for months, perhaps, separated from their families and friends, and denied the privilege of earning a living.

"What has happened to these two men is likely to happen to anybody. They are in jail not because they committed a crime, but because they are supposed to have seen one committed." C. M. O. 5, 1912, 4–14. *See also* C. M. O. 10, 1911, 6; ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 20.

3. **Assault**—Specific intent not necessary in simple assault. *See* ASSAULT, 23.
4. **Same**—Drunkenness. *See* ASSAULT, 17, 18; DRUNKENNESS, 7–9; INTENT, 5, 42.
5. **Assault and battery**—Specific intent need not be alleged in assault (and battery), the general criminal intent to commit the act being presumed. Evidence of drunkenness is inadmissible as a defense, except in cases where specific intent is necessary (robbery, perjury, forgery, burglary, larceny (theft), etc.). C. M. O. 8, 1911, 4–6. *See also* ASSAULT, 18.
6. **Assault, willful and malicious**—Drunkenness is a defense in so far as it affects the capacity of the accused to form the necessary specific intent. C. M. O. 47, 1910, 8.
7. **Assault with intent to kill.** *See* ASSAULT, 17.
8. **Assaulting and wounding**—No specific intent necessary. *See* ASSAULT, 18.
9. **Assaulting with a deadly weapon and wounding another person in the service.** *See* ASSAULT, 17.
10. **Burglary**—Specific intent necessary. *See* BURGLARY, 3, 6; INTENT, 2, 5, 49.
11. **Carelessly**—As expressing intent. *See* CHARGES AND SPECIFICATIONS, 52.
12. **Carelessness**—A general principle, recognized in all authorities, is that there may be such character of negligence or carelessness as will take the place of criminal intent C. M. O. 4, 1914, 10.
13. **Charges and specifications**—In cases where law has adopted certain expressions to show intent, etc. *See* CHARGES AND SPECIFICATIONS, 52; INTENT, 33.
14. **Conduct to the prejudice of good order and discipline.** C. M. O. 42, 1909, 10.
15. **Constructive intent.** *See* C. M. O. 23, 1911, 5. *See also* MANSLAUGHTER, 12.
16. **Corruptly**—Expressing intent. *See* CHARGES AND SPECIFICATIONS, 52.
17. **Criminal intent.** *See* DESERTION, 77 (p. 175); EMBEZZLEMENT; INTENT, 51.
18. **Desertion.** *See* DESERTION.
19. **Drunkenness**—As affecting the intent. (Roberts *v.* People, 19 Mich. 401.) *See* ASSAULT, 15–19; BURGLARY, 3; DRUNKENNESS, 12, 20, 22, 49–52, 59; INTENT, 42; STATEMENT OF ACCUSED, 16.
20. **Embezzlement.** *See* EMBEZZLEMENT, 15, 16.
21. **Enlistment record**—To prove specific intent in desertion. *See* SERVICE RECORDS, 10–14, 16.
22. **"Feloniously"**—Intent alleged by use of word "feloniously." C. M. O. 42, 1909, 9–10. *See also* ASSAULT, 13, 14; FELONIOUSLY; INTENT, 50.
23. **Forgery**—Specific intent required. *See* INTENT, 5, 42, 49.
24. **Fraudulent enlistment**—Intent to fraudulently enlist as affected by typhoid fever. *See* FRAUDULENT ENLISTMENT, 27.
25. **Fraudulent intent.** C. M. O. 37, 1883, 6. *See* C. M. O. 4, 1914, 4, for "intent to defraud."
26. **General intent**—Distinguished from specific intent. *See* INTENT, 49.
27. **Same**—Simple assault. *See* ASSAULT, 15, 16.
28. **Implied by negligence.** *See* EMBEZZLEMENT, 18.
29. **Implied intent.** *See* C. M. O. 23, 1911, 5. *See also* MANSLAUGHTER, 12.
30. **Inference**—Intent is inferred from act. *See* INTENT, 49.
31. **"Intentionally"**—As expressing intent. *See* CHARGES AND SPECIFICATIONS, 52.
32. **Kill**—Intent to kill. *See* ASSAULT, 17.

Digitized by Google

33. **"Knowingly"**—In cases where the law has adopted certain expressions to show the intent with which an offense is committed, the intent shall be expressed by the technical word prescribed. For example, a charge made against an officer for making or for signing a false muster must be laid to have been done "knowingly." *See* CHARGES AND SPECIFICATIONS, 52.
34. **Language**—Intent of language. *See* LANGUAGE, 2.
35. **Larceny.** *See* DRUNKENNESS, 49; INTENT, 5, 42, 49; THEFT, 9.
36. **"Leaving his station before being regularly relieved"**—Specific intent not necessary. *See* INTENT, 2.
37. **"Maliciously"**—Intent expressed by. *See* CHARGES AND SPECIFICATIONS, 52.
38. **Murder.** *See* DRUNKENNESS, 22; MURDER, 6, 13.
39. **Natural and necessary consequences**—Every man of sound mind is assumed to intend the natural and necessary consequences of his own deliberate acts. *See* ACTS, 3.
40. **Neglect or careless in obeying orders, etc.**—Specific intent not necessary. *See* INTENT, 2.
41. **Perjury**—Specific intent required. *See* INTENT, 5, 42, 49.
42. **Presumption from acts**—The accused was tried by general court-martial (station case) on the charge of "Assaulting with a deadly weapon and wounding another person in the service," the specification thereunder alleging that the accused did "willfully, maliciously and feloniously and without justifiable cause assault, and cut with a knife" another person in the service.

The charge in this case is based upon the third clause of article 8 of the Articles for the Government of the Navy, which reads as follows:

"Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy * * *.

"3. Or quarrels with, strikes, assaults, or uses provoking, or reproachful words, gestures, or menaces toward any person in the Navy."

Under the foregoing it is not necessary to allege that the act was done with any *specific* intent, and in the case of United States *v.* Gallagher (2 Paine, 447; Fed. Cas. No. 15, 185), which was a case of assault with a dangerous weapon, the court held that it was not necessary to charge that the assault was committed feloniously, *or with intent* to commit a felony.

In this case, therefore, the general criminal intent was presumed, and the intoxication of the accused furnished no excuse for the natural and probable consequences of his act.

"The condition of the prisoner's mind not being an element of the offense of assault and battery, evidence of the intoxication at the time of the alleged offense is not admissible." (A. & E. Enc., v. 17, p. 412.)

"When a person voluntarily drinks, and becomes intoxicated, and while in such a condition, commits an act which would be a crime if he were sober, he is nevertheless responsible, the settled rule being that voluntary drunkenness is no excuse. A person may be so drunk when he commits an act that he is incapable, at the time, of knowing what he is doing; but in case of voluntary intoxication a man is not the less responsible for the reasonable exercise of his understanding, memory, and will. A drunken man, equally with a sober man, is presumed to intend his acts, and the natural and ordinary consequences."

Exceptions to the foregoing principle arise when a *specific* intent to injure or to do other wrong is necessary to constitute the act charged, as in burglary, forgery, perjury, and in larceny and robbery where a specific intent to steal the goods taken is necessary. But there is no such necessary specific intent in an assault and battery.

"If injury would be the natural consequence of the overt act on the part of the aggressor, an unlawful intent is presumed, unless such presumption is repelled by the evidence." (A. & E. Enc., v. 2, p. 954.) C. M. O. 8, 1911, 5. *See also* ASSAULT, 23.

43. **"Profane swearing," etc.**—Specific intent not necessary. *See* INTENT, 2.
44. **Rape.** *See* INTENT, 49.
45. **Resisting arrest.** C. M. O. 23, 1910, 6. *See also* RESISTING ARREST.
46. **Seditious words.** *See* INTENT, 57; SEDITION.
47. **Service records.**—Proof of specific intent to desert. *See* SERVICE RECORDS.
48. **"Sleeping on watch"**—No specific intent necessary. *See* INTENT, 2.
49. **Specific and general intent distinguished**—As to general intent:

"A presumption of a criminal intention may arise from proof of the commission of an unlawful act. The general rule is that if it is proved that the accused committed the unlawful act charged it will be presumed that the act was done with a criminal intention, and it is for the accused to rebut this presumption." (12 Cyc. 152.)

Digitized by Google

"When the proof shows that the unlawful act was done, the law presumes the intent, and the proof of the act, that being in itself a violation of the law, is the proof of the intent. So that if these defendants are shown by the evidence to have done acts which in themselves are violations of law, the law presumes the intent and the jury need not look beyond the proof of the unlawful act for proof of an intent to violate the law." (U. S. *v.* Baldridge, 11 Fed. Rep. 552, 554.)

The foregoing fairly describes what the law means when it speaks of a general intent. As to a specific intent, the rule above stated is different. As set forth in 12 Cyc. 152.

"The rule, however, does not apply in the cases of crimes like burglary, assault with intent to kill, or rape, etc., for which a specific intent is necessary. Here the burden is on the State to prove, by either direct or circumstantial evidence, that the act was done with the requisite specific intent. But it is sufficient in such cases to prove facts from which the specific intent may be inferred." (12 Cyc. 152.)

Thus, in robbery and in larceny, the specific intent is to deprive the owner of his property; in burglary, it is to commit some felony, after breaking and entering the dwelling house of another in the nighttime; in the military offense of desertion, it is the intent to abandon the service or the pending contract of enlistment; and in all such cases the specific intent must be proved, either directly or circumstantially. C. M. O. 5, 1912, 8–9. *See also* DESERTION, 77 (p. 175).

50. **Statutory intent**—"As a general rule, where an act is prohibited and made punishable by statute, the statute is to be construed in the light of the common law, and the existence of a criminal intent is essential. The legislature, however, may forbid the doing of an act and make its commission criminal without regard to the intent of the doer, and if such an intention appears the courts must give it effect though the intention may have been innocent. Whether or not in a given case a statute is to be so construed is to be determined by the court by considering the subject matter of the prohibition as well as the language of the statute and thus ascertaining the intention of the legislature." (12 Cyc. 148.)

"The legislature may enact laws for the mere violation of which, irrespective of the criminal intent, penalties are attached; as for selling liquors to minors, selling adulterated food and drugs, allowing minors to frequent saloons, changing and obstructing public roads, maintaining a nuisance, disposing of mortgaged property." (8 A. and E. Enc. L. 291.)

"There are many instances where an act may be criminal in its character without there being a criminal intent. Gross carelessness by which a person may be injured or killed, while it may reduce the offense from murder to manslaughter, or modify the penalty, does not wholly relieve the person guilty of it from criminal responsibility. Governments, both national and State, and even municipal, make laws for protection against articles such as powder or glycerine from accidents resulting from negligence where no intention exists to cause an injury. If persons violate those laws they become liable to the penalty prescribed, because the necessity for strict care and caution in regard to such dangerous substances requires that carelessness in regard thereto, from which damage might result, should be punished notwithstanding there may be an absence of any criminal or felonious intent." (In re McCoy, 127 U. S. 731, 754.)

"While intent is in a certain sense essential to the commission of a crime, and in some classes of cases it is necessary to show moral turpitude in order to make out a crime, there is a class of cases within which we think the one under consideration falls where purposely doing a thing prohibited by statute may amount to an offense, although the act does not involve turpitude or moral wrong." (Armour Packing Co. *v.* U. S., 209 U. S. 56, 85, 86.) C. M. O. 5, 1912, 7–8.

51. **Same**—Criminal intent is the intention to do the *act charged* and *not* the intention of violating the law—"There is nothing at all unusual in a man's willfully and deliberately doing the acts in violation of laws of which he is ignorant. The court is not supposed to investigate and determine whether or not the accused knew the law, the only question being whether he willfully and deliberately did the acts with which he is charged. As plainly stated * * * in Court-Martial Order No. 4, 1913, it is the intention to do the *act charged* and *not* the intention of violating the law which constitutes criminal intent." (G. C. M. Rec. 26032.) C. M. O. 10, 1913, 4.

52. **"Suffering a vessel of the Navy to be stranded," etc.**—Specific intent not required. *See* INTENT, 2.

53. **Theft.** *See* DRUNKENNESS, 49; INTENT, 5, 42, 49; THEFT, 9.

54. **Threatening to assault his superior officer while in the execution of the duties of his office.** C. M. O. 23, 1910, 6.

Digitized by Google

55. **Unavoidable force and compulsion**—It is stated in De Hart's Military Law (p. 164), referring to "compulsion or inevitable necessity" as a plea in bar of judgment, quoting from Blackstone's Commentaries (4 Com. 26):
"These are a constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which it is presumed his will (if left to itself) would reject. As punishments, therefore, are only inflicted for the abuse of that free will, which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion." C. M. O. 5, 1912, 11.
56. **Using abusive, obscene, and threatening language toward his superior officer.** C. M. O. 23, 1910, 6.
57. **Uttering seditious words.** C. M. O. 14, 1910, 14–15. *See also* SEDITION.
58. **"Violating or refusing obedience to any lawful general order," etc.**—No specific intent necessary. *See* INTENT, 2.
59. **"Willfully"**—Intent expressed by. *See* CHARGES AND SPECIFICATIONS, 52.
60. **"Wrongfully"**—As expressing intent. *See* CHARGES AND SPECIFICATIONS, 52.

INTERCRANIAL HEMORRHAGE. C. M. O. 12, 1915, 9. *See also* LINE OF DUTY AND MISCONDUCT CONSTRUED, 9.

INTERFERING WITH A SENTINEL.
1. **Enlisted man**—Charged with. C. M. O. 102, 1903, 2.

INTERLINEATIONS.
1. **Findings**—Should be free from. *See* FINDINGS, 7, 54.
2. **Sentences**—Should be free from. *See* SENTENCES, 58.

INTERLOCUTORY PROCEEDINGS. *See* ARGUMENTS, 4.

INTERNATIONAL LAW.
1. **Citizenship**—*See* CITIZENSHIP.
2. **Civil Courts of Cuba**—Sentenced an enlisted man to confinement. *See* CONFINEMENT, 6.
3. **Expatriation**—Evidence of. *See* EXPATRIATION.
4. **Extradition treaty**—Deserters. *See* JAPAN, 3; TREATIES.
5. **Haiti**—Convening of general courts-martial on foreign territory. *See* JURISDICTION, 53.
6. **Same**—Gendarmerie. *See* OFFICERS OF THE UNITED STATES.
7. **Internment.** *See* INTERNMENT.
8. **Judge Advocate General**—Duties with reference to question of international law. *See* JUDGE ADVOCATE GENERAL, 17.
9. **Jurisdiction**—Convening naval courts-martial on foreign territory. *See* JURISDICTION, 53.
10. **Marine League.** *See* TARGET PRACTICE: WORDS AND PHRASES.
11. **Naturalization**—Of aliens. *See* CITIZENSHIP.
12. **Same**—Filipinos. *See* FILIPINOS, 2, 3.
13. **Neutral**—Engaged in business in an enemy's country during war, is regarded as a citizen or subject of that country. *See* CITIZENSHIP, 18.
14. **Officer of the United States**—Accepting office from a foreign state. *See* OFFICERS OF THE UNITED STATES, 1.
15. **Philippine Islands**—Naturalization of native Filipino by enlistment in Navy. *See* FILIPINOS, 2.
16. **Prisoners of war.** File 28573–6. *See also* PRISONERS OF WAR.
17. **Retired officer**—Civil employment by foreign corporation. *See* RETIRED OFFICERS, 31.
18. **Spanish subjects**—Who were inhabitants of the Philippine Islands on April 11, 1899, other than those who had elected to preserve their allegiance to Spain, were by the act of July 1, 1902 (32 Stat., 691), declared "to be citizens of the Philippine Islands and as such entitled to the protection of the United States." *See* FILIPINOS, 3.
19. **Treaty with Japan.** *See* JAPAN, 3; TREATIES.
20. **Treaty of peace ratified**—With Spain on April 11, 1899—Philippines were ceded to United States. *See* FILIPINOS, 3.
21. **War Prisoners.** *See* PRISONERS OF WAR.
22. **War vessels**—A war vessel is, throughout the civilized world, accorded rights of exterritoriality. File 3973–136:2, J. A. G., Feb. 26, 1916. *See also* WORDS AND PHRASES (EXTERRITORIALITY).

Digitized by Google

INTERNMENT.
1. **Belligerents**—Interned in a neutral state. File 28573-10; 27715-82.
2. **Neutral state**—Belligerents interned in. *See* INTERNMENT, 1.
3. **Parole**—Of officers of a belligerent ship interned in a neutral state. File 27715-82.

INTERPRETATION OF STATUTES. *See* STATUTORY CONSTRUCTION AND INTERPRETATION.

INTERROGATORIES. *See* DEPOSITIONS, 3.

INTOXICATED ON DUTY.
1. **Enlisted man**—Charged with. C. M. O. 33, 1893. *See* DRUNKENNESS ON DUTY, 4, for proper charge.

INTOXICATION. *See also* DRUNKENNESS.
1. **Acting sailmaker**—Charged with. G. C. M. Rec. 6178. Should have been charged as "Drunkenness."

INVESTIGATION.
1. **Index for.** *See* INDEX, 3.
2. **Oath**—Administering oath to witnesses. *See* GOVERNMENT CONTRACTORS, 5.

INVESTIGATION, BOARD OF. *See* BOARDS OF INVESTIGATION.

INVOLUNTARY RETIREMENT.
1. **Laws relating to.** *See* RETIREMENT OF OFFICERS, 28-31.

IRONS. *See* ARMY, 7; DOUBLE IRONS; SINGLE IRONS.

IRREGULARITY AND CARELESSNESS IN REGARD TO DISCHARGE OF PECUNIARY OBLIGATIONS.
1. **Officer**—Officer charged with "Fraud" in violation of article 14, etc., and found guilty in a less degree of the above offense. C. M. O. 4, 1916, 2.

IRRESPONSIBLE MENTALLY. *See* INSANITY, 27.

JACK-OF-THE-DUST.
1. **Enlistment of.** U. S. Navy Reg. Cir. No. 5, June, 1877.

JAPAN.
1. **Civil and naval authorities.** *See* JURISDICTION, 66.
2. **Citizenship.** *See* CITIZENSHIP, 23.
3. **Deserters**—Extradition treaty. File 27403-132, 1916. *See also* TREATIES.
4. **Target practice**—Within territorial waters of Japan. *See* TARGET PRACTICE.

JEOPARDY, FORMER.
1. **Accumulation of charges.** *See* ACCUMULATION OF OFFENSES; PLEA IN BAR, 1.
2. **Acquittal or conviction.** *See* JEOPARDY, FORMER, 3, 4, 38.
3. **Commanding officer is not a "court-martial"**—Counsel for accused conceded that to constitute former jeopardy there must have been a trial by a duly constituted court and that punishment imposed without trial does not bar subsequent proceedings by court-martial. Counsel, however, argues that the commanding officer of a naval vessel in administering punishments without trial by court-martial is himself "a duly constituted and legal court;" that the action of the commanding officer in such a case is "purely judicial," and accordingly "that the accused has been tried and convicted and punished."

   The Supreme Court of the United States has said that the commanding officer of a naval vessel in punishing enlisted men under his command occupies a position which is "*quasi* judicial." (*Wilkes* v. *Dinsman*, 7 How., 88, 129.) This accordingly disposes of the contention that the commanding officer acts in a "purely judicial" capacity, for the very word "quasi" used by the Supreme Court "*negatives the idea of identity*," and while it is "a term used to mark a resemblance," nevertheless it "*supposes a difference between two objects*." (2 Bouvier, 802.) Furthermore, the commanding officer of a naval vessel does not as a court possess any power to compel witnesses to testify under oath when investigating complaints, nor has he any power as a court to compel the attendance of witnesses, although he may, as commanding officer, compel the attendance of such witnesses in the case, if any, as may be under his command. It will therefore be seen that the commanding officer's investigation

Digitized by Google

of charges is necessarily "informal in a judicial sense," more so even than the investigation of charges by a court of inquiry, which has power to compel the attendance of witnesses, even civilians, to take testimony under oath, and to punish contempts.

In an opinion of the Attorney General, he held that a reprimand issued *as a punishment* by a commander in chief is no bar to subsequent trial for the same offense. In that case the *punishment* was inflicted *for the offense* pursuant to law and regulation, after careful investigation by a court of inquiry—a tribunal established by law. (25 Op. Atty. Gen., 623.) Certainly such investigation, in which the members of the court, the judge advocate, and the witnesses are all under oath and in which the proceedings are conducted with the formalities of a court-martial, including the power to punish witnesses for contempt, is far more formal than an investigation conducted by a commanding officer. Furthermore, as the commander in chief has, by law, far more power in a disciplinary way than the commanding officer of a single vessel, his power extending even so far as to include the ordering and reviewing of general courts-martial, certainly a reprimand administered by him as a punishment, especially after the facts have all been developed and reported to him by a court of inquiry, should be more far-reaching as a plea in bar than a punishment inflicted by a commanding officer after an informal investigation not under oath and of which no record is required to be kept. If a court of inquiry after completing an exhaustive investigation should decide that the accused is not to blame and, therefore, recommend that no further action be taken, this is not an acquittal nor is it conclusive upon superior authority; so, as held by the Attorney General, if the court of inquiry finds the accused was to blame and recommends that he be punished by the commander in chief, such recommendation and punishment imposed pursuant thereto does not bar subsequent trial by court-martial for the same offense. This being the case, it is *reductio ad absurdum* to contend that an informal investigation conducted by the commanding officer, who decides that the accused is free from blame, is an acquittal by a duly constituted and legal court, and, therefore, is a bar to trial by general court-martial. C. M. O. 7, 1914, 8-9. *See also* G. C. M. Rec. 13370.

A person who has been punished by his commanding officer for an offense, if subsequently brought to trial therefor, may show such fact in evidence in mitigation of such sentence as the court, in the event of conviction, may impose. File 26251-8144, J. A. G., Nov. 22, 1913.

4. **Constitutional provision**—The principle of the Constitution that no person shall "be subject for the same offense, to be twice put in jeopardy of life or limb" is derived to us immediately from the common law. To give benefit to this it is necessary that he should have been actually *acquitted* or *convicted* on a former trial and the record of this fact must be produced. C. M. O. 7, 1914, 5.

It is a principle of common humanity, a universal rule of law, and an express provision of the Constitution, that no man shall be twice put in jeopardy for the same offense. The law protects an officer from being tried even once for an offense more than two years old. File 26260-1392, 697, J. A. G., June 29, 1911, pp. 27-28.

5. **Constitutional right**—The right of an accused to plead former jeopardy before a naval court-martial can not be *directly claimed* under the Constitution, in view of the decisions of the Supreme Court that "the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or other amendment." File 26251-2993, J. A. G., March 10, 1910. *See also* JEOPARDY, FORMER, 24.

6. **Court**—Illegally constituted—No former jeopardy. *See* DECK COURTS, 26.

7. **Court of inquiry**—Punishment imposed, pursuant to findings and recommendations of a court of inquiry, by a commander-in-chief does not bar subsequent trial by court-martial for same offense. C. M. O. 7, 1914, 9. *See also* COURTS OF INQUIRY, 29; JEOPARDY, FORMER, 3; PRIVATE REPRIMANDS, 3.

Where the convening authority of a court of inquiry (fleet) states that "no further proceedings recommended," the department may either reconvene the court of inquiry or convene a court-martial for the trial of defendants. File 2639-04.

8. **Court-martial trial**—The only disciplinary action by naval authority which would bar subsequent trial by court-martial for an offense is a former trial by court-martial for the same offense, and the commanding officer is not in any sense a "court-martial" within the meaning of this rule. C. M. O. 7, 1914, 1; 31, 1914, 1. *See also* C. M. O. 49, 1910, 16; JEOPARDY, FORMER, 3.

9. **Deck court.** *See* DECK COURTS, 26.

10. **Department's letter**—Of reprimand. *See* JEOPARDY, FORMER, 30.

Digitized by Google

11. **Foreign court**—The fact that an officer was punished by a Mexican court does not bar his trial by general court-martial for the same misconduct; nor does the fact that he was suspended by his commanding officer for unofficerlike conduct, based upon the same occurrences, bar court-martial proceedings. File 26251-8144, J. A. G., Nov. 22, 1913. *See also* JEOPARDY, FORMER, 45, 46; STATE, 7.
12. **Formal reprimand.** *See* JEOPARDY, FORMER, 19.
13. **Former punishment**—Every kind of "former punishment" does not constitute a valid bar to subsequent trial by court-martial. The punishment, to constitute a valid bar, must be "punishment" in its legal sense and not a mere punishment administered by some authority whose inherent power authorizes him so to do. 14, J. A. G., 359½.
14. **Insanity**—Where accused is insane at time of trial. *See* INSANITY, 32.
15. **Jurisdiction of court**—Offense committed while under Army jurisdiction and accused tried by naval court-martial. C. M. O. 31, 1915, 6–10. *See also* MARINES SERVING WITH ARMY, 2, 3, 7.
16. **Same**—Regular Navy on board Naval Militia ship. C. M. O. 49, 1915, 16–20. *See also* C. M. O. 10, 1915, 11–12; NAVAL MILITIA, 39–41.
17. **Limitations.** *See* C. M. O. 21, 1885, 11.
18. **Mexican civil court.** *See* JEOPARDY, FORMER, 11.
19. **Navy Regulations, 1909**—Provided: "No officer who has been formally reprimanded for an offense shall be subsequently tried therefor, nor shall that offense be the subject again of inquiry, except when it may be indispensable to prove a particular habit charged; a private reprimand, however, is no bar to subsequent investigation and trial." (Art. 265.) "Whenever any person in the Navy who has been placed under suspension, in arrest, or confinement, or otherwise punished for misconduct, is released and entirely discharged by competent authority, such discharge shall be a bar to further disciplinary proceedings in the case by any naval authority." (Art. 220.) Both of these provisions, however, were stricken out before Navy Regulations, 1913, were issued. *See* C. M. O. 50, 1893, 5; File 1493-04, overruling C. M. O. 9, 1893.
20. **Philippine Islands civil court.** *See* JEOPARDY, FORMER, 45, 46.
21. **Previous punishment**—"The accused pleaded, in bar of trial, that he had, by punishment, already expiated the offense." G. O. 137, Sept. 7, 1869. *See also* C. M. O. 57, 1900.
22. **Previous punishment by commanding officer**—By reduction, confinement, and working under custody of a sentinel does not constitute a good bar. C. M. O. 7, 1914, 5.
23. **Principles of**—In an opinion rendered by the Attorney General, August 29, 1819 (1 Op. Atty. Gen., 294), it was held that—

A plea before a court-martial of a former arrest and discharge is bad; a former trial, only, is a defense under the eighty-seventh article of the Rules and Articles of War.

The principle of the Constitution that no person shall "be subject for the same offense, to be twice put in jeopardy of life or limb" is derived to us immediately from the common law. It is a maxim of this law "that a man shall not be brought into danger of his life more than once for the same offense;" but to give the benefit of this maxim it is necessary that he should have been actually *acquitted* or *convicted on a former trial* and the record of this fact must be produced.

In an opinion rendered July 31, 1883, by the Bureau of Military Justice, War Department, the rule with respect to the effect of punishment imposed by commanding officers was stated as follows:

"In this case the prisoner was arraigned on the charge of drunkenness on duty while a sergeant in command of a guard having charge of prisoners en route to the military prison. He pleaded in bar of trial that he had been previously punished for the offense by reduction, confinement, and working under custody of a sentinel. The court sustained the plea and the case is now submitted for the action of the convening officer. The reduction and confinement of this man as stated constituted no good bar to his trial for offense charged, however it might affect the quantum of punishment to be adjudged upon conviction of the offense. The action of the court is unusual and without sanction of law." (R. 47, p. 242, Dig. J. A. G. Army Digest, 1912, p. 519 (2).)

"*Former punishment.*—The plea of former punishment, i. e., that the accused has already been adequately punished for his offense by his commanding officer, though recognized in the English practice, is not known to our military law, and when made on our military trials has been properly overruled. Where indeed an accused has,

Digitized by Google

prior to trial, been subjected, on account of his offense, to any physical punishment, or to reduction to the ranks, or to a protracted arrest, or other unusual or unauthorized discipline, he may properly show the fact in evidence on the general issue in mitigation of such sentence as the court, in the event of his conviction, may impose. But, except in this form, he can not avail himself of such circumstances upon a trial." (1 Winth., p. 411.)

"The Constitution of the United States, Article V, provides that no person shall 'be subject, for the same offense, to be twice put in jeopardy of life or limb,' and this guarantee is applied to persons subject to military jurisdiction by the terms of the one hundred and second article of war, which are as follows:

"ARTICLE 102.—No person shall be tried a second time for the same offense.

"'Tried,' as here used, means duly prosecuted before a legally organized and competent court-martial to *final conviction*, or *acquittal*. Nothing short of 'conviction' or 'acquittal' will justify acceptance of the plea." (Dudley, p. 99, par. 194.)

In an opinion rendered by the Attorney General, June 15, 1906 (25 Op. A. G., 623), it was held, quoting syllabus:

"A private reprimand, administered by the commander in chief of a fleet to a naval officer in accordance with the recommendation of a court of inquiry, as a punishment for an offense, such as neglect of duty, is no bar to a subsequent trial of such officer by general court-martial for the same offense.

"The proceedings of a board of inquest or of a court of inquiry are in no sense a trial of an issue or of an accused person. These boards perform no real judicial function, but are convened only for the purpose of informing the department in a preliminary way as to the facts involved in the inquiry.

"The jeopardy of the law means real peril, originally of life or limb, and always of substantial punishment or penalty. There must be a trial upon an indictment for an offense, or upon some equivalent charge and presentment, as by *court-martial*, submitting a definite issue and involving conviction or acquittal."

To the same effect see also Forms of Procedure for Courts and Boards in the Navy and Marine Corps, 1910, p. 23:

"*Plea of former jeopardy.*—The jeopardy of the law means a real peril, originally of life or limb, and always of substantial punishment or penalty. A fundamental idea is that there must be a trial upon an indictment for an offense, or upon some equivalent charge and presentment, as by a court-martial, submitting a definite issue and involving conviction or acquittal. The person must be in danger of condemnation; a mere inquiry or other informal proceeding (informal in a judicial sense) ending in a reprimand does not satisfy either element of the principle of second jeopardy. Of course, if there is a trial in some form, which *might* result in conviction and punishment, the jeopardy is none the less complete and valid as a bar to another trial because, in fact, it issues in a simple rebuke; for absolute acquittal, if the peril is real, is equally a bar. This plea is, therefore, a valid bar when the accused has been duly prosecuted before a court-martial to a final conviction or acquittal; he may, however, waive objection to a second trial. (25 Opins. A. G., 623.)" C. M. O. 7, 1914, 5–6.

24. **Same**—The fifth amendment to the Constitution of the United States provides:

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

"This principle is derived to us immediately from the common law" (1 Op. Atty. Gen. 294; 6 Op. Atty. Gen. 204).

It embodies the common-law rule in criminal trials as expressed in the pleas of "*autres foits acquit*" (former acquittal), and "*autres foits convict*" (former conviction) (1 Op. Atty. Gen. 240).

It follows that no person can be twice tried for the same offense unless he expressly or impliedly waives his right to plead his former trial in bar to the second prosecution.

However, "every citizen of the United States is also a citizen of a State or a Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the State, a riot, an assault, or a murder and subject the same person to a punishment under the State laws for a misdemeanor or a felony. That either or both may (if they see fit) punish such an offender can not be doubted. Yet it can not be truly averred that the offender has been twice

Digitized by Google

punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable." (Moore *v.* Illinois, 14 How. 20.)

It will be seen from the foregoing that while no person may be twice tried for the same offense, where an officer or enlisted man of the Navy violates the law of a State and the same act is also a violation of the law of the United States, to wit, the Articles for the Government of the Navy, he may be tried by the State court for violations of the State law, and may thereafter be tried by naval court-martial for his offense against the law of the United States involved in the same act. *Held*, an officer or an enlisted man of the naval service who has been tried by a State court and acquitted or convicted may be tried for the same *act* by a naval court-martial. File 26504–285, J. A. G., July 15, 1916. *See also* G. O. 137, 1869; 152, March 29, 1870; C. M. O. 9, 1893, 4; 44, 1893; 50, 1893; 33, 1896; 18, 1897, 2; 90, 1897, 2; 104, 1897; 155, 1901, 3, 164, 1901; 169, 1901; 29, 1914; 13 J. A. G. 123; JEOPARDY, FORMER, 45, 46; STATE, 7.

25. **Private reprimand**—A private reprimand is not such a punishment as to constitute an effective plea in bar of further proceedings before a general court-martial under the jeopardy clause of the Constitution. File 4579–7; Op. Atty. Gen., June 15, 1906 (25 Op. Atty. Gen. 623). File 4579–7. *See also* JEOPARDY, FORMER, 19.

26. **Same**—"The accused pleaded in bar of trial the fact that he had been privately reprimanded for the offenses for which he was about to be tried, which plea was overruled by the court." Accused was acquitted. C. M. O. 28, 1907, 3.

27. **Public reprimand**—*See* JEOPARDY, FORMER, 29, 30; PLEA IN BAR, 6.

28. **Real "legal" peril**—There must be some real "legal" peril. A mere inquiry, ending in a reprimand, is not sufficient to prevent a subsequent trial for the offense. File 26251–2993, J. A. G., March 10, 1910.

29. **Reprimand**—A reprimand administered to an enlisted man does not bar subsequent trial of such enlisted man by general court-martial, provided that the reprimand was not administered pursuant to sentence of court-martial. File 26836–16, J. A. G., Dec. 9, 1913. *See also* File 26251–2993, J. A. G., March 10, 1910.

30. **Same**—The accused pleaded in bar of trial on the ground of former jeopardy, he having received a letter of reprimand from the department which ended with these words, "You will acknowledge receipt of this communication, a copy of which will be placed with your record and the incident will be considered closed." The court overruled the plea and found the accused guilty. The department approved. The case was sent to the Attorney General, who upheld the action of the court and the department. G. C. M. Rec. 21478; 21478a, p. 5. *See also* Op. Atty. Gen., June 15, 1906 (25 Op. Atty. Gen. 623); File 26251–6297:9; PLEA IN BAR, 6.

Letters of reprimand were addressed by a commander in chief of a fleet to an officer, in consequence of the recommendation of a court of inquiry. Later this officer was brought to trial by general court-martial for the same offense for which he had been reprimanded. He pleaded in bar that he had been previously punished for the same offense, which plea was properly overruled by the court. G. C. M. Rec. 15578. *See also* 25 Op. Atty. Gen. 623; File 26251–2993, J. A. G., Mar. 10, 1910, p. 10.

31. **Same**—A reprimand administered to an enlisted man does not bar subsequent trial of such enlisted man by general court-martial, provided that the reprimand was not administered pursuant to sentence of court-martial. File 26836–16, J. A. G., Dec. 9, 1913.

32. **Restored to duty**—Restoration to duty between the date of arrest and the date of trial can not be the basis of a valid plea in bar of trial. This has heretofore been decided in specific cases in accordance with the opinions of the Attorney General, and the regulations which at one time provided that men should not be tried after restoration to duty were revoked some years ago. Accordingly, there is no authority for the statement that such action bars trial by naval court-martial. File 26251–6297:9, Sec. Navy, Dec. 28, 1914; C. M. O. 6, 1915, 15. *See also* File 26251–8539:1.

33. **Restriction**—Previous punishment by restriction to the ship on which accused was serving. Court overruled the plea in bar and accused then pleaded "guilty." Department stated that the court erred in so doing. C. M. O. 38, 1894, 3. This decision of the department has been overruled by its later decision in C. M. O. 4, 1914.

34. **Revision**—Evidence may not be admitted in revision because the accused having once been "placed in jeopardy" and the trial once been finished he is protected against being again tried in whole or in part for that offense, which is in effect what would be done were additional testimony permitted in revision. C. M. O. 5, 1914, 6.

Returning the record for a revision of its findings or sentence does not constitute trying the accused a second time for the same offense. (Ex parte Reed, 100 U. S. 13

Digitized by Google

Swaim *v.* U. S., 165 U. S., 553; Carter *v.* McClaughry, 183 U. S. 365; 6 Op. Atty. Gen. 204, 205.)

35. **Secretary of the Navy**—The Secretary of the Navy has the right to censure a subordinate, publicly or privately, for negligence or inefficiency in the performance of duty, or for conduct bringing discredit upon the service. Such rebuke may be published to the service in such manner as the department may, in its discretion, decide, and does not constitute a bar to subsequent trial for that offense by court-martial. It is the mere exercise of the Secretary's right of administration of discipline and is in no wise connected with his power of reviewing authority wherein he merely executes the sentence of public reprimand imposed by the court. File 26251-2993, J. A. G., March 10, 1910. *See also* SECRETARY OF THE NAVY, 63.

36. **Specifications**—Struck out by court—Where the court, on motion of counsel for the accused, strikes out a charge and specification because they "alleged several distinct and separate offenses," the accused "may still be tried for the offenses stated therein," inasmuch as the charge and specification in question were stricken out as invalid. C. M. O. 16, 1911, 4.

Proceedings upon a "fatally defective" specification do not constitute former jeopardy. C. M. O. 22, 1916, 6. *See also* DECK COURTS, 59.

37. **Same**—Faulty deck court specifications. *See* DECK COURTS, 59.

38. **Same**—When called upon to plead before a summary court-martial, the accused, through his counsel, objected to the specification as "fatally defective." The court sustained the objection of the accused and notified the convening authority as required by Forms of Procedure that the accused submitted a plea in bar of trial which the court decided was a valid one. Thereupon the convening authority withdrew the specification and directed prosecution thereon be discontinued.

Thereafter, on June 16, 1916, the accused was brought before the same summary court-martial upon two specifications preferred by the same convening authority June 10, 1916, and setting forth in proper form the offenses charged in the specification in the previous case. The accused was represented by the same counsel, who now entered a plea of former jeopardy, in support of which he contended that the accused had already been tried for the same offenses.

The court overruled the plea of former jeopardy thus interposed by the accused, who thereupon "noted an objection" and "stood mute" upon arraignment. The court found both specifications proved, with a slight modification in one, and adjudged a sentence.

That the accused was not placed in jeopardy upon the original specification, and that the court properly overruled his plea on this ground, is established by precedent, (*See* C. M. O. 7, 1914; *see also* U. S. *v.* Rogoff, 163 Fed. Rep. 311.) In the case last cited, it was said by the court:

"It is difficult to see how the dismissal of an indictment before the case goes to the jury, when this dismissal is had upon the ground that no charge sufficient in law has ever been made against the defendant, can be said to have placed him in jeopardy. The entire transaction, from the finding of the indictment to the dismissal, is made a nullity, and the defendant comes before the court upon the second indictment as if the first charge had never been made.

"The court, having jurisdiction of the defendant, nevertheless had no jurisdiction over the offense which was attempted to be charged, inasmuch as no offense was charged, and the defendant was therefore never in a position of jeopardy before a jury which was called to pass upon any sufficient criminal charge. The matter was disposed of as a question of law, with the same effect as if it had been argued upon demurrer to the indictment."

The point which particularly deserves the department's notice in this connection is the fact, as shown above, that we here have the same accused, before the same court, and represented by the same counsel—an officer of the Navy—first contending that the original specification against him was "fatally defective," and then, when he had secured a favorable ruling upon this point, wholly changing front and contending that the aforesaid specification was a "valid indictment."

The evils that would result were accused persons permitted to assume inconsistent positions in court as their interests might happen to change in the course of criminal proceedings are so obvious as to require little comment. The opportunity thus presented for the guilty to escape punishment would result in placing a premium upon the ability of ingenious attorneys to confuse and mislead the court in order to obtain decisions in their favor, only to insist upon the incorrectness of such decisions when, after conviction, it should become to the interest of their clients to do so.

Digitized by Google

"But the principle is well settled that, in criminal as well as in civil cases, a defendant must be held to the position which he assumes and upon which he requests and secures a favorable judgment or other personal advantage." (People *v.* Moakim, 61 Hun. (N. Y.) 327.)

In the case cited, the court, upon a former trial, had directed an acquittal upon the ground of a variance between the proof and the facts charged in the indictment. A second indictment was found for the same offense, upon the trial of which the defendants urged that in fact there was no material variance between the proof upon the former trial and the allegations of the first indictment; that therefore the defendants had been once put in jeopardy; and consequently the second indictment was within the constitutional prohibition.

The court, however, declined to consider the question thus attempted to be raised, holding that "whether the variance referred to was or was not material, we think the defendants can not now be permitted to question the position which they took upon that head on the former trial. The record of that trial distinctly shows that the defendants there claimed that the variance was material; * * * having requested the court to rule in their favor in these particulars, and the court having thereupon directed an acquittal upon these very grounds, they can not now be heard to say that there was no material variance. * * * In other words, they must, under such circumstances, take the acquittal as it was directed and recorded, and they can not now be permitted to go behind the record as it was thus made up."

The principle has been stated in accordance with this case by Bishop in his work on Criminal Law (7th ed., sec. 1000) and has been applied in numerous reported decisions, for, as was said by the court in United States *v.* Jones (31 Fed. Rep. 725), "while counsel may go to great length in defense of one charged with crime, they can not be heard to blow hot and cold upon the same issue in the same record." (*See also* State *v.* Meekins, 41 La. Ann. 543; United States *v.* Rogoff, 163 Fed. Rep. 311).

Without further citation of authorities, it is sufficiently clear that the original specification preferred against Corpl. * * * must now be taken as "fatally defective" in accordance with counsel's contention which was sustained by the court. This being so, there is an end to the matter, the plea of former jeopardy based upon proceedings which, at the instance of the accused, were declared a nullity, having no support in law wholly aside from the fact that said proceedings did not advance to the stage required under the citations given above to operate as a bar of trial. File 26287-3475, J. A. G., July 5, 1916, approved by Sec. Navy, July 5, 1916; C. M. O. 22, 1916, 6-8.

39. **State courts.** *See* JEOPARDY, FORMER, 24, 45, 46.
40. **Summary court-martial trial**—Court sustained the plea in bar of trial the accused proving that he had been tried by summary court-martial for the offenses. G. O. 152, March 29, 1870.
41. **Suspension from duty**—By commanding officer, although imposed as punishment for an offense, does not bar subsequent trial by general court-martial for the same offense. C. M. O. 7, 1914, 1; 31, 1914, 1. *See also* G. C. M. Rec. 13370.
42. **Same**—Where an officer suspended from duty for a few hours was subsequently court-martialed, his suspension can not be regarded as punishment for the same offense. Bishop *v.* U. S. (38 Ct. Cls. 473, 474).
43. **Tagged "Thief"**—Accused charged with *theft* and pleaded guilty. After the trial was finished it came to the knowledge of the court that the accused had been punished by having the tag "Thief" hung about his neck. In the interests of substantial justice, the court reopened the case, and permitted the accused to enter a plea in bar of trial. File 799-94. *See also* 13 J. A. G. 457, Aug. 18, 1905, where accused pleaded in bar that the Academic Board had already punished him by giving him a mark of zero in seamanship and navigation, and court improperly sustained plea. *But see* JEOPARDY, FORMER, 8, 13, 22, 23, 24, 28, overruling these decisions.
44. **Tried twice for same offense**—Man should not be tried twice for the same offense under different charges, the facts alleged in the specifications being the same. Where man was tried by deck court for jumping ship and convicted, and was later tried and convicted of absence without permission, the facts alleged in the specifications of both offenses being the same, the second case was disapproved by the department. File 27217-21. *See also* C. M. O. 49; 1910, 16; STATE, 7. *But see* C. M. O., 3, 1916, 7-8.
45. **United States courts**—A person may not be tried twice for the same offense (by different courts) where both tribunals derive their jurisdiction and authority from the United States, as in the case of a court-martial and civil court in the Philippine Islands. (Grafton *v.* U. S., 206 U. S. 333, tried May 27, 1907). *See* JEOPARDY, FORMER, 24, 46.

Digitized by Google

46. **Same**—Where the same act constitutes an offense under a state law, as well as an offense under a law of the United States, the State court has jurisdiction to punish the offense under its law, as has also the Federal court. (Fox *v.* Ohio (5 How. 433); U. S. *v.* Marigold (9 How. 569); Moore *v.* Illinois (14 How. 19); Ex Parte Seibold (100 U. S. 390); Cross *v.* North Carolina (132 U. S. 131).) 14 Op. J. A. G., 188, Aug. 14, 1909. *See* JEOPARDY, FORMER, 24, 45; STATE, 7.

JOINDER, TRIAL IN.

1. **Accused**—Where men are tried in joinder they should be referred to in the record as "each of the accused." *See* JOINDER, TRIAL IN, 14, 15.
2. **Acquittal**—Of each person tried in joinder should be separately recorded. *See* JOINDER, TRIAL IN, 15.
3. **Challenges**—*See* JOINDER, TRIAL IN, 18.
4. **Collision.** *See* JOINDER, TRIAL IN, 5.
5. **Commanding officer and officer-of-the-deck**—Tried in joinder for collision with a merchant schooner. C. M. O. 44, 1883.
6. **Convening authority should indicate**—When the convening authority does not join the accused in the charges and specification, but indicates that he desires them tried separately by preferring separate charges and specifications, with separate letters of transmittal, courts-martial should not try them in joinder. C. M. O. 10, 1911, 3–5; 42, 1914, 4.
7. **Court should not try men in joinder without authority**—Two men were charged with "Desertion" the specifications being identical; tried in joinder by court without authority of convening authority (Secretary of the Navy); did not desire counsel; made no objection to being tried in joinder; department disapproved, stating that the action of the court in trying the men in joinder was "unlawful," that such trial was "illegal," etc. C. M. O. 39, 1905, 2; G. C. M. Rec. 12835. *But see* JOINDER, TRIAL IN, 9.

   In the above case the department severely criticized the court. The action of the court was certainly irregular and constituted a usurpation by the court of the prerogative of the convening authority. It should be distinctly impressed upon officers serving as members of courts-martial that the question whether or not the accused shall be tried in joinder is one of the matters which is to be determined *in all cases* by the convening authority, and that for such officers to assume that they have the right to determine such a question for themselves, without instructions from the convening authority, is an indication, at the least, of ignorance on their part of the duties devolving upon them and concerning which an efficient officer is expected to be informed.
8. **Same**—Convening authority was Secretary of the Navy—Two men were charged separately with "Scandalous conduct tending to the destruction of good morals" and "Drunkenness on duty;" one specification under each charge; everything was separate and the department desired them tried separately but the court tried them in joinder; no objection was made by the accused in the above case against being tried in joinder; accused were represented by civil counsel: as the offenses were several in character the department disapproved the proceedings, findings, and acquittals. C. M. O. 10, 1911, 3–5; G. C. M. Rec. 23473. *See also* JOINDER, TRIAL IN, 9.
9. **Same**—Separate specifications preferred—On March 28, 1916, the convening authority ordered the trial by summary court-martial of a fireman first class, preferring two specifications, each alleging an offense. On the same date, the same convening authority preferred similar specifications, *separately*, against two other enlisted men directing their trial by summary court-martial on board the same ship and before the same summary court-martial. The cases of these men were entirely separate and distinct, having separate specifications which did not allege that the offenses were committed in collusion or in concert. The court tried the men in joinder without instructions so to do by the convening authority. At the trial *each of the accused* was represented by the same naval officer as his counsel. Not only was there no objection to the procedure of trying these men in joinder made by counsel or any of the accused, but the record expressly disclosed the statement that *each of the accused* declared "that he desired to be tried in joinder with other two accused."

   The Supreme Court of the United States, in Logan *v.* United States (144 U. S. 263, 296), held that where objection was not made to the consolidation of indictments in a case similar to this, the question whether such consolidation was or was not legal would not be considered in review.

Digitized by Google

Also the Attorney General has stated in an opinion (4 Op. Atty. Gen., 171):

"It is a vain conceit, that because the proceedings are irregular, and fatally irregular (*if the exception be taken in proper time*), therefore the judgment once suffered to be entered up is void. Thus there are many things * * * in the conduct of a trial, that make the verdict void; yet, if advantage be not taken of them by motion in arrest of judgment, no writ of error lies, even where there is a competent court of errors (Rob. Abr., 783; 4 Cro. Eliz., 616), and it is very proper it should be so; * * * and the repose of society, and the putting an end to controversy and litigation, are more desirable than mere accuracy of procedure, or even the justice of a particular case—*not to mention that acquiescence implies consent, and consent cures error.*"

It does not appear that the accused in this case were prejudiced by their trial in joinder, but on the contrary their statement that they "desired to be tried in joinder with other two accused" would indicate that they regarded such procedure advantageous to their interests. Furthermore the court-martial reached separate findings and adjudged separate sentences in the case of each of the accused, who were also separately arraigned. *Held*, the procedure followed was not such as to invalidate the proceedings. (The following precedents of the department have been carefully considered: C. M. O. 44, 1883; 39, 1884; 15, 1896; 32, 1904, p. 2; 39, 1905, p. 2; 78, 1905.; 37, 1909, p. 7; 10, 1911, pp. 3–5; 42, 1914, p. 4; Index-Digest, 1914, p. 25; G. C. M. Rec. Nos. 11835; 20916; 23473; 23743.)

In a case similar to this the Secretary of the Navy approved an opinion of the Judge Advocate General which read in part as follows: "However, the action of the court while not illegal under the circumstances of the case, was certainly irregular and constituted a usurpation by the court of the prerogative of the convening authority. It should be distinctly impressed upon officers serving as members of courts-martial that the question whether or not accused shall be tried in joinder is one of the matters which is to be determined in all cases by the convening authority, and that for such officers to assume that they have the right to determine such a question for themselves, without instructions from the convening authority, is an indication, at the least, of ignorance on their part of the duties devolving upon them and concerning which an efficient officer is expected to be informed." (File 26251–4794, Sec. Navy, June 8, 1911; G. C. M. Rec. No. 23743.)

The findings and sentences in this case were accordingly approved. File 26287-3381, J. A. G., April 27, 1916; C. M. O. 13, 1916, 5–6.

10. **Same**—Convening authority was department—Three men were charged separately with "Knowingly and willfully misappropriating and applying to his own use and benefit, property of the United States, furnished and intended for the naval service thereof," and "Wrongfully and knowingly selling property of the United States, furnished and intended for the naval service thereof"; court of its own initiative tried these three men in joinder; all three of the accused were represented by civilian counsel; no objection to being tried in joinder; department did not disapprove this case because the "collusion" existed here to make it a proper offense to try in joinder citing 22 Cyc. 373 and Logan *v.* U. S. with reference to "not objecting." G. C. M. Rec. 23743. *But see* JOINDER, TRIAL IN, 9.

11. **Same**—Convening authority was commander in chief of the Pacific Squadron—Four men were charged with "Desertion" and "Violation of the eighth clause of the fourteenth article of the Articles for the Government of the Navy;" one specification under each charge each man being properly referred to in it; tried in joinder; accused were represented by an officer; no objection was made to being tried in joinder on these offenses; convening authority (same officer) approved without comment; department set aside the proceedings, findings, and sentences on the ground that these offenses were several. C. M. O. 32, 1904, 2; G. C. M. Rec. 11835. *But see* JOINDER, TRIAL IN, 9.

12. **Enlisted men**—Two enlisted men tried in joinder on the charges of "Theft" and "Disobedience of the lawful orders of their superior officer." C. M. O. 39, 1884.

13. **Same**—Four enlisted men tried in joinder on the charge of "Conduct to the prejudice of good order and discipline." The court's finding was that the four men were "jointly and severally of the charge, 'Guilty.'" One sentence was used but it contained the names of all of the men. The department approved without comment as to the trial in joinder. C. M. O. 15, 1896. *See also* C. M. O. 37, 1904, 7; G. C. M. Rec. 20916; JOINDER, TRIAL IN, 9.

14. **Same**—Two enlisted men tried in joinder on the charge of "Scandalous conduct tending to the destruction of good morals." The department criticised the procedure as the record disclosed the fact that when referred to the two men accused were

Digitized by Google

referred to as "the accused" instead of "each of the accused"; also because each of the accused was not arraigned separately. For these irregularities and others of a more serious nature the department set the sentences aside and directed that each of the accused be discharged as undesirable as an independent proceedings. C. M. O. 78, 1905, 1. *See also* C. M. O. 30, 1910, 8.

15. **Finding, sentence (or acquittal)**—Of each person tried in joinder should be separately recorded. Reference in the record to "the accused" is in error, as it should be recorded as "each of the accused." C. M. O. 78, 1905, 1; 30, 1910, 8.

16. **Method**—If the convening authority desires to try men in joinder the proper procedure is to prefer only one set of charges and specifications, and write only one letter of transmittal. C. M. O. 37, 1909, 7; 42, 1914, 4.

17. **Procedure**—In an actual trial in joinder is described in Forms of Procedure, 1910, pp. 24, 41. (*See also*, C. M. O. 37, 1909, p. 7; 30, 1910, p. 8; 10, 1911, pp. 3–5; G. C. M. Record 20916; 23743.) C. M. O. 42, 1914, 4.

18. **Record of proceedings**—Should show that if all or any of the accused take the stand they did so at their own request; that they were severally given opportunity to challenge members; that they severally expressed themselves ready for trial and that they were severally afforded opportunity to cross-examine all witnesses produced by the prosecution. C. M. O. 37, 1909, 7. *See also* JOINDER, TRIAL IN, 14.

19 **When trials in joinder may be had**—It is observed that the accused persons where tried in joinder upon the charges of "Desertion" and "Violation of the eighth clause of the fourteenth article of the Articles for the Government of the Navy."

It is further observed that the specification of the second charge was defective in that, while the accused were charged with violating the eighth clause of the fourteenth article of the Articles for the Government of the Navy, the allegation contained in the specification was not set forth in the terms used in the article. The specification should have alleged that each of the accused "*wrongfully* and *knowingly*" disposed of certain arms, etc., instead of which it was alleged simply that the accused unlawfully disposed of certain arms, etc. The accused were improperly tried in joinder, it not being alleged, nor was any evidence adduced at the trial to prove, that the offenses were committed together, much less in concert.

Attention is invited to Army Digest, 1901, art. 715, as follows:

Properly to warrant the *joining* of several persons in the same charge and the bringing them to trial together thereon, the offense must be such as requires for its commission a combination of action and must have been committed by the accused in concert or in pursuance of a common intent. The mere fact of their committing the same offense together and at the same time, although material as going to show concert, does not necessarily establish it. Thus the fact that several soldiers have absented themselves together without leave, will not, in the absence of evidence indicating a conspiracy or concert of action, justify their being arraigned together on a common charge, for they may merely have been availing themselves of the same convenient opportunity for leaving their station. Nor is desertion, of which the gist is a certain *personal* intent, ordinarily chargeable as a *joint* offense.

But where two or more soldiers have in fact deserted together as the result of a concerted plan they may properly be jointly or severally charged with desertion the specification in either case describing in proper terms a "desertion in the execution of a conspiracy."

But whenever the offense is, in its nature, *several* there can be no joinder.

Where the offense indicted doth not wholly arise from the joint act of all the defendants, but from such act joined with some personal and particular defect or omission of each defendant, without which it would be no offense, * * * the indictment must charge them severally and not jointly.

The mere fact that several persons happen to have committed the same offense at the same time does not authorize their being joined in the charge. Thus where two or more soldiers take occasion to desert, or absent themselves without leave, in company, but not in pursuance of a common unlawful design and concert, the case is not one of a single joint offense, but of several separate offenses of the same character, which are no less *several in law* though committed at the same moment.

Prisoners will not be joined in the same charge nor tried on joint charges, unless for concert of action in the same offense. (Winthrop, pp. 208-209.)

No previous deliberate concert was alleged in the specifications, nor proved by any evidence adduced at the trial, and it does not anywhere appear that the persons

Digitized by Google

accused in this case acted in pursuance of a common, unlawful design and concert. They were, therefore, improperly tried in joinder.

It may be added that the misjoinder here was of vital effect, for evidence of an alleged voluntary statement on the part of one of the accused in reference to himself alone was heard at the trial of each and all the accused.

The proceedings, findings, and sentence were set aside, and the accused released from confinement and restored to duty. C. M. O. 32, 1904. *But see* JOINDER, TRIAL IN, 9.

JUDGE.

1. **Deck court officer as.** C. M. O. 14, 1911, 7. *See also* DECK COURTS, 27.
2. **Members of courts-martial**—Capacity as judges. *See* COURT, 103; MEMBERS OF COURTS-MARTIAL, 25.

JUDGE ADVOCATE.

1. **"Absence from station without leave"**—Judge advocate tried by general court-martial. C. M. O. 104, 1896.
2. **Accused**—Relation of judge advocate to accused as counsel. *See* JUDGE ADVOCATE, 28-44.
3. **Acquittals**—Should be in handwriting of judge advocate. *See* ACQUITTAL, 17.
4. **Admissions by judge advocate**—Of contents of officer's record. *See* REPORTS ON FITNESS, 5.
5. **Same**—In open court that a person would give certain testimony if he were summoned and testified before court. *See* ADMISSIONS, 3.
6. **Admonished and censured**—A letter of admonition and censure was placed on the military record of an officer who acted as judge advocate because of the numerous occasions upon which it became necessary to return records of general courts-martial because of clerical errors and erroneous statements. File 26504-65, Sec. Navy, Dec. 2, 1909.
7. **Advisor to court.** *See* JUDGE ADVOCATE, 49-59.
8. **"Alcoholism"**—Judge advocate placed on sick list for. *See* ALCOHOLISM, 1.
9. **Alterations**—In findings and sentence. *See* FINDINGS, 7; SENTENCES, 10.
10. **Arguments, closing.** *See* ARGUMENTS.
11. **Same**—Upon admissibility of evidence, etc. *See* ARGUMENTS, 4.
12. **Arraignment.** *See* ARRAIGNMENT.
13. **Carelessness**—In not establishing fact that a certain time in evidence was *a. m.* or *p. m.* (C. M. O. 28, 1910, 7). Failing to introduce a confession. (C. M. O. 26, 1910, 7). For not objecting to an incompetent witness (wife of accused) when he admitted that he knew of such disability. (C. M. O. 21, 1910, 13). In certifying document to be a *true copy* when it was not an *exact* copy. (C. M. O. 17, 1910, 3; 23, 1910, 3). Dereliction in his duties. (C. M. O. 37, 1909, 4). Careless in writing up record. (C. M. O. 26, 1910, 3; 16, 1912, 4). Failing to introduce evidence of previous convictions which was in his possession. (*See* PREVIOUS CONVICTIONS, 17.) Failing to introduce evidence to identify accused. (*See* FRAUDULENT ENLISTMENT, 51.) Gross carelessness. (C. M. O. 78, 1905, 1.)
14. **Censured**—By department for being careless in certifying documents. C. M. O. 23, 1910, 3. *See also* C. M. O. 12, 1912, 8.

    A judge advocate was censured for not advising the court as to the law. *See* JUDGE ADVOCATE, 69.
15. **Certificate of claim**—For civilian witness fee. *See* ADDRESS, 3.
16. **Challenges.** *See* CHALLENGES, 5, 6.
17. **Chaplain**—May act as judge advocate. *See* CHAPLAINS, 4.
18. **Charges and specifications**—Correction of errors in. *See* CHARGES AND SPECIFICATIONS, 33.
19. **Clerical errors**—In charges and specifications. *See* CHARGES AND SPECIFICATIONS, 33.
20. **"Closed court"**—Judge advocate should not be present. *See* JUDGE ADVOCATE, 105.
21. **Same**—The advice to the court by the judge advocate on all matters of form and law must be in open court. G. C. M. Rec. 24633.
22. **Closing argument**—Judge advocate should not make his closing argument a plea for the accused when the accused is represented by counsel of his own selection. *See* ARGUMENTS, 2.
23. **Same**—Judge advocate entitled to final argument in a general court-martial trial, even where court in its discretion permits prosecution or defense more than one argument. *See* ARGUMENTS, 1.

Digitized by Google

24. **Comment**—No comment by judge advocate if court privileges the witness not to answer criminating questions. *See* SELF-INCRIMINATION, 4.
25. **Same**—No comment by judge advocate on failure of accused to take stand as witness in own behalf. *See* WITNESSES, 11.
26. **Contempt of court.** *See* CONTEMPT OF COURT.
27. **Convening authority**—Judge advocate responsible for proper performance of his duties to convening authority. *See* JUDGE ADVOCATE, 60.
28. **Counsel, for accused**—Though the judge advocate may act in an *advisory* capacity as counsel to the accused, rendering him both in and out of court such assistance as may be compatible with his primary duty of conducting the prosecution, he can not act in a *personal* capacity of counsel, since such character would be incompatible with that of public prosecutor, and it is therefore improper to have him *specifically* designated as such. C. M. O. 37, 1909, 4; 42, 1909, 8; 49, 1910, 13. *See also* G. C. M. Rec. 22141.
29. **Same**—Where the accused is without counsel the judge advocate will properly render him, both in and out of court, such assistance as may be compatible with his primary duty of efficiently conducting the prosecution. C. M. O. 6, 1909, 3; 47, 1910, 4; 26, 1910, 7.
30. **Same**—The judge advocate will properly advise the accused of his right to be furnished with counsel. C. M. O. 6, 1909, 3.
31. **Same**—The judge advocate will properly advise the accused of his right to take the stand as a witness. C. M. O. 6, 1909, 3.
32. **Same**—The judge advocate will properly assist the accused, when he is without counsel, in bringing out such circumstances of extenuation as may exist in the case. Also in offering pleas, general or special. C. M. O. 6, 1909, 3.
33. **Same**—Should not make inaccurate statements while acting in the capacity of counsel to the accused.
34. **Same**—The judge advocate will especially guard against even suggesting that the accused plead "Guilty," as inadvisable and objectionable. C. M. O. 6, 1909, 3. *See also* ADVISING, 3; JUDGE ADVOCATE, 86.
35. **Same**—Judges advocates of general courts-martial should, where the accused is not represented by counsel, aid him in properly presenting his case to the court and in guarding his interests they should inform the accused that any statement that he may make can not be considered as evidence, but if he takes the stand and testifies in his own behalf the facts then represented could be considered as evidence. Of course the advice given by the judge advocate must necessarily be determined within his judgment as to the best procedure to follow. File 26251-9722.
36. **Same**—Where the accused is without counsel the judge advocate should show particular care not to find himself in the position of asking leading questions, improperly. C. M. O. 26, 1910, 7.
37. **Same**—"In the remarks of the judge advocate in his capacity as counsel for the accused it is stated that the accused has only three minor offenses under both original and fraudulent enlistments. This appears to be inaccurate, as an examination of the attached copies of the enlistment records shows eight offenses." The judge advocate should be careful to be accurate in his statements.
38. **Same**—Where the accused is without counsel the judge advocate should show particular care to object to the admission of improper testimony. C. M. O. 26, 1910, 7.
39. **Same**—Judge advocate should not make his closing argument a plea in behalf of the accused when the accused is represented by counsel of his own selection. *See* ARGUMENTS, 2.
40. **Same**—When the accused is represented by civilian counsel, this fact relieves the judge advocate, in a measure, of his duties as to advising the accused. C. M. O. 47, 1910, 4.
41. **Same**—Should not be directed by the president of the court to act in a personal capacity as counsel for the accused. C. M. O. 49, 1910, 13.
42. **Same**—Judge advocate should not be *specially designated* as such. C. M. O. 37, 1909, 4; 42, 1909, 8; 49, 1910, 13.
43. **Same**—Judge advocate may make a closing statement for accused. C. M. O. 34, 1913, 7.
44. **Same**—Remarks of judge advocate in making a closing statement for accused is not evidence and court should not give weight to them as such. C. M. O. 34, 1913, 8.
45. **Counsel for judge advocate**—It was noted that the counsel for the accused entered an objection to counsel for the judge advocate "actively taking charge of the case, taking charge of the cross-examination, addressing the court," and that "under the

Digitized by Google

customs of the service, the judge advocate should have charge of the case, and that counsel for judge advocate should restrict himself to advising the judge advocate in any matter in or out of court, as he may desire." The court ruled that "hereafter the judge advocate would address the court and propose the questions directly, and not through his assistant." The matter being brought to the attention of the department, telegraphic orders were sent to the counsel for the judge advocate, signed by the convening authority, detailing him as counsel for the judge advocate and directing him to act in accordance with Navy Regulations, 1913, R–793, which reads in part as follows: "If counsel be detailed by the convening authority to assist the judge advocate, the court shall give him equal facilities with the counsel for the accused in the performance of his duties." Upon receipt of these orders, the "president stated that the court would be guided by that regulation," and the record discloses that counsel for the judge advocate was granted all the privileges required by the above regulation. (*See* File 26504–140, J. A. G., May 6, 1912.) C. M. O. 41, 1915, 10–11; File 26251–11180; 10, Sec. Navy, Nov. 2, 1915. *See also* G. C. M. Rec. 31509, p. 3.

46. **Same**—Solicitor assigned as associate and assistant to a judge advocate of a court of inquiry. *See* COUNSEL, 49.
47. **Same**—Law clerk assigned as. *See* COUNSEL, 39.
48. **Same**—Shall be appointed by convening authority. *See* JUDGE ADVOCATE, 45.
49. **Court, adviser to**—While it is the duty of the judge advocate to advise the court in all matters of law and form he should be exceedingly careful to give proper advice and to refrain from giving advice which is directly at variance with the instructions issued by the department in court-martial orders and Forms of Procedure. C. M. O. 29, 1914, 7. *See also* GUILTY IN A LESS DEGREE THAN CHARGED, 9, 13; C. M. O. 20, 1899.
50. **Same**—Where the offense was of a grave character and one committed in a particularly scandalous manner, the department considered that the judge advocate should have advised the court of the nature of the offense, when the accused had pleaded "guilty" in order that evidence could have been taken for the purpose of presenting the entire circumstances of the offense to the court. C. M. O. 1, 1914, 5–6. *See also* EVIDENCE, 42.
51. **Same**—It is an improper action for a court to refuse a certain question to be asked when the judge advocate advises the court that the question was contained in a form sent him from the office of the Judge Advocate General. C. M. O. 42, 1909, 7.
52. **Same**—Corrects statement of president of general court-martial. C. M. O. 14, 1910, 11.
53. **Same**—The court errs when it does not accept the advice of the judge advocate, that a previous conviction which occurred in an enlistment from which the accused was dishonorably discharged by court-martial is admissible. C. M. O. 28, 1913, 4.
54. **Same**—On every occasion when the court demands his opinion, the judge advocate is bound to give it freely and fully, and, even when it is not requested to caution the court against any deviation from essential form in its proceedings, or against any act or ruling in violation of law or material justice. C. M. O. 49, 1910, 7; 17, 1910, 10; 28, 1913, 4. *See also* JUDGE ADVOCATE, 58, 59, 69.
55. **Same**—Where the statement of the accused is inconsistent with his plea of guilty the judge advocate will very properly advise the court as to the correct procedure and the court errs in not accepting the advice if the statement and plea are manifestly inconsistent. C. M. O. 49, 1910, 7.
56. **Same**—The advice to the court by the judge advocate on all matters of form and law must be in open court. *See* JUDGE ADVOCATE, 21.
57. **Same**—Where upon the completion of a trial and before the court was cleared for deliberation, the judge advocate requested that upon the court arriving at its findings, and prior to proceeding to deliberate upon the sentence, he be called before it to record the findings, after which the court clear for deliberation upon the sentence, the court is in error if it does not follow this procedure which is prescribed by the Forms of Procedure, 1910, and Navy Regulations. C. M. O. 17, 1910, 10.
58. **Same**—It is the duty of the judge advocate to advise the court on all matters of law and form, and should his advice be disregarded the judge advocate shall be allowed to enter his opinion on the record. Where the court, in subsequent cases, follows the procedure to which the judge advocate objected in a prior case, it is the duty of the judge advocate to, in each case, advise the court. The ruling of the court in the prior case does not relieve the judge advocate from his duty to again raise the point in each subsequent case, as each record must be complete in itself, and where a court ruled that its first ruling applied to all subsequent cases, the department held that the court was in error. C. M. O. 17, 1910, 10–11. *See also* JUDGE ADVOCATE, 54, 59, 69.

Digitized by Google

59. **Same**—"Relative to the duties of the judge advocate of a general court-martial the following provisions appear in the Navy Regulations, 1913:

"R-749 (2) 'On every occasion when the court demands his opinion, he is bound to give it freely and fully, and even when it is not requested, to caution the court against any deviation from essential form in its proceedings, or against any act or ruling in violation of law or material justice.' [*See* C. M. O. 25, 1916.]

"R-752 (1) 'The judge advocate is particularly to object to admission of improper evidence, and shall point out to the court the irrelevancy of any testimony that may be adduced which does not bear upon the matter under investigation.

"'(2) Should the advice of the judge advocate be disregarded by the court, he shall be allowed to enter his opinion upon the record. Under such circumstances it is also proper for the court to record the reason for its decision. The minutes of opinion and decision are made for the information of the revising authority, who should have the error or wrong, on whichever side it may be found, brought fairly under his consideration; but neither the judge advocate, the accused, nor any member of the court has any right to enter an exception or protest on the record.'

"R-741 (3) 'The judge advocate is, in his military character as an officer, responsible for the proper discharge of his duty to the convening authority.'"

In view of these regulations, regardless of whether the judge advocate is correct in his opinion or not, the court errs in administering a rebuke and is wholly without power to do so. C. M. O. 49, 1915, 10, 11. *See also* G. C. M. Rec. 32388; JUDGE ADVOCATE, 75, 113.

"In the theory of military courts the judge advocate of the court is the legal adviser and he is in theory, and in many instances he is in fact, a lawyer, a member of the bar, and an officer of experience in military jurisprudence. For example, the United States Army, other armies, and some navies in the world are provided with a permanent corps of judges advocate, all of whom are lawyers of experience, who * * * act as judges advocate in all important trials." But "in the Navy, the courts are frequently thrown upon their own resources and in fact in the majority of cases the senior members of the courts are more experienced and possess a more accurate knowledge of the law than does the judge advocate himself. For these resons it has been the practice of the department, while deferring to the findings of the court on *questions of fact*, to unhesitatingly on receipt of the record of proceedings give instructions to the court concerning *matters of law* which should * * * have been given by the judge advocate at the time of the trial." (*For example, see* JUDGE ADVOCATE, 69.) File 26251-12159, Sec. Navy, Oct. 30, 1916, p. 2.

60. **Court should not censur**—The judge advocate is, in his military character as an officer, responsible for the proper performance of his duty to the convening authority. Therefore, a court errs in rebuking him, rather than reporting him to the convening authority. C. M. O. 49, 1915, 11. *See also* C. M. O. 17, 1910, 11.

61. **Court not to usurp**—The functions of judge advocate. *See* C. M. O. 72, 189, 5, 2; 81, 1897, 2.

62. **Court, functions of**—Not to be usurped by judge advocate. *See* JUDGE ADVOCATE, 123, 124.

63. **Court of inquiry**—Duties of judge advocate. *See* COURTS OF INQUIRY, 30.
May administer oaths, etc. C. M. O. 5, 1916, 7.

64. **Same**—Solicitor assigned as associate and assistant to a judge advocate of a court of inquiry. *See* COUNSEL, 49.

65. **Court-martial orders**—Should carefully read and study. *See* COURT-MARTIAL ORDERS, 15.

66. **Same**—Name of judge advocate printed in. C. M. O. 38, 1915, 3.

67. **Criticized by department**—In that he neglected his duty as prosecutor and failed to present proper evidence, cross examine witnesses, and for making his closing argument a plea for the accused when the accused was represented by counsel of his own selection. C. M. O. 1, 1914, 8. *See also* ARGUMENTS, 2.

68. **Same**—Criticized for failing to introduce evidence in his possession (*see* PREVIOUS CONVICTIONS, 17); for not producing better evidence which was available (C. M. O. 37, 1909, 5-6); for neglecting his duty in that he failed to present proper evidence cross-examine witnesses, and in his closing argument pleaded for the accused who was represented by counsel of his own choosing (C. M. O. 1, 1914, 8); for not making efforts to obtain evidence of previous convictions when he had notice of its existence (*see* PREVIOUS CONVICTIONS, 16); for failing to introduce proper and sufficient evidence (C. M. O. 10, 1912, 8); for stating, after the counsel for accused admitted absence as charged, "In view of the statement of the counsel for accused I have no evidence to put before the court" (C. M. O. 30, 1912, 5); for failing to make a closing argument

Digitized by Google

to advise the court as to the law when counsel for accused had give an erroneous statement of it. (C. M. O. 25, 1916, 3).

While it is not to be expected that officers serving as judge advocate of courts-martial shall exhibit a thorough knowledge of complicated or technical rules of evidence, they are expected to distinguish between evidence which is relevant and that which has no connection with the points at issue and to make timely objection to the introduction of the latter class. C. M. O 5, 1913, 11.

69. **Same**—Counsel for the accused (an officer who was charged with embezzlement) delivered an argument in defense of the accused, wherein he placed an erroneous interpretation upon the law governing the case, and the judge advocate not only failed to advise the court properly in regard thereto, but submitted the case to the court without any remarks. The judge advocate was furnished with a copy of Court-Martial Order No. 4, 1913, containing the necessary information regarding the offense with which the accused was charged. The judge advocate was under a duty to correct the erroneous statements of the counsel and also to place before the court, in an official manner through remarks, the correct law which should be applied to the case. Owing to the neglect of the judge advocate in failing to advise the court on the points of law involved, as shown by the record, the court arrived at an improper finding. The department thereupon returned the case, furnishing the court with the information which the judge advocate failed and neglected to supply, and the court in revision found the accused guilty of the offense as charge. G. C. M. Rec. 32388. *See also* C. M. O. 25, 1916, 3.

70. **Degree of criminality**—Judge advocate in certain cases should introduce evidence to indicate the degree of criminality involved where specification does not show particulars of offense, after plea of guilty. *See* DEGREE OF CRIMINALITY INVOLVED, 1.

71. **Deposition**—Judge advicate to procure—Necessity of approval by court. *See* DEPOSITION, 3.

72. **Documents**—Should not read document in his closing remarks which has not been introduced in evidence. *See* ARGUMENTS, 3.

73. **"Drunkenness"**—Judge advocate tried by general court-martial. C. M. O. 104, 1896. *See also* ALCOHOLISM, 1; DRUNKENNESS, 55.

74. **"Drunkenness on duty"**—Judge advocate tried by general court-martial. C. M. O. 57, 1880; 2, 1913.

75. **Duty of**—The judge advocate is, in his military character as an officer, responsible for the proper discharge of his duty to the convening authority. *See* JUDGE ADVOCATE, 59, 113.

See File 28025-403:3, Sec. Navy, Jan. 26, 1916, for a decision upon the question as to the liability of a Marine judge advocate for duty as officer of the day.

76. **Enlistment record**—Procedure in introducing in evidence. *See* EVIDENCE, DOCUMENTARY, 36, 37, 45; SERVICE RECORDS, 22.

77. **Exceptions**—Judge advocate may not enter on record of proceedings. *See* EXCEPTIONS, 2; JUDGE ADVOCATE, 59.

78. **Evidence**—The judge advocate in discharging his duty should present the best evidence he can and it then rests with the court to determine whether that evidence warrants a finding of guilty. (File 26251-10164: 3.) The judge advocate in his duty as prosecutor must obtain all evidence available and present such evidence, if it is possible, which will warrant a court in legally coming to a finding of guilty. File 26251-10164: 3.

79. **Findings**—Judge advocate shall be called before the court to record the finding before the court proceeds to deliberate upon the sentence, for otherwise the judge advocate is prevented, if occasion arises, from advising the court upon any possible irregularity in the finding before the court proceeds to sentence the accused. C. M. O. 17, 1910, 10; 23, 1910, 7; 26, 1910, 8; 25, 1914, 6; 6, 1916.

80. **Same**—Acquittals shall be recorded in handwriting of judge advocate. *See* ACQUITTAL, 17.

81. **Same**—The judge advocate shall enter the findings of the court on the record of proceedings in his own handwriting. He shall not typewrite them. C. M. O. 155, 1897, 2; 24, 1909, 3; 37, 1909, 4; 42, 1909, 6; 29, 1914, 5; 42, 1914, 4; 6, 1916.

82. **Same**—Alterations in. *See* FINDINGS, 7.

83. **General court-martial**—Judge advocate tried for "Absence from station and duty without leave," "Drunkenness," and "Scandalous conduct tending to the destruction of good morals." C. M. O. 104, 1896. *See also* ALCOHOLISM, 1.

84. **Same**—Judge advocate tried for "Drunkenness on duty." C. M. O. 2, 1913.

85. **Same**—Judge advocate tried for "Scandalous conduct tending to the destruction of good morals." C. M. O. 57, 1880; 104, 1896. *See also* ALCOHOLISM, 1.

Digitized by Google

86. **"Guilty"**—Should not advise accused to plead "Guilty." C. M. O. 6, 1909, 3. *See also* ADVISING, 3; JUDGE ADVOCATE, 34.
87. **Interfering with cross-examination**—Judge advocate should not place himself in the position of "interfering" with the cross-examination. G. C. M. Rec. 30485, pp. 361–362.
88. **Interlineations**—In findings and sentences. *See* FINDINGS, 7, 54; SENTENCES, 9, 52.
89. **Member**—Acting as judge advocate. *See* JUDGE ADVOCATE, 136.
90. **Minister of justice.** *See* JUDGE ADVOCATE, 108.
91. **Name**—Published in Court-Martial Order. C. M. O. 38, 1915, 30.
92. **Oath**—A judge advocate appointed without change of court must be sworn. C. M. O. 49, 1910, 11–12.
93. **Same**—Administers oath to members. *See* OATHS, 20.
94. **Objected**—Judge advocate objected to members of court interfering with him. C. M. O. 72, 1895, 2.
95. **Objections**—Duty of judge advocate to object to a witness (accused) refusing to answer questions without giving any reasons. C. M. O. 17, 1910, 13. *See also* last paragraph of JUDGE ADVOCATE, 68, holding that judge advocates should make timely objections to irrelevant evidence.

    The judge advocate may not be challenged. *See* CHALLENGES, 5.
96. **Officer of the day**—Liability of a Marine judge advocate for duty as officer of the day. File 28025–403:3, Sec. Navy, Jan. 26, 1916.
97. **Opinion**—Judge advocate may enter on record, if court disregards his advice. C. M. O. 17, 1910, 11; 28, 1913, 4; 49, 1915, 11. *See also* EXCEPTIONS, 2; JUDGE ADVOCATE, 59.
98. **Orders**—Where a judge advocate was temporarily appointed such during the temporary absence of the permanent judge advocate, the department held that upon return of the latter, he should resume his duties and that no specific orders therefor are necessary, the other judge advocate having been appointed as such *merely during his absence*. C. M. O. 49, 1910, 11.
99. **Same**—If the name of the judge advocate is on precept no orders from Marine Corps or Bureau of Navigation are essential to entitle the officer to act as judge advocate. C. M. O. 28, 1910, 5. *See also* C. M. O. 49, 1910, 11; JUDGE ADVOCATE, 101.
100. **Same**—Judge advocate shall not act without proper orders from the convening authority. C. M. O. 26, 1910, 8.
101. **Same**—Precept is sufficient authority for judge advocate to act as such. C. M. O. 38, 1895, 2; 53, 1895, 2. *See also* JUDGE ADVOCATE, 99.
102. **Same**—Judge advocate appointed without change of court—Procedure. File 26251–12159.
103. **Overruled by court**—Judge advocate properly objected to letter but court overruled him. C. M. O. 30, 1912, 4.
104. **Precept**—Sufficient authority for judge advocate to act as such. C. M. O. 38, 1895, 2; 53, 1895, 2; 104, 1896, 3–4. *See also* JUDGE ADVOCATE, 99, 101.
105. **Presence**—During "closed court" improper—In case of an officer tried by general court-martial it was contended in behalf of the accused that the findings and sentence be set aside on the ground that "his trial was not a public trial as required by law." The facts of the case as claimed by the accused were as follows: "At 3.22 p. m., December 31, 1914, the president of the court announced that the court would adjourn. At this point a member requested that the court be cleared but that the judge advocate remain that he (the member) desired to address the court informally in the presence of the judge advocate."

    Nothing concerning the alleged incident was contained in the record of proceedings and the contention of the accused did not state that the request of the member was granted and that the judge advocate in fact was present while the court was cleared.

    Assuming, however, that the request of the member was granted and that the record was incomplete in that it did not record the incident, the defense had the opportunity to have the record corrected when the proceedings of December 31, 1914, were "read and approved." The accused, who was represented by able counsel at his trial, not having objected to the alleged incompleteness of the record at the proper time, is now estopped to urge that the record is incorrect. The department therefore declined to go behind the record in order to ascertain what were the facts of any alleged incidents which it does not disclose.

    Even had the record shown the above occurrence this would not have necessarily invalidated the proceedings, as there is no statute in the Navy, as there is in the Army, providing that the judge advocate shall withdraw when a court-martial shall sit in closed session; and the provision of the Navy Regulations to that effect is held by

Digitized by Google

the department's precedents to be directory only and not mandatory. Accordingly, a disregard of said regulation, while a grave irregularity, would not necessarily render the proceedings invalid. File 26251-9996:2, Sec. Navy, Jan. 15, 1915; C. M. O. 6, 1915, 6.

106. **Same**—Argument by judge advocate during proceedings in revision while accused was absent. Department disapproved but on other grounds. C. M. O. 61, 1894, 3.

107. **Procedure irregular and improper**—For judge advocate to introduce enlistment record and letter while witness is on stand to impeach him. C. M. O. 47, 1910, 5. *See also* IMPEACHMENT, 9.

108. **Prosecutor**—"The judge advocate is to regard himself not only as a prosecutor endeavoring to secure a verdict of guilty, but as a minister of justice endeavoring to place the whole transaction, with which the accused is charged, in its true light before the court and the reviewing authority, in order that justice may be done. It is in omitting to bring out in evidence existing matters of defense or extenuation that judge advocates are most liable to fail in furthering complete justice." C. M. O. 6, 1909, 3.

109. **Protest**—Improper for judge advocate to enter on record of proceedings. *See* EXCEPTIONS, 2.

110. **Record of proceedings**—Judge advocate is responsible for correctness of record. C. M. O. 27, 1913, 12; 17, 1915, 2; 10, 1916.

111. **Relief**—In a general court-martial case returned to the court for revision, the record of proceedings showed that the judge advocate acted during the revision without reading the order appointing him having been read and he having been duly sworn. When the court reconvened for revision of the case, the orders relieving the old and appointing the new judge advocate should have been read and certified copies appended to the record. Record should show new judge advocate was sworn. C. M. O. 47, 1910, 10. *See* G. C. M. Rec. 32390, judge advocate relieved during trial account illness.

112. **Report of cases delayed over 10 days**—"It is a standing order that the judge advocate report all cases which are delayed 10 days after the charges and specifications are received. This is not to be construed as authority to unnecessarily delay trials over 10 days; all trials should be held as soon as practicable and the judge advocate will report in all cases which are not tried within 10 days after receipt of charges and specifications." File 26504-111:329, Sec. Navy, May 4, 1915. *See also* C. M. O. 20, 1915, 8.

113. **Reported by president to convening authority**—The president of a general court-martial may, without impropriety, address to the Secretary of the Navy directly, a communication reporting the judge advocate for failure to properly discharge the duties of his office. File 5611-97. *See also* JUDGE ADVOCATE, 59, 75.

A judge advocate was reported by the president of a general court-martial to the convening authority for "reprehensible carelessness." File 26260-3653.

114. **"Scandalous conduct tending to the destruction of good morals"**—Judge advocate tried by general court-martial. C. M. O. 57, 1880; 104, 1896.

115. **Sentences**—Judge advocate must authenticate. C. M. O. 30, 1900.

116. **Same**—Shall be in handwriting of judge advocate without alterations or interlineations. *See* SENTENCES, 58.

117. **Service records**—Procedure in introducing in evidence. *See* EVIDENCE, DOCUMENTARY, 36, 37, 45; SERVICE RECORDS, 22.

118. **Solicitor**—Assigned as assistant and associate for a judge advocate of a court of inquiry. *See* COUNSEL, 49.

119. **Statements made to judge advocate out of court**—Except under certain unusual circumstances, it is not proper for the judge advocate to testify as to statements made to him out of court during his preliminary examination of prospective witnesses. C. M. O. 211, 1902, 1.

120. **Statement of accused.** *See* JUDGE ADVOCATE 35; STATEMENT OF ACCUSED.

121. **Trials delayed over 10 days**—Shall be reported. *See* JUDGE ADVOCATE, 112.

122. **"Trying case out of court"**—Judge advocate should not. *See* JUDGE ADVOCATE, 123, 124.

123. **Usurpation of court's functions**—Judge advocates should not usurp functions of court by weighing evidence outside of court and advising court to accept plea of guilty in a less degree than charged. C. M. O. 37, 1909, 8; 30, 1910, 5; 1, 1911, 4; 10, 1912, 7; 30, 1912, 6; 16, 1913, 4; 34, 1913, 8; 1, 1914, 6; 29, 1914, 6; File 26251-10164:3, Mach. 20, 1915; C. M. O. 42, 1915, 7-8. *See also* TRYING CASE OUT OF COURT.

Digitized by Google

124. **Same**—Or by weighing evidence in the case as shown by the original papers sent them by the department and withholding evidence often of importance and which should be submitted to the court for its consideration. C. M. O. 1, 1914, 6.
125. **Same**—Court not to usurp the function of the judge advocate by interfering with his primary duty of conducting the prosecution. C. M. O. 81, 1897, 2. *See also* C. M. O. 72, 1895, 2.
126. **Same**—Judge advocate objected to a member asking a certain question "on the ground that it brought out new testimony which he he did not wish to have introduced by the prosecution, that as the court officer authorized to conduct the prosecution he objected to the court disturbing the general line adopted by him for the prosecution." Department held that position taken by judge advocate was untenable. C. M. O. 72, 1895, 2.
127. **Waiver**—Of receipt of record of proceedings should be secured from accused by judge advocate. *See* RECORD OF PROCEEDINGS, 32.
128. **Witnesses**—The judge advocate should cross-examine witnesses as to character of accused. C. M. O. 39, 1915.
129. **Same**—Should not assist improperly witnesses while they are testifying. C. M. O. 49, 1915, 12, 13.
130. **Witness, as**—Only witness for prosecution. C. M. O. 37, 1909, 9.
The judge advocate of a general court-martial may legally give testimony before the court. It is in general, however, most undesirable that the judge advocate should appear in the capacity of a witness, except perhaps where the evidence to be given relates simply to the good character or record of the accused. C. M. O. 14, 1911, 4-5.
Judge advocate as witness to introduce service record of accused. *See* EVIDENCE, DOCUMENTARY, 36, 37, 45; SERVICE RECORDS, 22.
131. **Same**—The judge advocate having taken the stand for the defense to testify as to the record of the accused, neglected his duty as judge advocate when he failed to cross-examine himself to bring out the fact that the accused had been retained in the service in his first enlistment 118 days to make good time lost by absence over leave. C. M. O. 28, 1910, 7.
132. **Same**—The record must show that the judge advocate resumed his seat as judge advocate after completing his testimony. C. M. O. 37, 1909, 9.
133. **Same**—Before a witness withdraws from the court room the president shall warn him not to converse upon matters pertaining to the trial during its continuance. This warning shall be *omitted* in case of members, the *judge advocate*, the accused, and counsel if they are called as witnesses. C. M. O. 37, 1909, 9; 15, 1910, 5; 26, 1910, 8; 31, 1910, 3; G. C. M. Rec. 29034.
134. **Same**—There is no authorized form of procedure permitting the judge advocate, after testifying, to waive the reading and verification of his testimony. C. M. O. 47, 1910, 6. *See also* EVIDENCE, 131-133.
135. **Same**—The judge advocate was called as a witness for the prosecution *after* the examination of one of his own witnesses, and the department remarked: "While not expressly prohibited by law or regulation, the appearance of the judge advocate of a general court-martial as a witness on the part of the prosecution is regarded as generally improper and not to be resorted to in any case where it can be avoided. Moreover, whenever it becomes necessary for such officer to testify he should be called *before* the other witnesses for the prosecution. This irregularity was not considered sufficient to invalidate the proceedings." C. M. O. 108, 1899. *See also* C. M. O. 27, 1882.
136. **Same**—In a case where the judge advocate was called as a witness and the junior member of the court acted as the judge advocate, the department stated: "The action of the court in requiring one of its members to perform duty as judge advocate is disapproved. The power to relieve or appoint a member a judge advocate of a court being vested in the convening authority alone, courts-martial are not authorized to appoint or assign a member or other person to duty as judge advocate." C. M. O. 27, 1882.

JUDGE ADVOCATE GENERAL.

1. **Acting judge advocate.**—*See* Circular, Sec. Navy, July 2, 1878; Circular, Sec. Navy, June 28, 1880; An. Rep. J. A. G., 1908, p. 3.
2. **Acting Judge Advocate General**—The Secretary of the Navy designates officers of the Navy or Marine Corps on duty in the office of the Judge Advocate General to act or perform the duty of the Judge Advocate General, in his absence, and to sign as "Acting Judge Advocate General." File 22724-29, Sec. Navy, Dec. 8, 1914; 22724-32, Sec. Navy, Aug. 21, 1916. *See also* JUDGE ADVOCATE GENERAL, 6.
3. **Same**—During the period between June 19, 1878, and June 8, 1880, an Acting Judge Advocate General attended to the duties of the Office of the Judge Advocate General. *See* JUDGE ADVOCATE GENERAL, 18.

Digitized by Google

4. **"Any other officer in either department"**—These words in R. S. 179 do not apply to the designation of an Acting Judge Advocate General. File 22724-20 and 26.
5. **Appointment of**—"That the President of the United States be, and he is hereby, authorized to appoint, for the term of four years, by and with the advice and consent of the Senate, from the officers of the Navy or the Marine Corps, a Judge Advocate General of the Navy, with the rank, pay, and allowances of a captain in the Navy or a colonel in the Marine Corps, as the case may be. And the office of the said Judge Advocate General shall be in the Navy Department, where he shall, under the direction of the Secretary of the Navy, receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and boards for the examination of officers for retirement and promotion in the naval service, and perform such other duties as have heretofore been performed by the Solicitor and Naval Judge Advocate General." (Act June 8, 1880, 21 Stat., 164.) *See* JUDGE ADVOCATE GENERAL, 18.
6. **Assistant to Judge Advocate General**—An officer of the line of the Navy or Marine Corps may be detailed as assistant to the Judge Advocate General of the Navy, and in case of death, resignation, absence, or sickness of the Judge Advocate General, shall, unless otherwise directed by the President, as provided by R. S. 179, perform the duties of the Judge Advocate General until his successor is appointed or such absence or sickness shall cease. (Act, Aug. 29, 1916, 39 Stat., 558.) *See* File N-31, 4499-79, Sept. 9, 1916, for first appointment.
7. **Attorney General's opinions**—Requests for opinions of the Attorney General must be accompanied by the written opinion of the Judge Advocate General or the Solicitor, etc. *See* ATTORNEY GENERAL, 17, 18.
8. **Books, law.** *See* LAW BOOKS, 1-2.
9. **Civil authorities**—Delay in cases, involving delivery of enlisted men to civil authorities, reaching office of the Judge Advocate General. *See* CIVIL AUTHORITIES, 20, 29.
10. **Civil liability**—Of Judge Advocate General. *See* LEGAL LIABILITY, 2.
11. **Clerks, extra**—During session of Congress. File 26254-1906, J. A. G., Nov. 12, 1915.
12. **Clerk, law**—Assigned as counsel to a judge advocate of a general court-martial. *See* COUNSEL, 39.
13. **Comptroller of the Treasury**—Requests for decisions of. *See* ATTORNEY GENERAL, 17, 18; COMPTROLLER OF THE TREASURY, 12, 14, 15.
14. **Same**—All requests for decisions of the Comptroller of the Treasury and other questions involving points of law, concerning the personnel, should be referred to the department (Judge Advocate General) for action, and not handled by the Bureau of Navigation. File 26254-584, Sec. Navy, Dec. 21, 1910; 26254-588, Sec. Navy, Dec. 21, 1910. *See also* File 5460-26, Sec. Navy, Jan. 26, 1909; 26516-9, Sec. Navy, Dec. 1, 1908.
15. **Congress**—Extra clerks during session of Congress. File 26254-1906, J. A. G., Nov. 12, 1915.
16. **Court-martial order**—The Judge Advocate General in a certain case suggested that the department's views upon the matter contained in his opinion be embraced in the court-martial order promulgating the case, for the guidance of general courts-martial in future cases where same questions arise. *See* COURT-MARTIAL ORDERS, 16.
17. **Duties of**—The duties of the Judge Advocate General of the Navy shall be to revise and report upon the legal features of and to have recorded the proceedings of all courts-martial, courts of inquiry, boards of investigation and inquest, and boards for the examination of officers for retirement and promotion in the naval service; to prepare charges and specifications for courts-martial, and the necessary orders convening courts-martial, in cases where such courts are ordered by the Secretary of the Navy; to prepare court-martial orders promulgating the final action of the reviewing authority in court-martial cases; to prepare the necessary orders convening courts of inquiry in cases where such courts are ordered by the Secretary of the Navy, and boards for the examination of officers for promotion and retirement, and for the examination of candidates for appointment as commissioned officers in the Navy other than midshipmen, and to conduct all official correspondence relating to such courts and boards.

    It shall also be the duty of the Judge Advocate General to examine and report upon all questions relating to rank and precedence, to promotions and retirements, and to the validity of the proceedings in court-martial cases, all matters relating to the supervision and control of naval prisons and prisoners; the removal of the mark of desertion; the correction of records of service and reporting thereupon in the Regular or Volunteer Navy; certification of discharge in true name; pardons; bills and resolutions introduced in Congress relating to the personnel and referred to the depart-

Digitized by Google

ment for report, and the drafting and interpretation of statutes relating to personnel; references to the Comptroller of the Treasury with regard to pay and allowances of the personnel; questions involving points of law concerning the personnel; proceedings in the civil courts in all cases concerning the personnel as such; and to conduct the correspondence respecting the foregoing duties, including the preparation for submission to the Attorney General of all questions relating to subjects coming under his own cognizance which the Secretary of the Navy may direct to be so referred. (R-134.) File 13673-3866, J. A. G., Aug. 16, 1916. *See also* File 26262-720: 2, Sec. Navy, Jan. 10, 1910; 26262-730:2; 27231-5; 27231-51: 1, J. A. G., Feb. 24, 1913; 26283-522, J. A. G., Feb. 12, 1913; 26837-3:21, J. A. G., Oct. 8, 1914; 26837-3:21, J. A. G., Dec. 16, 1914; Telegram signed "Daniels" Op.-9, SD-1641, Mar. 8, 1916, No. 11008, re records of military commission, Haiti; COAST GUARD, 1; JUDGE ADVOCATE GENERAL, 5.

It shall be the duty of the Judge Advocate General to advise the Secretary of the Navy on all matters relating to the supervision and control of prisoners of war, of vessels and individuals intended under custody of the Secretary of the Navy, and of the locality of internment. He shall advise the Secretary of the Navy on all matters involving questions of international law and shall conduct the correspondence respecting the foregoing duties. (Navy Regulations, 1913, R-134 (3).) *See* File 28573-1, Sec. Navy, Dec. 23, 1915.

18. **History of**—The act of March 2, 1865 (13 Stat. 468), authorized the President to appoint an officer in the Navy Department to be called the "Solicitor and Naval Judge Advocate General." The appointee, pursuant to this act, was carried on the Navy Register until 1870, when the Department of Justice was established. The act establishing the Department of Justice (June 22, 1870, 16 Stat. 162) provided that "the Solicitor and Naval Judge Advocate General, who shall hereafter be known as the Naval Solicitor," should be transferred to the Department of Justice. The incumbent's name was then dropped from the Navy Register and placed upon the rolls of the Department of Justice. This office of the Naval Solicitor as it existed under the Department of Justice (R. S. 349) was unsuited to the requirements of the naval service. After that office was abolished [act June 19, 1878, 20 Stat. 205] and prior to the establishment of the Office of the Judge Advocate General [act June 8, 1880, 21 Stat. 164] an officer was detailed as Acting Judge Advocate General. Files 13673-3866, J. A. G., Aug. 16, 1916.

The Office of the Judge Advocate General was established by the act of June 8, 1880 (21 Stat. 164). The Office of Naval Solicitor in the Department of Justice was abolished by act of June 19, 1878 (20 Stat. 205). The duties of the "Acting Judge Advocate" were prescribed in a department circular dated July 2, 1878. On June 28, 1880, after the establishment of the Office of the Judge Advocate General, the above-mentioned circular was rescinded, and on the same date, by General Order No. 250, the duties of the Judge Advocate General were defined. The duties therein generally outlined have been gradually amplified and are set forth in detail in Navy Regulations, 1905, R-12 (Navy Regulations, 1913, R-103 (3); R-134). 14 J. A. G., 11½, Apr. 22, 1909.

19. **International law**—Questions arising under. *See* JUDGE ADVOCATE GENERAL, 17.
20. **Interpretation of statutes**—The interpretation of statutes *not* relating to the personnel is not one of the duties of the Judge Advocate General as defined by the Navy Regulations. Such comes under the jurisdiction of the Solicitor. File 24482-34, J. A. G., May 1, 1911, p. 3. *See also* An. Rep., J. A. G., 1916, p. 17.
21. **Law clerk**—In office of Judge Advocate General assigned as counsel to a judge advocate of a general court-martial. *See* COUNSEL, 39.
22. **Law officer of the Navy.** *See* ATTORNEY GENERAL, 17, 18.
23. **Law, questions of.** *See* COAST GUARD, 1; JUDGE ADVOCATE GENERAL, 14, 17; QUESTIONS OF LAW.
24. **Legal liability**—Of Judge Advocate General. *See* LEGAL LIABILITY, 2.
25. **Mail**—Delay in mail reaching Office of Judge Advocate General from Secretary's office. *See* MAIL, 2.
26. **Navy Regulations**—Interpretation of. *See* ATTORNEY GENERAL, 13; JUDGE ADVOCATE GENERAL, 14, 17.
27. **Office of the Judge Advocate General**—Established by act of June 8, 1880 (21 Stat. 164). G. O. 250, June 28, 1880. *See also* JUDGE ADVOCATE GENERAL, 18.
28. **Same**—The current work in the Office of the Judge Advocate General is amply sufficient to keep the entire office force therein busy. Therefore, the department has adopted the policy of not answering hypothetical questions. C. M. O. 22, 1915, 8.

Digitized by Google

29. **Same**—"Knowledge of the law and other qualifications of a high order are necessary to meet the requirements of the work of the Office" of the Judge Advocate General. 13 J. A. G., 369, Sept. 30, 1904.

30 **Opinions and decisions defined**—When the Judge Advocate General renders an opinion, he states his inference or conclusion of what, in contemplation of law, would or should follow from a given state of facts, and where an opinion of the Judge Advocate General is received, it may be followed, or not, in the judgment of the person whose duty it is to act in the premises.

A decision is a ruling, or command, that certain things *shall* follow from a given state of facts, and departmental decisions are made by the head of the department. Where a decision has been rendered in any case by the Secretary of the Navy, it is an authoritative ruling or instruction which has all the force and effect of an order or command.

As with court decisions, so with departmental decisions, there may be presented with the decision an opinion or statement of the reasons which influenced the head of the department in arriving at his conclusions and which influenced him in rendering his decision, while in other cases the decision may stand alone. In either case, it is the *decision*, and not the *opinion*, which is binding upon all persons in the Naval Establishment whose cases come within its terms.

The Judge Advocate General does not render *decisions*, and the Secretary of the Navy does not render *opinions;* the former renders opinions and the latter, decisions.

Where an authoritative ruling, which will have the force and effect of an order or command is desired, a *decision* should be requested, and this would refer to a decision of the department. Where *advice* upon legal questions is deemed desirable, an *opinion* of the Judge Advocate General should be requested. File 13673-3897, J. A. G., Oct. 31, 1916; C. M. O. 37, 1916.

31. **Pardons**—Requests for pardon, and similar matters—Questions of this character to be referred to the department (Judge Advocate General) by Bureau of Navigation, with appropriate recommendation. File 26516-9, Dec. 1, 1908. *See also* File 26251-7738, J. A. G., Sept. 23, 1913.

32. **Questions of law**—The duties of the Judge Advocate General as defined by Navy Regulations, 1913, R-134 (2) include all "questions involving points of law *concerning the* personnel." *See* COAST GUARD, 1; JUDGE ADVOCATE GENERAL, 14, 17; QUESTIONS OF LAW.

33. **R. S. 179.** *See* JUDGE ADVOCATE GENERAL, 4, 18.

34. **R. S. 349.** *See* JUDGE ADVOCATE GENERAL OF THE NAVY, 18.

35. **"Solicitor and Naval Judge Advocate General."** *See* JUDGE ADVOCATE GENERAL, 18.

36. **"Solicitor in the Office of the Judge Advocate General"**—Has represented the United States in the Supreme Court (U. S. *v.* Smith, 197 U. S. 386). *See* File 409-1904.

37. **Same**—The Office of the Naval Solicitor in the Department of Justice was abolished by act of June 19, 1878 (20 Stat. 205).

The Office of the Naval Solicitor was established by the act of July 1, 1898, by separating the clerical force of the Office of the Judge Advocate General and assigning it to two offices, viz, the Office of the Judge Advocate General and the Office of the Solicitor. When this was done, the duties of the two offices were promulgated to the service by G. O. No. 72, June 17, 1908. The duties as laid down in that order have been embodied in Navy Regulations, 1909, R-12, 13. (Navy Regulations, 1913, R-103 (4); R-117). 14 J. A. G., 111½, Apr. 22, 1909.

38. **Same**—Recommendations upon the matter of combining the offices of the Judge Advocate General and Solicitor. 14 J. A. G., 111½, Apr. 22, 1909.

39. **Statutes**—Interpretation of. *See* JUDGE ADVOCATE GENERAL, 20.

40. **Title**—The title of the "Judge Advocate General" is such and not "Judge Advocate." File 7657-103:2, J. A. G., July 18, 1911. *See also* C. M. O. 41, 1916, 6.

41. **Useless papers**—Destroyed. File 14287-20, J. A. G., Nov. 4, 1915.

JUDICIAL NOTICE. *See also* STATUTES, 10.

1. **Absence of accused**—The court should take judicial notice of the fact that the accused was four hundred miles from his station and duty when his leave expired. C. M. O. 14, 1914, 4.

2. **Court-martial orders.** *See* COURT-MARTIAL ORDERS, 27.

3. **Days of the week**—Counsel for the accused asked the court to take judicial notice of the fact that certain dates came on certain days of the week. G. C. M. Rec. 30435, p. 664.

4. **Definition.** *See* WORDS AND PHRASES.

Digitized by Google

5. **Laws of a State**—Naval court-martial must take judicial notice of the law of a State which is pertinent to a case on trial, without such law having been referred to in evidence. C. M. O. 27, 1913, 8.
6. **Manual of Interior Guard Duty, United States Army, 1914**—Court may take judicial notice of. C. M. O. 49, 1915, 12, 13.
7. **Navy Regulations**—The Navy Regulations may be taken judicial notice of by a court-martial. C. M. O. 23, 1911, 3; 4, 1916, 3; 19, 1916; File 26251-11960, Sec. Navy, June 23, 1916; 26251-12309, J. A. G., Oct. 24, 1916, p. 3; 26251-12159; *See also* STATUTES, 10.
8. **Negotiable instruments**—The court should take judicial notice of the fact that it is customary in business transactions to include the agreement as to interest in the body of a negotiable instrument, particularly in a State where the law does not provide for the payment of interest in the absence of such agreement. C. M. O. 27, 1913, 7-8.
9. **Public statutes.** *See* FRAUD, 5; STATUTES, 10; File, 26251-12159.
10. **Specification**—In certain cases must allege an offense of which judicial notice can be taken. C. M. O. 33, 1914, 6. *See also* CHARGES AND SPECIFICATIONS, 103.
11. **State laws**—Naval courts-martial must take judicial notice of a State law which is pertinent to a case on trial. C. M. O. 27, 1913, 8.

"JUDICIAL QUESTION."

1. **Secretary of the Navy**—Not authorized to decide. C. M. O. 42, 1915, 14.
2. **Sunday ball playing**—At the Philadelphia Navy Yard. *See* SUNDAY LAWS.
3. **Voting**—Right of officers and enlisted men to vote in a certain State is a "judicial question." *See* VOTING, 7.

JUMPING SHIP. *See* JEOPARDY, FORMER, 44.

JUNIOR OFFICERS INVESTIGATING SENIORS. *See* BOARDS OF INVESTIGATION, 12.

JURISDICTION.

1. **Academic Board, Naval Academy.** *See* ACADEMIC BOARD OF THE NAVAL ACADEMY.
2. **Accounting officers' jurisdiction**—In death gratuity cases. *See* DEATH GRATUITY, 1.
3. **Army court-martial**—None shall be held on board a naval vessel. *See* ARMY, 7.
4. **Same**—Enlisted men while being transported on board an Army transport shall not be tried by Army courts-martial. *See* ARMY, 7.
5. **Same**—Marines serving with Army. *See* MARINES SERVING WITH ARMY.
6. **Army transport.** *See* ARMY, 7.
7. **Auditor for the Navy Department.** *See* AUDITOR FOR THE NAVY DEPARTMENT, 51.
8. **Bail, on**—An enlisted man released by Federal civil authorities on bail should not be placed under restraint upon returning to naval jurisdiction, unless he is not to be tried in the civil court, since such court has adequate power to cause his appearance when required. File 26283-281, June 27, 1911. *See also* BAIL, 1, 2; CIVIL AUTHORITIES, 31; GENERAL ORDER NO. 121, SEPT. 17, 1914, 14.
9. **Boston Navy Yard.** *See* U. S. *v.* TRAVERS, 28 Fed. Cas. 16537.
10. **Same**—Naval vessel in Boston Harbor. (*See* U. S. *v.* BEVANS, 3 Wheat. 336) 14 J. A. G. 187, Aug. 4, 1909.
11. **Cavite, P. I.**—Offense committed on board a naval ship at Cavite, P. I. File 26524-19, Sec. Navy, Oct. 26, 1910.
12. **Ceded land**—Exclusive in U. S. only when so provided. File 6769-21, J. A. G., July 19, 1911, pp. 8, 10, 11, 33; 15 J. A. G. 424, 426, 427, 449.
13. **Chelsea, Mass.**—Marine Hospital. *See* U. S. *v.* DAVIS, 25 Fed. Cas. 14930.
14. **Chiefs of bureaus in Navy Department**—Are subject to jurisdiction of naval courts-martial (18. Op. Atty. Gen. 176). *See* C. M. O. 8, 1886.
15. **China**—Murder outside of Peking, China. *See* MURDER, 9.
16. **Civil authorities**—Unjust arrest of an enlisted man by a police justice for contempt of court. File 7657-330.
17. **Same**—Delivery of enlisted men to. *See* CIVIL AUTHORITIES, 8, 11, 12, 16, 19, 20, 42, 48, 50; GENERAL ORDER NO. 121, SEPT. 17, 1914.
18. **Civil courts**—Reviewing naval courts-martial trials—For list of decisions of Supreme Court in reference to civil courts reviewing trials by naval general courts-martial, *see* File 26262-1625:8, Sec. Navy. *See also* Dynes *v.* Hoover, 20 How. 65; *Ex parte* Milligan, 4 Wall. 2; Wise *v.* Withers, 3 Cranch, 330; *Ex parte* Reed, 100 U. S. 13; *Ex parte* Mason, 105 U. S. 696; Keyes *v.* U. S., 109 U. S. 336; Wales *v.* Whitney, 114 U. S. 564; Moffitt *v.* Kurtz, 115 U. S. 487; Smith *v.* Whitney, 116 U. S. 167; *In re* Grimley, 137 U. S. 147; U. S. *v.* Fletcher, 148 U. S. 84; Johnson *v.* Sayre, 158 U. S. 109; Swaim.

Digitized by Google

v. U. S., 165 U. S. 553; Carter *v* Roberts, 177 U. S. 496; Carter *v.* McClaughry, 183 U S. 365.

19. **Commandants of naval stations.** File 26812; 4469, Mar. 22, 1906. *See also* OFFICIAL CHANNELS, 1.
20. **Comptroller of the Treasury.** *See* COMPTROLLER OF THE TREASURY.
21. **Concurrent jurisdiction**—Where the same act constitutes an offense under a State law, as well as an offense under a law of the United States, the State court has jurisdiction to punish the offense under its law, as has also the Federal court. (Fox *v.* Ohio, 5 How., 433; U. S. *v.* Marigold, 9 How., 569; Moore *v.* Illinois, 14 How., 19; *Ex parte* Siebold, 100 U. S., 390; Cross *v.* North Carolina, 132 U. S., 131.) 14 J. A. G. 188, Aug. 4, 1909. *See also* JURISDICTION, 71; JEOPARDY, FORMER, 46. C. M. O. 7, 1914, 10; File 26251-12159, p. 22.
22. **Coroners**—If a death occurs upon lands over which the United States has exclusive jurisdiction, and such death was not caused by any act within the acknowledged jurisdiction of the State within whose boundaries such land is situated, then a coroner could have no jurisdiction in the matter and could not, under the reserved right of the State to serve process upon such lands, come upon them and hold an inquest. Furthermore, such a proceeding would be of no use as a step in the criminal procedure of the State, because the State would have no jurisdiction to try the offender. But if the body of a drowned person were found in waters within the limits of a navy yard, and no drowning had occurred at the yard, it would be proper to allow the coroner to hold an inquest. Where a person in the naval service who has been injured outside the navy yard, returns thereto and dies from the injury, the coroner if he should so desire should be permitted to hold an inquest, because the injury was inflicted or occurred while the deceased was within the jurisdiction of the State. In proper cases, and when thought advisable, but as not establishing a precedent or as acknowledging any jurisdiction of the State to do so, a coroner might be allowed, as a matter of courtesy, to come into a navy yard to hold an inquest; but before permitting such action, the commanding officer or commandant should feel convinced that such a course would be advisable or accomplish some desirable end. File 6769-21, J. A. G., July 19, 1911, pp. 29-33. *See also* JURISDICTION, 85.
23. **Same**—A coroner has the right to hold an inquest in case of accident resulting in death, occurring within the limits of a naval reservation where concurrent jurisdiction exists. File 3727-97, quoted in File 6769-21, J. A. G., July 19, 1911, p. 30. *See also* JURISDICTION, 85.
24. **Same**—In the case of an enlisted man of the Navy killed on board a battleship at the navy yard, Philadelphia, Pa., the coroner attempted to hold an inquest outside the yard and applied for delivery of the enlisted man charged with the homicide and against whom court-martial proceedings had been commenced. On advice of the Department of Justice this application was denied. File 6674-29, April, 1907. *See also* JURISDICTION, 105; MURDER, 22-24.
25. **Courts of inquiry.** *See* COURTS OF INJURY.
26. **Courts-martial**—"Under every system of military law, for the government of either land or naval forces, the jurisdiction of courts-martial extends to the trial and punishment of acts of military or naval officers [and enlisted men] which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or a social relation, or in private business." (Smith *v.* Whitney, 116 U. S. 168, 183.) [An. Rep. J. A. G., 1915, p. 13; File 26251-12159, Sec. Navy, Dec. 9, 1916, p. 18.]

"It is not possible for an officer to do any act punishable by the known laws of the land, however foreign that act may be to his duties or immediate relations as a soldier, which shall not be cognizable by court-martial; that to commit a crime of any sort is, to say the least of it, in general, unofficerlike and ungentlemanly conduct; that as general proposition it is the part of an officer and a gentleman to observe the laws of his country, and for not doing it he would in most cases be censurable and in all his conduct would be lawfully subject to military inquiry." (6 Op. Atty. Gen. 413.) *See* File 5252-74:14, 1915; 26251-9965:17, J. A. G., Aug. 31, 1915.
27. **Same**—Review of naval courts-martial trial by civil courts. *See* JURISDICTION, 18.
28. **Same**—Courts-martial form no part of the judicial system of the United States, and their proceedings, within the limits of their jurisdiction, can not be controlled or revised by the civil courts. (Dynes *v.* Hoover, 20 How. 65; Ex parte Mason, 105 U. S. 696; Wales *v.* Whitney, 114 U. S. 564: Kurtz *v.* Moffitt, 115 U. S. 500.) A naval court-martial is a branch of the executive department of the Government. *See* JURISDICTION, 37

Digitized by Google

The decisions of naval courts-martial are not subject to review on the questions of conduct to the prejudice of good order and discipline or conduct unbecoming an officer and a gentleman. (Carter *v.* McClaughry, 183 U. S., 400; U. S. *v.* Fletcher, 148 U. S., 84.) G. C. M. Rec. 30485, pp. 768-769.

29. **Same**—A naval court-martial is a court of limited jurisdiction. C. M. O. 49, 1910, 9; 14, 1910, 8; 15, 1910, 9. *See also* COURT, 104; EVIDENCE, 21; JURISDICTION, 73.

30. **Same**—Dissolved, no jurisdiction to revise its proceedings in a former case tried by it. *See* COURT, 69, 70; JURISDICTION, 115; REVISION, 13.

31. **Same**—Convened on foreign territory. *See* JURISDICTION, 53.

32. **Same**—After expiration of enlistment. *See* ENLISTMENTS, 8; JURISDICTION, 48, 52.

33. **Same**—Naval court-martial may try person subject to its jurisdiction for any offense committed in the scope of legally assigned duties—The record of the general court-martial in the case of an enlisted man who was tried by order of the commandant of the naval station, Guam, shows that the accused, when arraigned, entered a plea to the jurisdiction of the court based, *inter alia*, upon the grounds that the offenses alleged against him were not military charges but were founded upon an alleged violation of the laws of Guam; and that any crime for which he could be tried must be a military offense. The court sustained the plea to the jurisdiction and submitted the record to the convening authority, who directed the trial to proceed.

The plea of the accused to the jurisdiction in this case was without foundation. The decisions of courts show that the essential features, in addition to being legally constituted, to give a general court-martial jurisdiction in a case similar to that of the accused are, (a) that an accused shall belong to an organization whose members are subject to trial by a naval court-martial, and (b) that the offense alleged against him must be one recognized by either the laws regulating civil society or the laws for the government of military forces. (Ex parte Mason, 105 U. S. 700; Smith *v.* Whitney, 116 U. S. 183; Ex parte Milligan, 4 Wall. 123.) In this case the accused was charged with having aided in the violation of the liquor laws of Guam, which laws it was his duty, as acting chief of police of that island, to enforce. There can be no question as to the jurisdiction over the person of the accused, nor did the accused contend that the act committed by him was not in violation of the duly authorized laws of the island of Guam. Inasmuch as the offense with which the accused was charged was committed in the scope of his duties as acting chief of police of Guam, and as this duty was assigned by competent authority and was a duty which could legally be assigned to the accused, there can be no doubt but that his misconduct in the execution of such duty constituted a military delinquency and as such came under the cognizance of a naval court-martial the same as would an offense committed by the accused in the course of duties ordinarily prescribed. (*See* 6 Op. Atty. Gen. 415.) G. C. M. Rec. No. 31819; C. M. O. 9, 1916, 5-6.

A man while in desertion was convicted by the civil authorities for an offense and by them placed on probation. He then returned to naval jurisdiction. *Held:* That a "general court-martial will not be ordered by the department at this time." File 26251-5566, Sec. Navy, Jan. 3, 1912.

34. **Same**—Courts-martial other than naval can not convene on vessel of regular Navy—Naval Militia officers can not convene State courts-martial on board a vessel of the regular Navy in the service of the United States; as the established policy of this Government, expressed in Navy Regulations which have been approved by Congress and are still in effect, does not permit any other than a naval court-martial to be held on board a naval vessel. (*Citing* Navy Regulations, 1913, R-3845; Navy Regulations, 1870, R-987; sec. 1547, R. S.) This policy has its origin in the customs and regulations of the British Navy. (*Citing* McArthur on Courts-Martial, 1813, vol. 1, p. 205.) File 3937-107, Feb. 16, 1915. *See also* NAVAL MILITIA, 38.

35. **Same**—Errors in procedure of naval courts-martial—Can not be reviewed by civil courts. (*See In re* McVey, 23 Fed. Rep. 878; *Ex parte* Dickey, 204 Fed. Rep. 322; *Ex parte* Tucker, 212 Fed. Rep. 569; *Ex parte* Reed, 100 U. S. 23.)

36. **Same**—Sufficiency of charges and specifications can not be reviewed by civil courts. (*Ex parte* Dickey, 204 Fed. Rep. 322; Carter *v.* McClaughry, 183 U. S. 355, 400; Swaim *v.* U. S., 165 U. S. 553; Smith *v.* Whitney, 116 U. S. 178; U. S. *v.* Fletcher, 148 U. S. 84.)

37. **Same**—"Courts-martial form no part of the judicial system of the United States, and their proceedings, within the limits of their jurisdiction, can not be controlled or revised by the civil courts." (Dynes *v.* Hoover, 20 How. 65; *Ex parte* Mason, 105 U. S. 696; Wales *v.* Whitney, 114 U. S. 564; Kurtz *v.* Moffitt, 115 U. S. 500.)

A naval court-martial is a branch of the Executive Department and not of the Judicial Department of the Government. C. M. O. 24, 1914, 19. *See also* COURT, 82, 113; JURISDICTION, 28.

Digitized by Google

38. **Same**—Sentence—When affirmed by the military tribunal of last resort, the sentences of naval courts-martial can not be revised by the civil courts save only when void because of an absolute want of power. *See* Carter *v.* McClaughry, 183, U. S. 380.
39. **Same**—The following is quoted from the civil court's opinion in the case of a naval general court-martial prisoner: "The case before me shows that the court-martial under which the petitioner was tried was properly constituted; that the charge and specification were in due form, and authorized under the Regulations for the Government of the Navy; that the trial court had jurisdiction of the case, and of the subject matter of the charge; and acted within the scope of its lawful authority; that it also acted within its authority in imposing sentence; that such sentence was duly approved by the commander-in-chief of the Atlantic Fleet, by whom the court was convened; that it was also approved by the Secretary of the Navy, the final reviewing authority provided by law to act upon records of courts-martial, in cases which do not extend to the loss of life, or to the dismissal of a commissioned or warranted officer; that the sentence, therefore, can not be revised by the civil courts." (*Ex parte* Dickey, 204 Fed. Rep. 322.) *See* File 26262-1625:20.
40. **De facto enlisted men.** *See* DE FACTO, 2; HONORABLE DISCHARGE, 3.
41. **Death gratuity.** *See* DEATH GRATUITY.
42. **Deck courts.** *See* DECK COURTS, 29.
43. **Decorations**—From foreign governments. *See* DECORATIONS, 2.
44. **Detention barracks' commanding officer.** *See* DETENTION BARRACKS.
45. **Dismissed officers.** *See* JURISDICTION, 97.
46. **Divested.** *See* JURISDICTION, 97.
47. **Double jeopardy.** *See* JEOPARDY, FORMER.
48. **Enlistment, expired**—Trial of man after expiration of enlistment—It has further been held and is now settled law in regard to military offenders in general that if the military jurisdiction has once duly attached to them previous to the date of the determination of their legal period of service, they may be brought to trial by general court-martial after that date, *their discharge being meanwhile withheld.* This principle has mostly been applied to cases where the offense was committed just prior to the end of the term. It is held therefore that if before the day on which his service legally terminates and his right to a discharge is complete the proceedings with a view to trial are commenced against him—as by an arrest or the serving of charges—the military jurisdiction will fully attach and once attached may be continued by a trial by a court-martial ordered and held after the end of the term of the enlistment of the accused. File 26251-9965, J. A. G., Jan. 28, 1915. *See also* JURISDICTION, 52, 97.
49. **Exclusive jurisdiction of the United States.** *See* File 3818, J. A. G., June 27, 1906. *See also* 26 Op. Atty. Gen. 91; File 4143-04; 3863-04; JURISDICTION, 119, 120, 122.
50. **Same**—In some cases offenses committed by persons in the naval service are cognizable *exclusively* by naval courts-martial, as, for example, where the offense is a purely military one, such as "Desertion" or "Fraudulent enlistment," which no civil court has jurisdiction to try. (File 5252-74: 14, 1915), or "Falsehood" (File 26251-12159).
51. **Executive department**—A naval court-martial is a branch of the executive, not of the judicial, department of the Government. *See* COURT, 8., 113; JURISDICTION, 37.
52. **Expiration of enlistment, trial after**—The Articles for the Government of the Navy provide:

"And if any person, being guilty of any of the offenses described in this article while in the naval service, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed." (A. G. N. 14.) *See also* In re Bogart, 3 Fed. Cas. 1596.

When the jurisdiction of a court attaches in a particular case by the commencement of proceedings and arrest of accused, it will continue for all purposes of trial, judgment, and execution. *See* File 26251-5447, Dec. 8, 1911, *See also* R. S. 1422, as amended by act Mar. 3, 1875 (18 Stat., 484); File 26504-102, J. A. G., Mar. 1, 1910, holding that the Navy Department has authority to retain a general court-martial prisoner to serve out his sentence after his enlistment has expired and he has been given a discharge from the service. He is not held by the contract of enlistment, but under sentence of a court. He is a military prisoner though he has ceased to be an enlisted man of the naval service (Carter *v.* McClaughry, 183 U. S. 365). *See also* BREAKING ARREST, 3.
53. **Foreign country**—When the United States forces have landed in foreign territory for military purposes, that part of the foreign territory actually occupied by such forces is not subject to foreign jurisdiction within the meaning of Navy Regulations, 1913,

Digitized by Google

R–763, which provides that "no naval general court-martial, or other assembly of a judicial character, shall be ordered or permitted to assemble or conduct any part of its proceedings in any place subject to foreign jurisdiction." (*See* Harwood, p. 57.) File 26504–254, J. A. G., Oct. 26, 1915; C. M. O. 42, 1915, 10. (Haiti.)

A court of inquiry was ordered to convene on board the U. S. S. *Hancock*, at Santo Domingo City, D. R., or such other places as the court in its judgment may deem desirable and advisable. File 28028–245, Sec. Navy, Sept. 2, 1916. *See also* JURISDICTION, 128.

54. **Same**—Where a naval court-martial was held in a place subject to foreign jurisdiction, the proceedings were disapproved. (Harwood, p. 57.) *See* C. M. O. 42, 1915, 10; JURISDICTION, 53.
55. **Former jeopardy.** *See* JEOPARDY, FORMER.
56. **Fraudulent enlistment**—A man fraudulently enlisting is subject to jurisdiction of a naval court-martial. *See* FRAUDULENT ENLISTMENT.
57. **General courts-martial**—Convened on foreign territory. *See* JURISDICTION, 53.
58. **General Order No. 121.** *See* GENERAL ORDER NO. 121, Sept. 17, 1914.
59. **Goat Island.** File 4778–95, Sec. Navy, Dec. 9, 1916.
60. **Guam.** *See* BANISHMENT, 1; JURISDICTION, 33.

Jurisdiction of civil and naval courts. File 9463–03. *See also* GUAM, 5; JURISDICTION, 33.

61. **Same**—Naval court-martial may try an enlisted man for violation of laws of Guam. *See* JURISDICTION, 33.
62. **Haiti**—Convening of general courts-martial and courts of inquiry. *See* JURISDICTION, 53.
63. **Indian Head, Md.**—Naval proving ground. *See* JURISDICTION, 83, 84.
64. **Insular authorities.** *See* JURISDICTION, 11, 94, 106, 108.
65. **Isthmian Canal Zone**—An enlisted man on board a naval vessel at anchor off Cristobal, Isthmian Canal Zone, Panama, did, feloniously and wilfully, strike, stab, and cut another enlisted man attached to the same vessel with a knife, inflicting a mortal wound, of which wound said enlisted man died. G. C. M. Rec. 27005. *See also* File 26251–7593, J. A. G., Apr. 30, 1913.
66. **Japan**—Civil and naval authorities. *See* File 5542–00. *See also* TREATIES.
67. **Jeopardy, Former.** *See* JEOPARDY, FORMER.
68. **Judicial department**—A naval court-martial is not a branch of the judicial department of the Government. *See* COURT, 83, 113; JURISDICTION, 37, 51.
69. **Key West.** *See* File 26812–7, Sec. Navy, Aug. 19, 1915.
70. **Lack of**—Where there is a want of jurisdiction apparent upon the record the proceedings of the court are not valid. C. M. O. 14, 1911, 3.
71. **Lands leased or rented to the United States**—"Ordinarily the United States does not possess exclusive jurisdiction over lands leased or rented to the United States. (*See* U. S. *v.* Tierney, 28 Fed. Cas. No. 16517; 6 Comp. Dec. 877.) File 7940–349, Sec. Navy, Oct. 17, 1916.
72. **Letter of transmittal**—Gives court jurisdiction over the person named therein. C. M. O. 8, 1911, 6. *See also* LETTERS, 28–30.
73. **Limited jurisdiction**—A naval court-martial is a court of limited jurisdiction. *See* COURT, 104; EVIDENCE, 21; JURISDICTION, 29.
74. **Manslaughter.** *See* MANSLAUGHTER; MURDER.
75. **Marine battalion afloat**—A regulation prescribing that the relations between the commanding officer of a marine battalion embarked on board an armed transport of the Navy and the naval commanding officer of the latter shall be the same, as nearly as possible, as those existing between the commanding officer of marines at a navy yard and the commandant thereof, so far as it relates to the administration of punishments and the convening of summary courts-martial and deck courts, would be contrary to law. 15 J. A. G. 454. *But see* JURISDICTION, 76; SUMMARY COURTS-MARTIAL, 22.
76. **Same**—When a force of marines is embarked on a naval vessel, or vessels, as a separate organization, not a part of the authorized complement thereof, the authority and powers of the officers of such separate organization of marines shall be the same as though such organization were serving at a navy yard on shore, but nothing herein shall be construed as impairing the paramount authority of the commanding officer of any naval vessel, over the vessel under his command and all persons embarked thereon. (Act. Aug. 29, 1916, 39 Stat, 586.)
77. **Marine brigade, Philippine Islands.** *See* File 21277, Sec. Navy, Mar. 31, 1906. *See also* File 5530, J. A. G.

Digitized by Google

78. **Marines serving with Army**—A marine having committed an offense while detached for service with Army was returned to jurisdiction of Navy and tried by naval general court-martial. *Held*, that naval court-martial was without jurisdiction and that prisoner is entitled to release in habeas corpus proceedings. C. M. O. 31, 1915, 6. *See also* MARINES SERVING WITH ARMY, 7.
79. **Same**—Sentence imposed by Army court-martial, mitigated by President after return of accused to naval jurisdiction. *See* MARINES SERVING WITH ARMY, 6.
80. **Military offenses.** *See* JURISDICTION, 26, 50.
81. **Murder.** *See* JURISDICTION, 90, 94, 102; MANSLAUGHTER; MURDER.
82. **Naval Militia.** *See* NAVAL MILITIA.
83. **Naval proving ground, Indian Head, Md.** *See* File 6692–233; 6769–21; 7001; 7101–6, March, 1908; 7101–9; 7101–10, Apr. 17, 1908; 9212–72, J. A. G., Apr. 19, 1916; 26283–988:2.
84. **Same**—In an opinion rendered by the attorney general of the State of Maryland, February 7, 1916, it was held that the United States unquestionably have exclusive jurisdiction over the naval proving ground, Indian Head, Md., except for the right of the State to execute process upon the reservation for offenses committed outside, but the State has no right to punish offenses committed in the reservation. *See* File 6692–233:7.
85. **Naval reservations**—Coroners have a right to hold an inquest in case of accidental death occurring within the limits of a naval reservation where concurrent jurisdiction exists. File 1766–03; 3726–97; 7101. *See also* JURISDICTION, 22–24.
The punishment of offenses committed on lands used for public purposes, the punishment of which is not provided for by any law of the United States, shall be the same as provided by laws of the State in which situated. Section 289, Criminal Code, act Mar. 4, 1909 (35 Stat., 1145). *See* File 4143–04; 5103–164:4.
Right of a collector of customs to enter upon a naval reservation without assent of commandant. File 3312–04, 3377–04, J. A. G., Apr. 14, 1904.
86. **Naval stations**—Marine officers' right to command. File 5530, Nov. 8, 1906.
87. **Naval training station, Great Lakes, Ill.** File 14560–174; 26250–331, Feb. 24, 1912.
88. **Naval vessels.** *See* GENERAL ORDER No. 121, Sept. 17, 1914. *See also* File 7204:1, Sept. 13, 1907; MURDER, 8, 16, 21, 22–28.
89. **Navy mail clerks.** *See* File 7538–74; 26283–524:1; 7538–142, J. A. G., Dec. 3, 1913; Ct. Inq. Rec. 5698. *See also* MAIL CLERKS.
90. **New London, Conn.**—An enlisted man of the Navy committed an assault upon another enlisted man on board a naval vessel which was under way in the Thames River, opposite New London, Conn. Man was removed to naval hospital, where he died. Attorney General held that the accused might be tried by naval court-martial under A. G. N. 22. (Op. of Attorney General, Nov. 15, 1880.) G. O. 259, Jan. 25, 1881. *See also* 14 J. A. G., 188; 16 Op. Atty. Gen., 578.
91. **New York Navy Yard**—Civil or criminal by State or municipal authority in navy yards. *Held*, first: That the reservation of the power in the State of New York to serve civil or criminal processes within the ceded limits does not empower the State or municipal authorities forcibly to take possession of persons in the naval service within such limits, subject to the qualification that in order that such service of process may not interfere with the operation of the Federal Government, the person deputed to perform that duty should first obtain the permission of the commandant, and such permission should only be withheld upon the most forcible and cogent reasons of public necessity. Second: The reservation of this power to the State applies equally to the apprehension of civil employees, whether classified or unclassified, with the same qualification as stated above. Third: A similar answer is also given in the case of a vessel permanently stationed at navy yards. Fourth: In all cases, however, this reservation of power to the State of New York has no application to offenses committed *within the limits* of the navy yard. File 6769–21, J. A. G., July 19, 1911.
The coroner is wholly without jurisdiction to conduct an investigation of deaths occurring *within* the New York Navy Yard and his subpœnas in such a case are of no legal force. File 26283–988:5, Sec. Navy, Feb. 18, 1916.
92. **Same**—Naval vessel in Wallabout Bay at Cob dock. *See* U. S. *v.* Carter (84 Fed. Rep. 622 quoted in File 6769–21, J. A. G., July 19, 1911, p. 35. *See also* MURDER, 26.
93. **Norfolk, Va.**—Naval vessel at navy yard, Norfolk, Va. (*See* Western Union Tel. Co. *v.* Chiles, 214 U. S. 274.) *See* File 6769–21, J. A. G., July 19, 1911.
94. **Olongapo, P. I.**—Homicide on naval vessel at Olongapo, P. I. File 15285–64. *See also* Op. Atty. Gen., Oct. 20, 1909; 26 Op. Atty. Gen. 91.
95. **Same**—Jurisdiction of Subig Bay Naval Reservation. *See* 26 Op. Atty. Gen. 91.

Digitized by Google

96. **Same**—All persons desiring to enter or reside within the boundaries of the Subic Bay Naval Reservation, which includes the naval station, Olongapo, must first obtain permission from the commandant of the naval station, who also has the express power to exclude and deport from the reservation and naval station all those persons who may seem undesirable. This drastic action of deportation is taken only after a careful and thorough investigation, and because such persons have forfeited their privileges to such an extent that the public welfare and the necessity of protecting the civil and military interests demand their absence from the reservation.

Title to all real estate of the reservation vests in the United States and the residents are permitted to use it by sufferance, signing what is known as a "waiver," in which they take an oath that they will surrender such property upon demand of the United States. File 11406–429, Sec. Navy, July 6, 1915.

97. **Once attached**—Where jurisdiction has attached, it can not be divested by mere subsequent change of status. In accordance with this principle an officer tried by court-martial and sentenced to dismissal and imprisonment may be held by the naval authorities to serve out the prescribed term of imprisonment notwithstanding that the sentence of dismissal is first executed. Upon the same principle, an enlisted man who commits an offense just prior to the expiration of his enlistment may be held for trial for court-martial after his enlistment expires, provided the necessary steps are promptly taken with a view to such trial. (Carter *v.* McClaughry, 183 U. S. 383.) *See* File 26251–5447, Dec. 8, 1911; 5252–74:14; ENLISTMENTS, 8–10.

It is a settled doctrine of this court that a court having possession of a person or property can not be deprived of the right to deal with such person or property until its jurisdiction is exhausted, and that no other court has the right to interfere with such custody and possession. (In re Johnson, 167 U. S., 121.) 14 J. A. G., 191, Aug. 4, 1909.

Where civil authorities have not as yet acquired jurisdiction "the man in question should be tried by naval court-martial and as stated by the department (File 7538–74, Sec. Navy, Oct. 4, 1909) 'such a course would probably be a more expeditious manner of disposing of' the case." File 7538–142, J. A. G., Dec. 3, 1913.

98. **Panama**—Canal Zone. *See* JURISDICTION, 65.

99. **Paroled by civil authorities**—A naval court-martial has jurisdiction to try and sentence an enlisted man paroled by the civil authorities where the governor of the State consents to such man's delivery to the Navy for disciplinary action. File 26524–44.

100. **Same**—An enlisted man arrested as a deserter while on parole for a civil offense will not be tried by court-martial, because constructively in the custody of the civil authorities, but should be discharged as undesirable as of the date of his conviction in the civil courts. File 4495–02, May 27, 1902. *See also* File 26283–281.

101. **Paymaster's clerks**—Were subject to jurisdiction of naval courts-martial, even at a time when they were not strictly officers of the Navy. *See* C. M. O. 27, 1887, 13; 102, 1894; 160, 1901; 26, 1902; 31, 1905; 39, 1905; 4, 1907; 32, 1908; 29, 1911; 30, 1911; 26, 1912; 37, 1912; 35, 1913; 38, 1913; 24, 1915; 26, 1915.

Naval general courts-martial have jurisdiction of offenses committed by Clerks to Assistant Paymasters, U. S. M. C. C. M. O. 10, 1916.

102. **Peking, China**—Murder outside of Peking. *See* MURDER, 9.

103. **Pensacola, Fla.**—Navy yard. *See* 7 Op. Atty. Gen. 573, quoted in File 6769–21, J. A. G., July 19, 1911, p. 9.

104. **Pensions**—Taxation of service pensions. *See* JURISDICTION, 127.

105. **Philadelphia Navy Yard**—Where an enlisted man was charged with a crime against a civilian, alleged to have been committed on a vessel of the Atlantic Reserve Fleet at the navy yard, Philadelphia, Pa., the department declined to deliver him to the civil authorities of Pennsylvania on the ground that the State was without jurisdiction. File 26524–127, Mar. 23, 1915. *See also* JURISDICTION, 24; MURDER, 22–24.

With reference to the authority of the coroner in a case of homicide within the limits of this naval station, *see* File 26250–752:3, Sec. Navy, Feb. 11, 1916.

106. **Philippine Islands**—The courts of the Philippine Islands have no jurisdiction over offenses committed on board a naval vessel at Cavite, P. I., notwithstanding Act No. 1457 of the Philippine Commission, which provides that "the jurisdiction of the city of Manila for police purposes only shall extend to three miles from the shore into Manila Bay," etc. The laws for the government of the Navy, the Navy Regulations, and lawful orders of superior naval authority, embody the only police regulations in force on board naval vessels. File 26524–19, Oct. 26, 1910. *See also* JURISDICTION, 94–96.

Digitized by Google

107. **Poll Taxes.** *See* POLL TAXES.

108. **Porto Rico**—*Advised*, That the insular authorities would not have the right to arrest an enlisted man of the Navy within the limits of the naval station, San Juan, Porto Rico. File 26524-32, J. A. G., July, 1911, citing treaty between United States and Spain, proclaimed Apr. 11, 1899 (30 Stat., 1755); 24 Op. Atty. Gen. 10; act, July 1, 1902 (32 Stat. 731); President's Proclamation, June 26, 1903 (33 Stat. pt. 2, 2314); act, Apr. 12, 1900, sec. 13 (31 Stat. 80); 23 Op. Atty. Gen. 566; 25 Op. Atty. Gen. 571; 25 Op. Atty. Gen. 194.

For authorities on the question of jurisdiction in the Territories, and their application to Porto Rico, *see* File 3818, June 27, 1906; 1831-8; 8210.

109. **Prisoners**—Service of process upon. *See* GENERAL ORDER No. 121, SEPT. 17, 1914, 15, 16; JURISDICTION, 111.

110. **Same**—After discharge and end of enlistment—The department has authority to retain a general court-martial prisoner to serve out his sentence after his enlistment has expired and he has been given a discharge from the service. *See* ENLISTMENTS, 8-10.

111. **Same**—Civil or criminal processes upon court-martial prisoners—While it is the desire of the department to cooperate with the civil authorities in the punishment of crime and for placing in their hands offenders for whom warrants have been issued, it is proper that such should be done in a way so as to not interfere with the trial by naval courts-martial and execution of sentences imposed thereby upon the men desired by civil authorities. *Held*, therefore, such men should serve their sentences imposed by naval courts-martial, unless the civil proceedings would be thereby barred by the statute of limitations, and upon completion of confinement in naval prisons they should then be turned over to the civil authorities. File 2944-2, Oct. 10, 1905; 26251-5546:1, Jan. 20, 1912; 26524-41, Mar. 7, 1912. *See also* GENERAL ORDER No. 121, SEPT. 17, 1914, 16.

112. **Questions involving jurisdiction**—Matters involving questions of jurisdiction, or conflict of authority, which can not be reconciled by correspondence between officers must be referred, by officers of the Navy, to the Navy Department. (I-5303.)

113. **Resigned officers**—An officer who has resigned from the naval service is not subject to jurisdiction of naval courts-martial on charges preferred after date resignation was accepted, unless there is a law conferring such jurisdiction. G. O. 143, Oct. 28, 1869. *See also* In re Bogart, 3 Fed. Cas. No. 1596.

114. **Retired officers**—Are subject to jurisdiction of naval courts-martial. (*See* Runkle *v.* U. S., 19 Ct. Cls. 396). *See* RETIRED OFFICERS, 33.

115. **Revision**—After a court-martial has been dissolved it has no jurisdiction to revise the proceedings in a former case tried by it. C. M. O. 4, 1914, 11. *See also* COURT, 69, 70.

116. **San Juan, Porto Rico.** *See* JURISDICTION, 108.

117. **State authorities**—The State authorities are not empowered to arrest persons, either in the naval or civil service of the United States, within the limits of a navy yard, whether on shore or on board vessels at the yard, without first obtaining the permission of the commandant, to the end that such service of process shall not interfere with or obstruct operations of the United States Government. (File 6769-21, J. A. G., July 19, 1911, pp. 33-34.) However, where a police officer, holding a warrant for the arrest of an enlisted man upon a charge of a misdemeanor, persuaded the man to leave his vessel on liberty and accompany the police officer outside the limits of the navy yard, there making the arrest, it was held by the Attorney General that while there are authorities which indicate that an application to the commanding officer is a necessary condition precedent to the State's acquiring jurisdiction (especially Ex parte McRoberts, 16 Iowa, 600, 604), yet the better view, as held in the case of In re O'Connor (37 Wis. 379), is that application to the commanding officer is not jurisdictional, the matter being one that does not go to the jurisdiction of the civil court issuing the process; that there is no doubt that the members of the military forces of the United States are subject in times of peace to the criminal laws of the States; and accordingly, that want of an application to the commanding officer would be a mere informality which might make the warrant of arrest irregular but would not make it void or voidable to be attacked upon a habeas corpus proceeding. File 7657-261:1, Nov. 14, 1914. It is not intended that there should be any friction between the civil and naval authorities in this matter. Should a question arise at any time the commandant should inform the local authorities that the Navy Department has no desire to obstruct the operation of State laws by preventing the punishment of persons in the naval service or of persons in the civil service for violation of such laws; and that upon presentation of lawful process in proper hands the person wanted will invariably be delivered to the civil officer or such officer will be allowed to serve process himself,

Digitized by Google

whichever course appears the more advisable, provided that the case is not one in which, by reason of any Federal interest involved, the United States should intervene. File 6769–21, J. A. G., July 1, 1911, p. 36, quoting File 6807, Sec. Navy, Mar. 16, 1907.

118. **Same**—The principle that no State has the right to interfere with the instrumentalities of the Federal Government has been recognized from the earliest days of our Government. *See* File 6769–21, J. A. G., July 19, 1911, p. 36.

119. **Same**—Purchase by consent of the legislature of the State—When the title is acquired by purchase by consent of the legislatures of the States, the Federal jurisdiction is exclusive of all State authority. This follows from the declaration of the Constitution that Congress shall have "like authority" over such places as it has over the District of Columbia; that is, the power of "exclusive legislation in all cases whatsoever." Broader or clearer language could not be used to exclude all other authority than that of Congress. File 6769–21, J. A. G., July 19, 1911, pp. 2–8, citing Ft. Leavenworth R. R. Co. *v.* Lowe (114 U. S. 525); U. S. *v.* Cornell (25 Fed. Cas. No. 14867); Com. *v.* Clary (8 Mass. 72); U. S. *v.* Meagher (37 Fed. Rep. 875); U. S. *v.* San Francisco Bridge Co. (88 Fed. Rep. 891, 894); U. S. *v.* Penn (48 Fed. Rep. 669). It will be seen, therefore, that the exclusive jurisdiction of the United States over lands within a State which it has acquired only exists when the State within whose borders the land lies has ceded jurisdiction to the Federal Government; that is, by the consent of the legislature of the State. File 6769–21, J. A. G., July 19, 1911, p. 8.

120. **Same**—Consent of the State—The consent of the States to the purchase of land within them for the special purposes named in clause 17, section 8, Article I of the Constitution is essential, under the Constitution, to the transfer to the General Government, with the title of political jurisdiction and dominion. Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the Government, is subject to the legislative authority and control of the States equally with the property of private individuals. (Fort Leavenworth R. R. Co. *v.* Lowe, 114 U. S. 531.) File 6769–21, J. A. G., July 19, 1911, pp. 10–11.

121. **Same**—Reservation of power to serve State process—Speaking generally of this reservation of power by the States to serve civil and criminal process upon lands under the exclusive jurisdiction of the Federal Government, it may be said that this is not considered as interfering in any respect with the supremacy of the United States over such lands, but is permitted to prevent them from becoming an asylum for fugitives from justice. (Ft. Leavenworth R. R. Co. *v.* Lowe, 114 U. S. 531.) File 6769–21, J. A. G., July 19, 1911, p. 12, citing U. S. *v.* Travers (28 Fed. Cas. No. 16537); U. S. *v.* Carter (84 Fed. 622); U. S. *v.* Tucker (122 Fed. Rep. 518); Western Union Tel. Co. *v.* Chiles (214 U. S. 274); In re Ladd (74 Fed. 31); Steiner's Case (6 Op. Atty. Gen. 413); 6 Op. Atty. Gen. 577; 7 Op. Atty. Gen. 628; 8 Op. Atty. Gen. 418; 20 Op. Atty. Gen. 611; 23 Op. Atty. Gen. 254; Army Digest, 1901, 675, 679, 691, 740, 742, 750, 1699; Martin *v.* House (39 Fed. Rep. 694).

122. **Same**—Mere occupancy with State's tacit consent—Exclusive jurisdiction may be acquired by the United States with the consent of the State legislature, but if the Federal Government buys land, the same as any private individual might do, it does not thereby acquire any greater right thereover as to jurisdiction than would the private purchaser. Or, if it leases land it is not a "place" within the meaning of the 17th clause, section 8, Article I of the Constitution, for that clause plainly implies the permanent use of the property purchased for the construction or erection of some of the structures designated or some other needful building. File 6769–21, J. A. G., July 19, 1911, p. 10, *citing* U. S. *v.* Tierney (28 Fed. Cas. No. 16517).

123. **Statute of limitations**—Having run. *See* STATUTE OF LIMITATIONS.

124. **Sentence of civil court suspended**—A naval court-martial has jurisdiction over an enlisted man convicted by a civil court, and turned over to naval jurisdiction, sentence being suspended, and he was tried for his unauthorized absence. File 26524–44.

125. **Subig Bay Naval Reservation.** *See* JURISDICTION, 94–96.

126. **Summary courts-martial.** *See* SUMMARY COURTS-MARTIAL.

127. **Taxation of service pensions.** File 9212–22, J. A. G., Feb. 21, 1912.

128. **Territorial jurisdiction**—There is no territorial limit to the jurisdiction of naval courts-martial—The jurisdiction of general courts-martial is not similar to that of civil courts, their jurisdiction being coextensive with the territory of the United States; that is to say, a general court assembled at any locality within that territory may legally take cognizance of an offense committed at any other such locality what-

Digitized by Google

ever. Further in cases of offenses committed in friendly foreign territory entered without the authority of the government of said territory they are, nevertheless, subject to the jurisdiction of courts-martial convened within the United States, provided that the offender at the time of the offense was a member of an organization, detachment, or other forces under military command and discipline. File 26251-9965, J. A. G., Jan. 28, 1915. *See also* JURISDICTION, 53.

129. **Trial of man**—After expiration of enlistment. *See* BREAKING ARREST, 3; ENLISTMENTS, 8–10; JURISDICTION, 52, 97.
130. **Voting**—Dishonorable discharge—State to decide effect of dishonorable discharge on right to vote, not department. *See* VOTING, 7.
131. **Same**—State must decide, not department, if persons in naval service may vote in certain city. *See* VOTING, 7–10.
132. **Want of jurisdiction.** *See* JURISDICTION, 70.

JURORS.

1. **Members of courts-martial**—Capacity as jurors. C. M. O. 94, 1905, 1. *See also* 6 Op. Atty. Gen. 200, 206; COURT, 106.

JURY.

1. **Civil employees**—At navy yard, Charleston, S. C. *See* File 21090-3, Sept. 3, 1908; 20 Op. Atty. Gen. 618. *See also* CIVIL EMPLOYEES, 2; CONSTITUTIONAL LAW, 8.
2. **Court of inquiry**—A court of inquiry corresponds to a grand jury in civil courts, with the difference that the court of inquiry has larger powers and the scope of its investigation is broader than is the case with a grand jury. Act of Feb. 16, 1909, 38 Stat. 621; act of Mar. 16, 1878, 20 Stat. 30; art. 57, A. G. N., sec. 1624, R. S. *See* G. C. M. Rec. 29422; File 26251-9280.
3. **Courts-martial**—The court in its capacity of jury has the power of determining the weight to be given to the testimony of the accused and consider it in coming to its finding. File 26251-9649; G. C. M. Rec. 24745; C. M. O. 16, 1916, 8. *See also* COURT, 107; JURY, 4, 12.
4. **Same**—A naval court-martial in its capacity of jury is the sole judge of fact. G. C. M. Rec. 24735. *See also* COURT, 107; JURY, 3, 12.
5. **Same**—Until the sentence of a court-martial has been approved or disapproved, the case still remains *sub judice*. In fact, the analogy of a court-martial is that of a jury in the trial of a civil case, the approving power in the former occupying the relation of the judge in the latter. The judge remands the case to the jury for further consideration. The verdict must be accepted by the judge, and judgment rendered accordingly, before the verdict can have its complete execution and effect, whether of conviction or acquittal. So, in the corresponding case it must be with the proceedings of a court-martial as respects the approving power. 6 Op. Atty. Gen. 200, 206.
6. **Same**—Trials by jury not required in Navy—Congress has power to provide for the trial and punishment of persons in the naval service without a jury. (Dynes *v.* Hoover, 20 How. 65, 79.) File 26260-1392, 697, J. A. G., June 29, 1911, p. 30. *See also* MURDER, 15.
7. **Deck court officer**—As jury. C. M. O. 14, 1911, 7. *See also* DECK COURTS, 28.
8. **Discharge**—Honorably discharged officer. *See* JURY, 14.
9. **Government employee.** *See* JURY, 1.
10. **Grand jury**—Compared with court of inquiry. *See* JURY, 2.
11. **Honorably discharged officer**—Liability for jury duty. *See* JURY, 14.
12. **Members of courts-martial**—Capacity as jurors. *See* JURY, 3, 4, 5.
13. **Officers**—Retired officers summoned to appear for jury duty should urge to the judge of the court the objection arising from his military status, to his serving on a civil jury.
14. **Same**—Department is aware of no law which would excuse an "honorably discharged commissioned officer of the United States Navy from serving on a Federal jury." File 21090-8, J. A. G., July 14, 1916. *See also* RETIRED OFFICERS, 41.
15. **Retired officers.** *See* JURY, 13.

KEEPING FALSE ACCOUNTS.

1. **Paymaster's clerk**—Charged with. C. M. O. 28, 1887, 2.

KIN, NEXT OF.

1. **Medical records**—Deceased enlisted men, furnished to. *See* MEDICAL RECORDS, 3–4.

KNEE.

1. **Injury to**—Enlisted man. *See* LINE OF DUTY and MISCONDUCT CONSTRUED, 49.

Digitized by Google

KNOWING OF AN INTENDED MUTINY, NOT COMMUNICATING HIS KNOWLEDGE TO HIS SUPERIOR OR COMMANDING OFFICER.

1. **Prisoner**—A general court-martial prisoner had knowledge that four other prisoners "had a united purpose to commit mutiny" and did fail and neglect to communicate such knowledge to his superior or commanding officer, G. C. M. Rec., 23522. *See also* MUTINY, 1.

KNOWINGLY. *See also* INTENT, 33; JOINDER, TRIAL IN, 19.

1. **Defined and discussed**—In "Words and Phrases Judicially Defined" it is stated that "the term 'knowingly' imports a knowledge that the facts exist which constitute the act or omission a crime and does not require knowledge of the unlawfulness of the act or omission"; and also that "'knowingly' is equivalent to 'wilfully.'" (Fry *v.* Hubner, 57 Pac. 420, 421; 35 Or., 184.) "Knowingly and wilfully" as used in Revised Statutes, paragraph 3995 (U. S. Comp. Stat. 1901, p. 2716), providing that any person who shall knowingly and willfully obstruct and retard the passage of the mail shall be fined, the words "knowingly and wilfully" refer to those who know that the acts performed, however innocent they may otherwise be, will have the effect of obstructing and retarding the passage of the mail, and they perform the act with the intention that such will be their operation. (United States *v.* Cassidy, 67 Fed. Rep. 698, 704.) C. M. O. 12, 1911, 5.
2. **False statements**—The accused was tried upon a specification alleging that, when testifying before a board of investigation, he made a statement which "was knowingly false and intended to deceive."

   The evidence adduced at the trial showed clearly that the statement in question was false, but there was no evidence introduced indicating that the statement was *knowingly* false and intended to deceive. An analysis of the offense charged shows that there are two elements essential to its completion, namely (1) falsity of the testimony in question and (2) knowledge of such falsity together with an intention to deceive. Inasmuch as only (1) of the above elements constituting this offense was established by evidence, proof was, therefore, lacking of the completion of the offense and the court properly acquitted the accused thereof. C. M. O. 17, 1916, 8.
3. **Fraudulent enlistment**—In relation to. C. M. O. 12, 1911, 5. *See also* C. M. O. 17, 1916, 8.

KNOWINGLY AND WILFULLY MISAPPROPRIATING AND APPLYING TO HIS OWN USE AND BENEFIT MONEY OF THE UNITED STATES INTENDED FOR THE NAVAL SERVICE THEREOF.

1. **Chief Pay Clerk**—Charged with. C. M. O. 28, 1916.
2. **Paymaster's Clerk**—Charged with. C. M. O. 29, 1911.
3. **Paymaster's Clerk, U. S. M. C.**—Charged with. C. M. O. 10, 1916.

LANDSMAN.

1. **Rating of**—Abolished for the seaman branch. G. O. 178, Nov. 29, 1904. *See also* C. M. O. 36, 1905, 3.

LANGUAGE. *See also* STATUTES, 9; STATUTORY CONSTRUCTION AND INTERPRETATION, 62-64.

1. **Abusive and profane**—Words to be included in specification. *See* CHARGES AND SPECIFICATIONS, 51, 56.
2. **Intent of**—It has been held that language is to be given its ordinary import and meaning unless an explanation accompanies the use of the words which gives them a different meaning. C. M. O. 52, 1910, 2.
3. **Purpose**—The purpose of language is to convey ideas and not to create distinctions.
4. **Threatening and profane**—Under Massachusetts statutes. *See* File 26251-2993:12.
5. **"Using abusive and threatening language toward another person in the service"**—Warrant officer charged with. C. M. O. 10, 1914.
6. **"Using obscene and threatening language toward another person in the naval service"**—Warrant officer (commissioned) charged with. C. M. O. 28, 1915.
7. **"Using provoking and reproachful words toward another person in the Navy"**—Commissioned officer charged with. C. M. O. 19, 1915.

LARCENY. *See also* THEFT.

1. **Civil authorities**—Requested naval prisoner to try him for larceny. File 26524-217, J. A. G., Dec. 28, 1915.

LAS ANIMAS NAVAL HOSPITAL.

1. **Civil authorities**—Delivery of enlisted men to. *See* CIVIL AUTHORITIES, 30.
2. **Summary courts-martial.** *See* SUMMARY COURTS-MARTIAL, 22; HOSPITALS, 2.

Digitized by Google

LAW BOOKS.

1. **Number of and approximate value**—In library of Office of Judge Advocate General. File 5087-107, J. A. G., Jan. 7, 1913.
2. **Sale of.** File 10101-19, J. A. G., Sept. 8, 1915; 10101-19:1, J. A. G., Oct. 26, 1915.

LAW CLERK.

1. **Counsel to judge advocate**—Law clerk in Office of Judge Advocate General assigned as counsel to judge advocate of a general court-martial. *See* COUNSEL, 39.

LEAD DROPPINGS.

1. **Storage batteries**—Of submarines. C. M. O. 41, 1915.

LEADING QUESTIONS.

1. **Aiding a defective memory.** *See* LEADING QUESTIONS, 5.
2. **Alternate form.** *See* LEADING QUESTIONS, 5.
3. **Court**—May ask leading questions. File 26262-1194. *See also* WITNESSES, 41.
4. **Cross-examination**—Allowed in. *See* LEADING QUESTIONS, 5.
5. **Definitions and discussion**—In the case of an officer where many leading questions were irregularly permitted the department made the following remarks:

As will be seen from this line of direct examination, each question suggests or puts the desired answer in the mouth of the witness, and was therefore subject to objection and exclusion from evidence on account of being leading.

The judge advocate should have objected to these questions being asked the witness, but since he did not do so, and the procedure, irregular as it was, favored the accused, the proceedings were not held to be invalid.

Forms of Procedure, 1910, p. 142, with reference to this subject states: "So long as the questions are relevant to the issue considerable latitude is allowed in the direct examination of witnesses, but care must be taken not to ask leading questions, i. e., those which suggest their answers, for they are excluded if objected to by the opposite party. Questions of identification of persons or things which have already been described, introductory questions, questions tending to aid a defective memory, and those asked a witness who appears hostile to the party calling him, are exceptions to this rule." Upon cross-examination leading questions are permitted.

In a case published in C. M. O. 42, 1909, pp. 7-8, it was noted by the department that, in the examination of a witness for the prosecution, after he had testified to having heard a statement made by the accused, the judge advocate asked the witness this question:

"Was or was not that statement voluntary?"

This question was objected to by a member of the court as being leading, and, although the judge advocate in reply stated in substance that this question was contained in a form sent him from the office of the Judge Advocate General, the court nevertheless ruled that it was a leading question and should not be asked.

A leading question has sometimes been incorrectly defined as one which may be answered by "Yes" or "No." As a matter of fact, such definition is not helpful, and a question which may not be answered by "Yes" or "No" may well be a leading question.

The proper significance of the expression is a suggestive question—one which suggests or puts the desired answer in the mouth of the witness. (*See* 40 Cyc., 2423.) A question addressed to a witness on examination is not necessarily leading because it may be answered "Yes" or "No." A leading question is one that points out the desired answer, and not merely calls for a simple affirmative or negative; and an interrogatory which merely asks a witness if he has any idea as to a fact which is in dispute between the parties, and directs him, if he has such knowledge, to state the extent thereof, is not objectionable on the ground of being a leading question. (Coogler *v.* Rhodes, 21 South, 109; 38 Fla., 240; 56 Am. St. Rep., 170; People *v.* Mather, 4 Wend. (N. Y.), 229; 21 Am. Dec., 122.)

A question is leading which instructs the witness how to answer on material points, or puts into his mouth words to be echoed back, or plainly suggests the answer which the party wishes to get from him, whether it be put in the alternative form or not. (Page *v.* Parker, 40 N. H., citing with approval People *v.* Mather, 4 Wend. (N. Y.), 229, 21 Am. Dec. 122, and Courteen *v.* Touse, 1 Camph., 431.)

Simply because a question can be answered by "Yes" or "No" does not necessarily class it as a leading one. The question, "Do you recognize the accused?" is answerable by "Yes" or "No," and yet no authority would consider this a leading question. (*See in this connection* G. C. M., Rec. 32420, p. 4.)

Digitized by Google

In Court-Martial Order No. 49, 1910, p. 18, the department held that "it is improper to ask the witness * * * if he recognizes the accused as John Doe, seaman, U. S. Navy, etc."

The department has held that the following two questions were leading when asked on direct examination:

"Were you present on the *Philadelphia* on July 20, 1910, *when the accused was delivered on board by civil authorities of Tacoma?*" In this case the accused was charged with "Desertion." (C. M. O. 26, 1910, p. 7.)

"At or about 10.30 *a. m.* that date did you notice anything peculiar about the accused?" Here the fact to be established was the time. (C. M. O. 28, 1910, p. 7); C. M. O. 48, 1915. *See also* C. M. O. 76, 1899, 1; 33, 1905, 1; 42, 1909, 7–8; 49, 1910, 18; 26, 1910, 7; 28, 1910, 7; G. C. M., Rec. 28681, pp. 42, 43, 44, 62, 65, 66; 30485, pp. 41, 42, 453, 609; DYING DECLARATIONS, 1 (p. 202, line 19).

The court during the examination, acting as judges, may propound leading questions. (Wigmore, sec. 784.) At common law a judge could even call a new witness of his own motion, and could seek evidence to inform himself judicially; much more could he ask additional questions of a witness already called but imperfectly examined. The confusion of a witness would be a further valid reason why leading questions might, in the discretion of the court, be asked. It may be necessary to put leading questions to a child or an ignorant person, or to one having a defect of speech. When and under what circumstances a leading question may be put is a matter resting in the sound discretion of the court, and not a matter which can be assigned for error. A question by the court can not, in the nature of the case, be obnoxious, since the court is not supposed to favor either side, and therefore neither for the questioner nor for the witness can the supposed danger of improper suggestion exist. File 26262–1194, J. A. G., June 11, 1911, p. 8.

6. **Direct examination**—In general (subject to exceptions), leading questions should not be asked in direct examination. *See* LEADING QUESTIONS, 5.
7. **Examples.** *See* LEADING QUESTIONS, 5.
8. **Exceptions to rule.** *See* LEADING QUESTIONS, 5.
9. **Hostile witnesses**—Leading questions may be asked a witness who appears hostile to the party calling him in direct examination. *See* File 26251–12462; LEADING QUESTIONS, 5.
10. **Identification**—Leading questions of identification of persons or things which have already been described may be asked in direct examination. *See* LEADING QUESTIONS, 5.
11. **Same**—Frequently the judge advocates, in their examination of witnesses, ask a question concerning the identity of the accused which is leading and therefore improper.

    The witness should be asked if he recognizes the accused; and if so, as whom, thereby permitting the witness to state to just what extent he does identify the accused. It is improper to ask the witness, as is so frequently done, if he recognizes the accused as John Doe, seaman, U. S. Navy, etc. C. M. O. 49, 1910, 17. *See also* LEADING QUESTIONS, 5.
12. **Instructs witness**—How to answer on material points. *See* LEADING QUESTIONS, 5.
13. **Introductory questions**—May be asked on direct examination. *See* LEADING QUESTIONS, 5.
14. **Judge advocate**—Should not ask leading questions (which are not exceptions to the rule) in direct examination, particularly when accused is without counsel. *See* JUDGE ADVOCATE, 36.
15. **Memory, defective**—Questions aiding a defective memory. *See* LEADING QUESTIONS, 5.
16. **Suggestive question.** *See* LEADING QUESTIONS, 5.
17. **"Was or was not."** *See* LEADING QUESTIONS, 5.
18. **"Yes" and "No"**—Questions which may be answered by. *See* LEADING QUESTIONS, 5.

LEAVE OF ABSENCE.

1. **Arrest**—Persons arrested by civil authorities may be granted leave of absence. *See* GENERAL ORDER No. 121, SEPT. 17, 1914, 14.
2. **Bail**—Leave of absence may be granted by commanding officer to an enlisted man who returns to ship on bail. *See* BAIL, 1; CIVIL AUTHORITIES, 31; GENERAL ORDER No. 121, SEPT. 17, 1914, 14.
3. **Burden of ascertaining time of expiration**—Is on the individual. C. M. O. 23, 1915.
4. **Civil employees**—Leave of absence without pay. *See* LEAVE OF ABSENCE, 13.
5. **Extension of**—Failure to receive positive permission to remain absent renders it essential to return at once. C. M. O. 25, 1915, 2.

Digitized by Google

6. **Half pay**—Improper if such pay to be forfeited to Government—The Secretary of the Navy can not grant an officer leave of absence for one year, with one-half pay as provided by law, upon condition that said officer return to the Government the pay received by him during such leave of absence. However, should such officer return his salary to the Treasury it would be received and placed in the "conscience fund" and the legality of the condition would probably not arise. File 13673-1442:1, J. A. G., Jan. 13, 1912.
7. **Officers**—Can not be demanded as a right—If an officer chooses not to avail himself of his accumulated leave of absence, or to request it, it is not demandable as a matter of right, since the granting of leave of absence to officers is discretionary with the Secretary of the Navy. File 26253-170:2, J. A. G., May 20, 1911. *See also* LEAVE OF ABSENCE, 8, 10.
8. **Request for, prior to retirement**—Recommended that the application of an officer for accrued leave of absence be disapproved; and that when an officer is found incapacitated for active service he be retired in conformity with the provisions of law applicable in his case. File 26253-170:2, J. A. G., May 20, 1911. *See also* LEAVE OF ABSENCE, 7, 10.
9. **Retirement**—Request for, prior to retirement. *See* LEAVE OF ABSENCE, 7, 10.
10. **Right, not a**—But a privilege granted to suit convenience of officer and Government—Leave of absence is not recognized as a right, but as a privilege which is granted to suit the convenience of an officer, *and of the Government. Held*, where it is definitely established by a naval retiring board that an officer is incapable of performing further active duty, it is for the best interests of the service that he be placed on the retired list immediately upon the approval of the board's finding, and a request from such an officer that he be granted leave of absence prior to being placed on the retired list was denied. (*See* File 26253-170:2, J. A. G., May 20, 1911.) File 26253-447, Sec. Navy, Dec. 7, 1915: C. M. O. 49, 1915, 25. *See also* LEAVE OF ABSENCE, 7, 8.
11. **Warrant officers**—As provided in act of Aug. 29, 1916. *See* WARRANT OFFICERS, 14.
12. **Without pay**—No legal effectiveness could be given to a condition that leave would be granted without pay, i. e., as the department would not have the power to enforce such a condition, it would be useless to give leave upon those terms. File 13673-1442, J. A. G., Nov. 22, 1911. *See also* PAY, 115, 116.
13. **Same**—Where a person holds his position in the discretion of the Secretary of the Navy, and the matter of leave of absence to that person is within the Secretary's discretion, the Secretary may grant leave of absence to such a person subject to such limitations and conditions as he might impose. Therefore, leave of absence for a year may be granted to such person *without pay*, but such a case is distinguishable from the case of an *officer* whose position is not held in the discretion of the Secretary of the Navy. The Secretary can not, therefore, grant an officer leave of absence for an extended period upon the condition that such leave be with pay. File 13673-1442, J. A. G., Nov. 22, 1911. *See also* File 5252-72, J. A. G., Sept. 20, 1915; Andrews *v.* U. S., 49 Ct. Cls., 391; PAY, 115, 116.

See File 2704-04, J. A. G., Mar. 29, 1904, with reference to furloughing a clerk of the Navy Department without pay.

LEAVING HIS STATION BEFORE BEING REGULARLY RELIEVED.

1. **Enlisted man**—Charged with. C. M. O. 49, 1915, 16.
2. **Naval cadet**—Charged with. C. M. O. 89, 1899.
3. **Officer**—Charged with. C. M. O. 28, 1908; 25, 1910.
4. **Specific intent**—Not required. *See* INTENT, 2.

LEAVING HIS STATION BEFORE BEING REGULARLY RELIEVED, IN VIOLATION OF PARAGRAPH 9, ARTICLE 4, OF THE ARTICLES FOR THE GOVERNMENT OF THE NAVY.

1. **Midshipmen**—Charged with. G. C. M. Rec., 13186.

LEAVING HIS STATION WITHOUT BEING REGULARLY RELIEVED.

1. **Officers**—Charged with. C. M. O. 50, 1882; G. C. M. Rec., 8821.

LEAVING SHIP.

1. **While under suspension from duty and missing ship**—Officer tried by general court-martial on charge of "Conduct to the prejudice of good order and discipline." *See* CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE, 10.

Digitized by Google

LEGAL ASSISTANCE FOR OFFICERS AND ENLISTED MEN.

1. **Department affords**—In proper cases the department takes action through the Department of Justice to protect persons in the naval service from the consequences which may ensue from the performance by them of official duties; but where an officer evaded or declined furnishing sufficient information, although the papers were twice referred to him for this purpose, the department was unable to take action upon his request that he be afforded legal assistance at the expense of the United States. His request could not, therefore, be granted. File 26262-1705:3, J. A. G., May 21, 1915; C. M. O. 20, 1915, 5-6. *See also* OFFICERS, 86.

LEGAL LIABILITY.

1. **Chief commissary steward (court-martial prisoner)**—Against five naval officers in connection with his court-martial. File 26522-19:4, Dec. 3, 1912. *See also* 9 Op. Atty. Gen. 51.
2. **Judge Advocate General**—Suit was entered by a retired naval officer against the Judge Advocate General of the Navy, based upon action alleged to have been taken by the Judge Advocate General in his official capacity. The chief justice of the Supreme Court of the District entered an order dismissing the suit. (At law, No. 46683, Supreme Court of the District of Columbia.) File 204-04, Jan. 15, 1904. *See also* 9 Op. Atty. Gen. 51.
3. **Mandamus proceedings**—By a retired naval officer against Secretary of the Navy. File 27231-8:6, Feb. 6, 1911. *See also* 14 J. A. G. 263; 15 J. A. G. 94, Mar. 10, 1911; 9 Op. Atty. Gen. 51.
4. **Members of courts-martial.** *See* MEMBERS OF COURTS-MARTIAL, 7; REVISION, 24.
5. **Officer**—Civil suit by a pawnbroker against a marine officer who searched his shop. File 28478-2:1. *See also* 9 Op. Atty. Gen. 51; Steele *v.* Hallingan (229 Fed. Rep., 1011).
6. **Secretary of the Navy.** *See* LEGAL LIABILITY, 3.

LEGAL REPRESENTATIVES.

Definition—The words "legal representatives" while ordinarily indicating executors or administrators, have been construed by the courts in some cases to apply to other persons and in the Navy Regulations, 1913, R-211, 9, have been given a broad interpretation so as to include "heirs at law" and "relatives." File 26250-477:6½, J. A. G., Oct. 8, 1914; 28478-33, J. A. G., April 17, 1916.

LEGATION GUARDS.

1. **Orders to**—By diplomatic or consular officers. *See* DIPLOMATIC OFFICERS, 2.

LEGISLATION.

1. **Attorney's claim**—For services in procuring. *See* DEBTS, 18.
2. **Influencing**—The claims of an attorney at law, against certain officers of the Navy for alleged services rendered in legislation in their behalf were held to be not legal and the department should not aid in their collection. File 17789-12:1, J. A. G., Feb. 25, 1910. *See also* File 13673-3192; 28091-5; CLAIMS, 5; DEBTS, 18.
3. **Lobbying.** *See* DEBTS, 18; CLAIMS, 5; LEGISLATION, 2.
4. **Permanent legislation**—As indicated by word "Hereafter." *See* "HEREAFTER," 1.
5. **Restoration of dismissed officers**—No more powerful influence for the demoralization of the naval service is to be found than that which results from the restoration of officers dismissed from the service for drunkenness or other misconduct, or for demonstrated incapacity.

   While affirming in the strongest terms its opinion of the general inexpediency of restoring dismissed officers, the department also relies for the protection of the service upon the unconstitutionality of legislation for such purposes, as set forth in President Arthur's veto message of July 2, 1884. (*See* VIII, Messages and Papers of the Presidents, 221.) An effectual barrier has been established by the Constitution to any restoration to the Navy, by legislation, of particular officers who have been dismissed therefrom; and the Supreme Court has further established the proposition that such dismissals when once accomplished can not be revoked by the Executive. Annual Report of the Secretary of the Navy, 1884, pp. 42, 43.

LENDING MONEY. *See* C. M. O. 21, 1910, 6. *See also* BORROWING MONEY.

Digitized by Google

LETTERS. *See also* EVIDENCE, 87.

1. **Accused**—Identifying letter from accused. C. M. O. 8, 1905, 3.
2. **Same**—The accused was tried upon the charge of "Desertion," the specification of which alleged that he deserted from the receiving ship *Wabash* on or about the first day of November, 1903, and continued in desertion until he was apprehended by the civil authorities and delivered on board said vessel, on the twenty-sixth day of December, 1904. The accused pleaded guilty to the specification, except to the words implying desertion and to the charge he pleaded guilty in a less degree than charged, guilty of absence without leave. The accused was, therefore, by his own plea, guilty of an unauthorized absence of about fourteen months.
   The court erred in admitting a letter from the accused, copy of which was appended as an exhibit and marked "J," for the letter so admitted had not been sworn to, nor even acknowledged by the accused to be his letter. With available evidence before it of such a long, unauthorized absence by the accused and that he was apprehended by the civil authorities and delivered on board the *Wabash*, the court should have rejected the plea of the accused and proceeded with the trial upon its merits, but as the error of the court worked to the benefit of the accused and in no wise to his disadvantage the Judge Advocate General recommended that, subject to the foregoing remarks, the proceedings, finding, and sentence in the case be approved. C. M. O. 8, 1905, 3. *See also* LETTERS, 15, 16.
3. **Same**—A judge advocate offered a letter purported to have been sent by the accused to an officer in charge of a recruiting district. It was not shown to have been written by the accused nor was it shown to have been received by the officer to whom it was addressed. The department held that such letter was inadmissible as evidence. C. M. O. 17, 1910, 4.
4. **Adjutant and Inspector, Marine Corps**—Indorsement on—The judge advocate introduced in evidence, for the purpose of showing previous conviction of the accused, an indorsement of the Adjutant General of the Army upon a letter of the Adjutant and Inspector of the Marine Corps. This procedure was improper for such writing is not competent evidence to prove previous conviction. C. M. O. 47, 1910 4,.
5. **Same**—While the witness was still on the stand and undergoing cross-examination, the judge advocate irregularly and improperly introduced a letter from the Adjutant and Inspector, U. S. Marine Corps, to the commanding officer of the naval prison at the navy yard, Portsmouth, N. H., in reference to the change of the witness's name to discredit his testimony. C. M. O. 47, 1910, 5. *See also* IMPEACHMENT, 9.
6. **Army**—Letter from the military authorities at Alcatraz Island, Calif., as evidence. C. M. O. 49, 1910, 10.
7. **Bureau of Navigation**—Letters from Bureau of Navigation to judge advocate as evidence. C. M. O. 12, 1895, 2; 38, 1895, 2.
8. **Carbon copies**—As evidence. *See* CARBON COPIES.
9. **Charges and specifications**—Letter of transmittal. *See* LETTERS, 28-30.
10. **Commandant of Marine Corps**—Letter to judge advocate as evidence. C. M. O. 47, 1896, 2; 53, 1895, 2.
11. **Commanding officer**—Letter of, as evidence. *See* LETTERS, 16.
12. **Confession**—Letter containing a confession. *See* C. M. O. 41, 1904, 2; CONFESSIONS, 5; LETTERS, 2.
13. **Copy of letter**—As evidence—A copy of a document of any kind is never competent evidence when it is practicable to produce the original in the case. The fact that the copies submitted were certified by the judge advocate showed conclusively that if they were available for the purpose of his making a copy thereof, they were also available for introduction in evidence, and, therefore, such copies as were introduced were wholly incompetent as evidence. C. M. O. 40, 1909, 2.
14. **Cross-examination**—The judge advocate objected to the introduction of a certain letter in evidence on the ground that it was not subject to cross-examination, and the court erred when it did not sustain the objection. The admission of the letter in evidence was a clear violation of the rule against the admission of hearsay evidence. C. M. O. 30, 1912, 4. *See also* C. M. O. 6, 1913, 4; HEARSAY EVIDENCE, 3.
15. **Desertion, to prove**—A letter from the Bureau of Navigation addressed to the Navy Department (Judge Advocate General) through the Major General Commandant, United States Marine Corps, in which it is stated that the Bureau is informed that a bluejacket who deserted from a certain naval vessel on a given date is now serving in the Marine Corps under another name, is inadmissible as documentary evidence to prove desertion from the naval service. C. M. O. 30, 1910, 6. *See also* LETTERS, 2, 16.

Digitized by Google

16. **Same**—The judge advocate introduced as evidence of "Desertion" a letter from the commanding officer of the accused, reporting him to the Bureau of Navigation for the offense.

While the introduction of this letter does not appear to have been objected to by the counsel for the accused, the court erred in permitting the same, as such a letter, even when fully identified and its character as an original document established, or, as in this case, accepted without question, as to its authenticity is not evidence of the commission of any offense set forth therein, but only that the man had been charged with, or reported for, committing said offense. A document of this kind differs materially from the man's enlistment record (which was properly introduced in this case to show the fact of the accused's absence from his ship without leave from and after a certain date), as the latter is the original, formal record of a man's service in the Navy from the beginning of his enlistment, showing, as required by law and regulations, the place, date, and circumstances of such enlistment, and the dates of subsequent transfers to various ships or stations, and, in case the man's service be terminated before the expiration of his enlistment, the date and place of his death, discharge, or of absenting himself in other than an authorized manner. This record is required to be kept with especial care and accuracy, as constituting the official history of the man to whom it pertains, and every entry thereon relating to the circumstances above mentioned, as well as to his conduct and professional ability, must be authenticated by the signature of his commanding officer.

While the court's finding of "proved" as to the first specification appears to have been based solely upon the contents of the letter above mentioned, and was therefore not justified by any competent evidence, the offense alleged in the second specification was established in a satisfactory manner, and thus the findng of "guilty" upon the charge was correct.

Accordingly the finding upon the first specification was disapproved. C. M. O. 74, 1903, 3. *See also* LETTERS, 2, 15.

17. **Evidence, as**—Counsel for the accused irregularly introduced documentary evidence in the form of a letter addressed to the agent of the accused and also photographic copies of certain checks. The record does not show that either the court or the judge advocate was afforded an opportunity to object to the introduction of these documents, or even that the same were received in evidence by the court. (Rec. pp. 9–10.) Also the judge advocate irregularly introduced documentary evidence in the form of a letter written by the Army and Navy Club to the Navy Department. In the present case the record does not positively show, as should be the case, that the above-mentioned documents were properly identified before being introduced; that they were submitted to both the court and the accused, or to the court and the judge advocate, depending upon the use to be made of this evidence; and whether or not objection was made to its receipt in evidence and the court's action thereon. Also, in consequence of the irregular manner of their introduction, the court did not pass upon the question of the competency or relevancy of these documents as evidence to be used in the trial of this case, and the court thereby and to that extent failed to fully perform its functions as a court. C. M. O. 15, 1916, 3. *See also* C. M. O. 2, 1917, 2.

The court improperly allowed the introduction of certain letters, testimonial as to the previous good character of the accused, to be admitted in evidence. Such procedure was improper, but in this case did not affect adversely the interests of the accused. The court should have excluded these letters and directed that such testimonials be forwarded by the judge advocate of the court to the department for the consideration of the reviewing authority. File 26251–11479, Sec. Navy, Feb. 16, 1916.

18. **Same**—Letters are, in general, incompetent as evidence. C. M. O. 74, 1903, 3; 8, 1905, 3; 47, 1910, 5; 49, 1910, 10; 17, 1910, 4; 30, 1910, 6; 30, 1912, 3–5; 6, 1913, 4. *See also* EVIDENCE, 87; LETTERS, 2, 3, 4, 5, 12–16.

19. **Form**—For denying requests of pardon for unconvicted deserters. File 26282–84, J. A. G., March 27, 1912.

20. **Hearsay**—Letters are, in general, inadmissible in evidence because they are hearsay evidence. *See* HEARSAY EVIDENCE, 3; LETTERS, 14.

21. **Letterpress copies.** *See* CARBON COPIES, 1.

22. **Letter of transmittal.** *See* LETTERS, 28–30.

23. **Midshipman**—Form letter for dismissing a midshipman. File 26283–925, Sept. 18, 1915.

24. **Pardon**—Form for denying. *See* LETTERS, 19.

25. **Post adjutant**—A letter from a post adjutant introduced in evidence was held improperly admitted, being, though official, a mere *ex parte* statement. (Forms of Procedure, 1910, p. 147.)

Digitized by Google

26. **Public reprimand.** *See* PUBLIC REPRIMAND.
27. **Threatening letters.** *See* OFFICERS, 118.
28. **Transmittal, letter of**—The letter of transmittal is the document that gives the court jurisdiction in that particular case over the person named therein. C. M. O. 8, 1911, 6. *See also* CHARGES AND SPECIFICATION s, 59.
    Marking of. *See* CHARGE AND SPECIFICATIONS, 59.
29. **Same**—Original or certified copy must be filed with the charges and specifications as as part of the record. C. M. O. 1, 1894, 3; 3, 1894; 62, 1894; 38, 1895, 2; 47, 1895, 2; 62, 1895; 56, 1897, 2; 155, 1897, 2; 103, 1899, 2. *See also* CHARGES AND SPECIFICATIONS, 57.
30. **Same**—The letter of transmittal (transmitting the charges and specifications to the judge advocate) in this case was on the same sheet of paper as the charges and specifications. Accordingly, the entry given on page 22 of the Forms of Procedure, 1910, should have been slightly modified to fit the circumstances, being changed to read, "The judge advocate read the letter of transmittal, and the charge and specification original prefixed, marked 'B,' and arraigned the accused," etc. C. M. O. 6, 1916, 3.
31. **Transmitting to commanding officer copy of charges and specifications for accused**—The letter from the convening authority to the commanding officer of the accused, transmitting to him, for delivery to the accused a copy of the charges and specifications was appended to the record marked "B," and had been read to the court. This letter has no place in the record, should not be read to the court, and should not even come into the possession of the judge advocate. (Forms of Procedure, 1910, p. 56; Index-Digest, 1914, pp. 27, 33.) C. M. O. 6, 1916, 3. *See also* C. M. O. 47, 1895, 2; 53, 1895, 2; 26, 1910; 8, 28, 1910, 5; 25, 1914, 3; 42, 1914, 4.
32. **Unsigned**—Written before offense committed—Counsel for accused, with consent of judge advocate, introduced in evidence an unsigned letter purporting to have been written by deceased wife of accused and found on a dresser in accused's apartment shortly after the shooting which resulted in the death of accused's wife. Letter was not identified as having, in fact, been written by deceased and was moreover irrelevant. It was not claimed that it had been written after the shooting, but a claim was made that it was written before. Notwithstanding that it was wholly and entirely irrelevant it must have been accepted at the highest value by court and made the basis of its complete and unqualified exoneration of the accused. The acquittal in this case was accordingly disapproved. C. M. O. 5, 1913, 11.

"'LEY DE FUGA'—THE LAW OF FLIGHT." Ct. Inq. Rec., 6029.

LIBEL. *See also* STATE, 7.

1. **Defined and discussed with reference to letters of reprimand**—An officer having received a letter of reprimand from the Secretary of the Navy for certain offenses was later brought to trial by general court-martial for the same offenses. When the case came on to be heard, counsel for the accused presented a plea in bar, "by reason of the fact that the accused has once been punished for the same offense," and in support thereof, argued that the letter addressed by the department to the accused was a formal reprimand, within the meaning of Navy Regulations, 1909, R-265 [*See* JEOPARDY, FORMER, 19]; that by analogy with the law of libel said letter must be held to have been published, inasmuch as it had been necessarily read by the stenographer who wrote it, by the officer of the Navy Department who initialed it, by the Secretary of the Navy who signed it, and by the commandant of the naval station through whom it was transmitted to the accused. The counsel for accused thus argued that the law of libel should be extended by analogy to the question of what constitutes a public reprimand, and that, therefore, any letter of reprimand which is seen by a third person is *public*. Counsel does not specify whether by the "law of libel" he refers to criminal or civil libel. In either case, however, it requires but little consideration to conclude that his contention is wholly untenable. All the authorities agree that "public" is a relative term used in contradistinction to the word "private." (*See* State *v.* Sowers, 52 Indiana 311, 312.) These terms properly have no application to the law of libel—it is not necessary that a libel should be public in a usual sense of the word in order to be actionable, and there can technically be no such thing as a private libel. It is commonly said that a libel must be "published" to constitute a wrong, but a communication of the defamatory matter to the mind of another—even privately to the party injured, and not to a third person—is a publication thereof, rendering the offender subject to trial under penal statutes (State *v.* Shaffner, 44 Atl. 620, 621; Swindle *v.* State, 10 Tenn. 581, 582); and it has even been held that the writing of a letter and depositing it in the post office for transportation to the party addressed, constitutes a publication of it within the law of criminal libel (Menkins *v.* Stat., 41

Digitized by Google

Tex. Cr. R. 662), though the contents should not in fact become known. (Haase *v.* State, 53 N. J. Law, 34.) On the other hand, under the law of civil libel it is necessary merely that the matter should be communicated to some person other than the parties to the action, and the dictation of a libelous letter to a stenographer is held a sufficient publication thereof. (Gambrill *v.* Schooley, 93 Md. 48.)

Applying the arguments of counsel for accused, therefore, it would follow that there could be no such thing as a letter of private reprimand written by the Secretary of the Navy, as such a letter must of necessity be communicated to the officer addressed, which of itself, would constitute a publication, according to the law of criminal libel; and, in any event the letter must be seen by some official or clerk of the Navy Department in the course of its preparation, recording and transmittal, which would constitute a publication according to the law of libel as applied in civil actions to recover damages. File 26251-2993, J. A. G., March 10, 1910, pp. 5-6.

2. **Enlisted man**—Charged with writing and mailing libelous letter concerning his superior officer. C. M. O. 20, 1915, 2.
3. **Public and private reprimands.** *See* LIBEL, 1.
4. **Publication**—It is commonly said that a libel must be "published" to constitute a wrong, but a communication of the defamatory matter to the mind of another—even privately to the party injured, and not to a third person—is a publication thereof, rendering the offender subject to trial under penal statutes (State *v.* Shaffner, 44 Atl. 620, 621; Swindle *v.* State, 10 Tenn. 581, 582); and it has even been held that the writing of a letter and depositing it in the post office for transportation to the party addressed, constitutes a publication of it within the law of criminal libel (Mankins *v.* State, 41 Tex. Cr. R. 662), though the contents should not in fact become known. (Haase *v.* State, 53 N. J. Law, 34.) File 26251-2993, J. A. G., March 10, 1910, quoted with approval in File 26251-12158-12159, J. A. G., August, 1916. *See also* File 26251-12159, Sec. Navy, Dec. 9, 1916, p. 11; C. M. O. 5, 1917.
5. **Reprimands.** *See* LIBEL, 1.
6. **Seditious libel.** *See* C. M. O. 14, 1910, 14.

LIBERTY.

1. **Deprivation of on shore**—Distinguished from confinement. *See* CONFINEMENT, 12, 13

LIBRARY, LAW.

1. **Office of Judge Advocate General.** *See* LAW BOOKS.

LIGHTSHIPS.

1. **Appropriations for.** File 4670-47, J. A. G., Nov. 23, 1910, p. 4.

LINE AND STAFF.

1. **Controversy between.** *See* COMMAND, 19.

LINE OFFICERS. *See also* OFFICERS.

1. **Military command**—Line officers exercise military command. *See* COMMAND, 18, 19.
2. **Rank and title of**—As compared with staff officers. *See* RANK, 17.

LINE OF DUTY AND MISCONDUCT CONSTRUED.

1. **Accidental injuries**—Fracture of skull due to bursting in of an air port in crew's head while vessel was at sea in heavy weather. Death of deceased due to one of the ordinary hazards of life on board ship while attending to his daily needs in the part of the ship authorized for that purpose and deceased was not negligent. *Held*: Line of duty and not misconduct. File 26250-335; Ct. Inq. Rec. 5451.
2. **Acts of personal nature**—Distinguished from acts of duty. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 22.
3. **Air port**—In crew's head bursting in. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 1.
4. **Automobile**—Officer killed while speeding. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 87.
5. **Bilges**—Explosion of gasoline while cleaning bilges. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 111.
6. **Boiler explosions**—Deceased while on duty in fireroom of naval vessel was burned by flame and steam, death being caused by external burns and inhalation of steam. *Held:* Line of duty and not misconduct. File 26250-642, Sec. Navy, Mar. 16, 1915; Bd. of Inquest; C. M. O. 12, 1915, 9. *See also* Ct. Inq. Rec. No. 6145; File 26250-643 to 26250-650, inc.

Digitized by Google

7. **Boxing ashore**—Deceased while boxing ashore was struck by his opponent on the jaw, death resulting from a combination of the blow and head striking floor. *Held:* Not line of duty but not misconduct. File 26250-630, Sec. Navy, Feb. 10, 1915, Bd. of Inquest; C. M. O. 10, 1915, 8.
8. **Boxing on board ship**—Deceased, while boxing on board ship at his own request with another enlisted man using five-ounce gloves, was struck a shoving blow on the right chin and fell, landing on shoulder; friend of opponent; evidence that death was incident to a beginning right-sided pneumonia producing acute dilation of heart as result of exertion of boxing. *Held:* Line of duty and not misconduct. File 26250-624, Sec. Navy, Jan. 25, 1915, Bd. of Inquest; C. M. O. 6, 1915, 12.
9. **Same**—Deceased engaged with shipmate in friendly boxing bout on board ship, training for boxing bouts for which permission had been given by commander-in-chief, using boxing gloves issued to ships for boxing purposes; tripped over stanchion, fell to deck; death due to an intracranial hemorrhage due to jar resulting from fall or blow on jaw. *Held:* Line of duty and not misconduct. File 26250-637, Sec. Navy, March 3, 1915; Ct. Inq. Rec. No. 6163; C. M. O. 12, 1915, 9.
10. **Brain, concussion.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 16.
11. **Bunker**—Deceased entered coal bunker and striking match. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 71.
12. **Burning.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 111.
13. **Bursting of an air port.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 1.
14. **Coal bunker.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 71.
15. **Coaling ship**—Deceased while on duty coaling ship was struck by a bag used in coaling ship. *Held:* Line of duty and not misconduct. File 26250-638, Sec. Navy, March 11, 1915; Ct. Inq. Rec. No. 6157; C. M. O. 12, 1915, 9. *See also* File 26250-41; 26250-225; 26250-308:1; Ct. Inq. Rec. No. 5432.

    For a case of where an officer was killed while coaling ship, *see* File 26250-744, Sec. Navy, Feb. 17, 1916.
16. **Concussion of brain**—Deceased, while on authorized liberty and riding a motor cycle for his own pleasure, was thrown therefrom and sustained injuries which resulted in death. There was no evidence of negligence on the part of the deceased. *Held:* Not line of duty but not misconduct. File 26250-783, Sec. Navy, April 20, 1916; C. M. O. 13, 1916, 8.
17. **Crushed by turret**—Deceased while sleeping during noon hour beneath overhang of turret was killed by turret crushing his head while it was being trained for adjustments under competent direction and proper authority. *Held:* Line of duty and not misconduct. File 26250-595:1, Sec. Navy, Nov. 13, 1914; Ct. of Inq. Rec. No. 6036; C. M. O. 6, 1915, 12.
18. **Disappearance**—An enlisted man, after several days' debauch when sent to sick bay on board ship showed signs of alcoholic poisoning; disappeared next morning from sick bay, a thorough search failing to disclose him. *Held:* As there was not sufficient evidence to warrant conclusion of death, final action as to whether or not he was dead was suspended for one year and it was directed that an entry to this effect be made on the man's service record. (File 26250-614, Sec. Navy, Jan. 4, 1915; Ct. of Inq. Rec. No. 6123; C. M. O. 6, 1915, 14.) On February 5, 1916, the department held that "a period of over one year has elapsed since this occurrence and during which time no trace has been found of" the deceased, the facts pertinent to the case warrant the conclusion that he met his death by accidental drowning, not in line of duty and not due to his own misconduct. File 26250-614:2, Sec. Navy, Feb. 5, 1916.
19. **Same**—Where an enlisted man disappeared from his ship, which was within easy swimming distance of the beach, and board of investigation unable to come to a definite opinion, the department held that there was not sufficient evidence to warrant conclusion of death and final action was postponed one year. File 26250-631, Sec. Navy, Feb. 11, 1915; Bd. of Invest. Rec. No. 6137; C. M. O. 10, 1915, 10.
20. **Same**—Absent and unheard of—In the case of an enlisted man who had been absent and unheard of from December 24, 1907, to date, the department held that this evidence was sufficient to raise the presumption of death, and it was directed that the mark of desertion entered on his enlistment record be removed as erroneous and an entry made describing the details, and that the department now holds that he is dead. File 7657-280, Sec. Navy, Feb. 20, 1915; C. M. O. 10, 1915, 9.
21. **Same—Foreign port**—Where an enlisted man disappeared mysteriously in a foreign port while on authorized liberty; several thorough but unsuccessful searches were made; American consul reported later that there had been many mysterious disappearances since the outbreak of the war and that the man might have been the

Digitized by Google

victim of foul play; the commanding officer recommended that mark of desertion be removed. *Held*, that, while the length of absence necessary to raise presumption of death is generally conceded by common law to be seven years, this does not prevent an inference of death from absence for a shorter period, where the circumstances attending the case force a conviction that death must have occurred; but on the facts of this case, however, there is no more reason for holding that the man is dead than that he deserted, and there is not sufficient evidence to warrant the removal of the mark of desertion and closing his record as by death. File 7657-277, J. A. G., Feb. 6, 1915; C. M. O. 10, 1915, 9. *See also* File 26322-3:1, J. A. G., Dec. 9, 1915.

22. **Distinction important between acts of duty and those of personal nature**—An important fact which should not be overlooked by officers serving on boards of inquest or courts of inquiry in cases of this character is that, while "every person who enters the military service of the country—officer, soldier, sailor, or marine—takes upon himself certain moral and legal engagements of duty, which constitute his official or professional obligations," nevertheless, "*though a soldier or sailor, he is not the less a man and a citizen, with private rights to exercise and duties to perform;* and while attending to these things he is not in the line of his public duty." (Attorney General's opinion, May 17, 1855. *See also* File 26250-534, Sec. Navy, March 10, 1914.) In the same opinion the Attorney General further stated on this point: "It is impossible to say that the phrase *casualties or injuries received 'in the line of duty'* comprehends all the possible misadventures of mere private life, which may happen to an officer in his personal affairs, and wholly disconnected from his public duty, though he be not on furlough." In other words, as was held by the United States Circuit Court of Appeals (Rhodes v. U. S., 79 Fed., 740), in order to support a finding of line of duty "*the service must have been the cause of the disease [or injury] and not merely coincident with it in time.*"

23. **Drowning**—Absent without leave—Deceased with other enlisted men left naval station on board a private gasoline launch without permission from proper authority; engine caught fire, all jumped overboard to swim to beach, but deceased drowned. *Held:* Not line of duty and misconduct. File 26250-531, Sec. Navy. Sept. 12, 1914; Ct. of Inq. Rec. No. 6062; C. M. O. 10, 1915, 9.

24. **Same**—Absence, unauthorized—Deceased, returning from unauthorized absence, intoxicated, attempted to go aboard ship over unauthorized gangway, fell overboard, and was drowned. *Held:* Not line of duty and misconduct. File 26250-758, Sec. Navy, April 19, 1916; C. M. O. 13, 1916, 8.

25. **Same**—Bathing on Government territory, etc.—Deceased was drowned while bathing on Government territory at place designated by commanding officer, who had issued specific instructions encouraging men under his command to learn to swim; deceased was not on liberty, and act in which he was engaged when drowned was a customary one at the post, approved by the commanding officer. *Held:* Line of duty and not misconduct. File 26250-669, Sec. Navy, May 20, 1915, Bd. Inquest; C. M. O. 20, 1915, 7. *See also* File 26250-521:2, Sec. Navy, April 18, 1914.

Deceased on duty at the Naval station, Guantanamo, obtained permission to use a Government-owned dinghy for a sail as an amusement. Accidentally fell overboard and was drowned. Was not intoxicated. *Held:* Line of duty and not misconduct. File 26250-853. *See also* LINE OF DUTY AND MISCONDUCT CONSTRUED, 57, 58 (second paragraph).

26. **Same**—Collision—Deceased, a member of an organized funeral party returning to station, jumped from a cutter which had collided with a tug. While evidence showed that jumping from the cutter was an error of judgment on the part of the deceased, still such error did not extend to culpability. *Held:* Line of duty and not misconduct. File 26835-553, Sec. Navy, April 12, 1916; C. M. O. 13, 1916, 7.

Deceased, member of a cutter's crew at a training station, attempted to turn boat in breaking sea. Error of judgment on part of coxswain who was drowned with other members of crew. *Held:* Line of duty and not misconduct. File 26250-763, Sec. Navy, Apr. 1, 1916; C. M. O. 13, 1916, 8.

Deceased, late auxiliary officer, while on board the *Solace*, disappeared. Several days later his body was found and disclosed that he had met death by drowning. No evidence of self-destruction or suicidal intent. *Held:* Line of duty and not misconduct. File 26250-774, Sec. Navy, Apr. 27, 1916; C. M. O. 13, 1916, 7.

Deceased, while acting as stern man on a cutter, fell overboard as a result of a fainting spell. Autopsy revealed weak heart. *Held:* Line of duty and not misconduct. File 26250-779, Sec. Navy, Apr. 20, 1916; C. M. O. 13, 1916, 7.

Digitized by Google

Deceased, an acting ship's cook, went to ship's side to dump eggshells, fell overboard and was drowned. Evidence showed that life line had been let down. *Held:* Line of duty and not misconduct. File 26250-796, Sec. Navy, May 26, 1916; C. M. O. 17, 1916, 10.

27. **Same**—Entering boat on duty—Deceased on duty ashore as member of firing party slipped as he was entering the steamer and went overboard. *Held:* Line of duty and not misconduct. File 26250-613, Sec. Navy, Dec. 15, 1914, Bd. of Inquest; C. M. O. 6, 1915, 12.

28. **Same**—Field maneuvers—Deceased while on duty during field maneuvers, attempted to swim across a small inlet in field uniform with rifle slung across shoulder and wearing cartridge belt. *Held:* Line of duty and not misconduct. File 26250-652, Sec. Navy, March 22, 1915; Ct. Inq. Rec. No. 6183; C. M. O. 12, 1915, 9.

29. **Same**—Liberty—Collision of merchant ships—Deceased while on leave of absence took passage on a steamship which sank at sea and he was not reported among the survivors. Originally the department held that there was no presumption of death (File 7657-227, Sec. Navy, Apr. 9, 1914), but at this date, one year and two months after steamship sank, the department declared him dead from the date the steamship sank. *Held:* Not line of duty but not misconduct. File 7657-227, Sec. Navy, Apr. 10, 1915; C. M. O. 16, 1915, 5.

Deceased fell overboard from a *shore boat* while returning to his ship from authorized liberty. Deceased was sober at the time and his death was found due to accidental drowning. *Held:* Not line of duty and not misconduct. File 26250-789, Sec. Navy, May 5, 1916; C. M. O. 17, 1916, 10.

30. **Same**—Liberty—From hospital—Deceased found in water near shore alive but died shortly after being removed from water; was on authorized liberty from hospital where he had been surveyed for blindness in one eye resulting from syphilis (origin not in line of duty); no evidence of intoxication. *Held:* Not line of duty but not misconduct. File 26250-618, Sec. of Navy, Jan. 19, 1915, Bd. of Inquest; C. M. O. 6, 1915, 13.

Liberty for the express purpose of swimming. *Held:* Line of duty and not misconduct. File 26543-151:8, Sec. Navy, Nov. 4, 1916. *See also* LINE OF DUTY AND MISCONDUCT CONSTRUED, 58, 60.

31. **Same**—Liberty—Intoxicated—Deceased having returned from liberty intoxicated made an unprovoked assault upon the petty officer having the day's duty, who placed his hand over deceased's mouth to stop him from using boisterous language; deceased struck petty officer and then rushed him and both went overboard; petty officer was rescued but deceased failed to come to surface. *Held:* Not line of duty and misconduct. File 26250-617, Sec. Navy, Jan. 15, 1915; Ct. of Inq. Rec. No. 6122; C. M. O. 6, 1915, 13.

32. **Same**—Liberty—Intoxicated—Deceased while on authorized liberty was seen intoxicated on wharf waiting for boat to return him to his station and shortly after was heard yelling for help and seen struggling in the river. An old cut on deceased's head was opened up by fall. *Held:* Not line of duty and misconduct. File 26250-612, Sec. Navy, Dec. 12, 1914, Bd. of Inquest; C. M. O. 6, 1915, 13.

33. **Same**—Liberty—Intoxicated—Deceased and another enlisted man went boating in the wherry of their ship; upon returning the deceased fell overboard; both intoxicated. *Held:* Not line of duty and misconduct. File 26250-625, Sec. Navy, Jan. 25, 1915, Bd. of Inquest; C. M. O. 6, 1915, 13.

34. **Same**—Liberty—Intoxicated—Deceased with permission went canoeing in a canoe owned by the post exchange for use of enlisted men; became intoxicated; canoe capsized; calm night; deceased not good swimmer; excellent record. *Held:* Not line of duty and misconduct. File 7657-266:2, Sec. Navy, Jan. 8, 1915, Bd. of Inquest; C. M. O. 6, 1915, 13.

35. **Same**—Liberty—Intoxicated—Deceased while on authorized liberty was drowned by the capsizing of canoe in which he was returning to station; death due to his carelessness and inebriety. On December 11, 1914, department held that since body was not found there was insufficient evidence to warrant conclusion of death; body found on February 17, 1915. *Held:* Not line of duty and misconduct. File 7657-266:4, Sec. Navy, March 2, 1915, Ct. Inq. Rec. No. 6114; C. M. O. 12, 1915, 9.

36. **Same**—Liberty—Intoxicated—Deceased while on authorized liberty became intoxicated; resisted being placed on tug which would return him to station and duty and was placed on board by force; became subdued and apparently went to sleep; jumped overboard with apparent intention of returning to beach, and drowned. *Held:* Not line of duty and misconduct. File 26250-658, Sec. Navy, Apr. 10, 1915, Bd. of Inquest, C. M. O. 16, 1915, 6.

Digitized by Google

37. **Same**—Liberty—Intoxicated—Deceased, returning from liberty in a private boat; intoxicated; attempted to jump from boat to dock and fell in water. *Held:* Not line of duty and misconduct. File 26250-663, Sec. Navy, May 22, 1915; Bd. Inquest No. 6230; C. M. O. 20, 1915, 7.

38. **Same**—Liberty—Violated orders—Deceased having permission to go on liberty, went boating in private boat without first obtaining the necessary express permission and pass, as required by orders of post; boat capsized. *Held:* Not line of duty and misconduct. File 26250-525, Sec. Navy, Mar. 21, 1914; Ct. of Inq. Rec. No. 5934; C. M. O. 10, 1915, 9.

39. **Same**—Ship's wherry on duty—Three deceased were in ship's wherry on duty; when wherry about 6 to 20 feet astern of ship which had a little more than steerageway, engines were backed ½ speed; wherry and men carried into swirl and sucked under. *Held:* Line of duty and not misconduct. File 26250-641, Sec. Navy, March 24, 1915; Ct. Inq. Rec. No. 6186; C. M. O. 12, 1915, 9.

40. **Same**—Swimming party—Deceased while attempting to qualify in swimming in accordance with a fleet order, by swimming from the boom to the gangway of his ship, was drowned. *Held:* Line of duty and not misconduct. File 26250-541, Sec. Navy, Mar. 27, 1914; Bd. of Invest. Rec. No. 5943; C. M. O. 10, 1915, 8.

41. **Same**—Swimming party—Deceased, while a member of a regularly detailed swimming pary in charge of an officer, was drowned. File 26250-632, Sec. Navy, March 1, 1915; Ct. Inq. Rec. No. 6162; C. M. O. 12, 1915, 9.

42. **Same**—Venereal restricted list—Deceased while on venereal restricted list was found floating in water near his ship with life preserver around him; nothing to show how he happened to be in water. Not entitled to liberty. *Held:* Not line of duty and misconduct. File 26250-627, Sec. Navy, Feb. 3, 1915, Bd. of Inquest; C. M. O. 10, 1915, 8-9.

43. **Erroneous conception of what constitutes "Line of Duty"**—The prevailing idea entertained by officers serving on boards of inquest seems to be that in all cases where the death of a person in the service was not the result of his own misconduct it must be held to have occurred in the line of duty. Thus, in three cases recently considered by the department, it appeared that the deceased men, while on leave of absence, had gone to a hotel together, engaged a room, and were later found asphyxiated as the result of a gas jet in the room having been left turned on and unlighted when they retired. Granting, in such cases, that death was accidental and was not caused by any fault of the deceased, it is nevertheless difficult to perceive in what manner the board arrived at the conclusion, as it did, that their deaths were due to an act of duty. (File 26250-238, 239, and 240.) These cases do not materially differ from another of recent occurrence, in which the deceased, while on leave of absence and not performing any act, even remotely connected with the service, was run over by a train, and the board of inquest found that his death was due to an act of duty. (File 26250-228.) In another case, the deceased, while on liberty in Cherbourg, France, was murdered by a shipmate in consequence of some difficulty between the two men of a wholly personal nature. Here, again, the board of inquest held that the death was due to an act of duty. (File 26250-214.) Many other cases of like character might be cited, in all of which the department found it necessary to disapprove the finding of the board of inquest, for the reason that there was nothing in the evidence to warrant the conclusion that death was the result of an act of duty.

As remarked by the Attorney General in an opinion rendered May 17, 1855, the law "does not say 'any disease [or injury] not the consequence of misconduct,' and if that had been the category contemplated by the legislator he would have propounded it in simple and apt phraseology." It follows, therefore, that the words "line of duty" can not properly be held to embrace every cause of death not due to the misconduct of the deceased, but are used by Congress in a more limited sense in its various enactments relating to the disability or death of persons in the Army or Navy. This conclusion is further supported by the fact that the law providing for the allowance of six months' pay to the widow or designated beneficiary of deceased officers or enlisted men of the Navy originally applied by its terms to cases where the death was due to "wounds or disease contracted in line of duty"; but by act of August 22, 1912 (37 Stat. 328), Congress substituted the words "not the result of his own misconduct," for the words "contracted in the line of duty," this amendment being made for the express purpose of giving the law a broader application. (43 Cong. Rec. 2688.)

44. **Exercising.** *See* File 26250-89. *See also* LINE OF DUTY AND MISCONDUCT CONSTRUED, 7, 8, 9, 16, 25, 40, 41, 52, 57, 58, 60.

Digitized by Google

45. **Explosion**—Deceased met death as a result of an explosion caused by his entering a coal bunker and striking a match. *Held:* Not line of duty and misconduct. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 71. *But see* File 26250–746.

Explosions on board the submarine *E–2*. *Held:* Line of duty and not misconduct. File 26283–988, 26250–750, 26250–751, Sec. Navy, Feb. 17, 1916.

46. **Same**—Boiler explosion. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 6.

47. **Same**—Explosion of gasoline while cleaning bilges. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 111.

48. **Falling from mainmast**—Deceased was sent up mainmast to tar down topgallant stay. Upon attempting to enter boatswain's chair he apparently lost his head and fell to deck. Prior to going up he made no objection and weather was favorable. *Held:* Line of duty and not misconduct. File 26250–615, Sec. Navy, Dec. 23, 1914; Ct. of Inq. Rec. No. 6111; C. M. O. 6, 1915, 12.

49. **Falling and injuring knee**—While sweeping down deck under orders a sweeper was accidentally tripped and thrown to deck by being bumped by another sweeper and knee was permanently injured, necessitating his discharge from the service; no skylarking. *Held:* Line of duty. File 26283–829, Sec. Navy, Jan. 19, 1915; Bd. of Invest. Rec. No. 6127; C. M. O. 6, 1915, 12.

50. **Falling into drydock**—Deceased while walking on deck of his ship which was in drydock stumbled on some hose, fell backward under upper life line and over ship's side into drydock. Lower two life lines had been unrigged to facilitate work. *Held:* Line of duty and not misconduct. File 26250–611:2, Sec. Navy, Jan. 4, 1915; Ct. of Inq. Rec. No. 6094; C. M. O. 6, 1915, 12.

51. **Foot crushed**—A bowman in sailing launch lost his right foot by having it caught in bow painter of his launch, a heavy swell causing painter to suddenly tauten. *Held:* Line of duty. File 26283–806, Sec. Navy, Nov. 11, 1914; Bd. of Invest. Rec. No. 6086; C. M. O. 6, 1915, 12.

52. **Football.** File 458–5.

53. **General rule**—No general rule, each case must be determined upon its own facts. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 70.

54. **Heart failure**—Deceased, while seated in band room, his regular station, dropped dead. Although there was evidence to show that during the preceding 24 hours the deceased had slightly indulged in the use of intoxicating liquor, an autopsy revealed that death was due to acute dilation of the heart resulting from pneumonia contracted in line of duty. *Held:* Line of duty and not misconduct. File 26250–780, Sec. Navy, April 14, 1916; C. M. O. 13, 1916, 8.

55. **Hernia.** *See* SURGICAL OPERATIONS, 3, 6.

56. **Horse play.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 71.

57. **Horse, thrown from**—Deceased officer, on duty in a foreign country, absent from command with permission, dined at hotel about 2 miles from post. While returning, and riding a government-owned horse, the horse slipped and deceased fell to pavement, receiving injuries from which he died shortly after. *Held:* Not line of duty but not misconduct. File 26250–743:4, J. A. G., May 6, 1916. *See also* LINE OF DUTY AND MISCONDUCT CONSTRUED, 25.

58. **Hunting with express permission**—Deceased met his death without fault of any kind on his part, while hunting under express permission to be absent for that purpose.

It is held by the Department of the Interior in Pension Cases, the War Department, and has heretofore been held by the Navy Department, that men killed while engaged in athletic sports or exercises encouraged by regulations, meet their death in line of duty, although on liberty, where the permission to be absent was granted for the *express purpose* of engaging in such athletic sports or exercises. (*See* 9 P. D. 227; 11 P. D. 55.)

The Naval Instructions, 1913, I–2620, contains the following provisions: "The commanding officer shall encourage the men to engage in athletics, fencing, boxing, boating, and other similar sports and exercises. Gymnastic outfits will be furnished by the department to vessels requesting them. When the weather and other circumstances permit, he shall establish in the routine of exercises and drills a regular period for swimming, such exercise to include every enlisted person on board, except those excused by the surgeon."

The evidence in this case shows that hunting is encouraged in the service as an athletic sport or exercise pursuant to the foregoing regulation, and that some of the vessels are supplied with shotguns and ammunition for hunting purposes. Inasmuch as this department *encourages* athletic sports and exercises by explicit provisions of regulations, it can not consistently, at the same time *discourage* such athletic sports and exercises by holding that a man who is given *express* permission to engage therein

Digitized by Google

and while so doing, is killed without fault on his part shall be marked on the records as having met his death "not in line of duty." Also, in the interest of uniformity in the practice of the different departments of the Government having to decide the same or similar questions, as well as due regard for precedent, the finding of "line of duty" in this case should stand. *Held:* Line of duty and not misconduct. File 26250-510:1, J. A. G. March 16, 1914. Approved by Sec. Nav. March 16, 1914; Ct. Inq. Req. No. 5975. *See also* Forms of Procedure, 1910, p. 11, of corrections inserted between pp. 224 and 225; Manual Med. Dept., U. S. N., 1914, p. 167; Army Bulletin, No. 14, April 12, 1915. *See also* LINE OF DUTY AND MISCONDUCT CONSTRUED, 30, 60. *But see* File 26250-622:1, Sec. Navy, Feb. 19, 1916; Ct. Inq. Rec. No. 6140.

59. **Liberty**—Deceased was returning from authorized liberty in a ship's boat. Culpable negligence of those in charge of the boat caused a collision which resulted in the death of the deceased. *Held:* Line of duty and not misconduct. File 26835-621, Sec. Navy, Jan. 6, 1917; Ct. Inq. Rec. *See also* LINE OF DUTY AND MISCONDUCT CONSTRUED, 83.

60. **Same**—If a man is given permission to go on shore for the express purpose of engaging in athletic sports or exercises encouraged by the Navy Regulations, or permission to go swimming or boating, and is injured or killed without negligence or other act the result of his own misconduct, the finding should be line of duty. Where, however, a man is granted liberty for his own purposes, and while on liberty goes in swimming and is drowned, the mere fact that swimming is encouraged by the regulations is not sufficient ground for holding that his death occurred in line of duty. In such a case the general rule applies, and it must be held that his death resulted from the exercise of his private rights and was not caused by "an act of duty performed." (File 26250-277:1; 14 P. D. 114). *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 29-38.

61. **Same**—Assisting an injured shipmate back to ship. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 82.

62. **Same**—Returning from. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 83.

63. **Medical operation**—Deceased was operated on for enlarged tonsils, in a naval hospital local anesthetic (cocaine) being used; all usual precautions were taken prior and during operation; death caused by an idiosyncrasy due to effects of the anesthetic. *Held:* Line of duty and not misconduct. File 26283-518, Sec. Navy, Feb. 13, 1913; Ct. of Inq. Rec. No. 5676; C. M. O. 10, 1915, 8.

64. **Same**—Hernia. *See* SURGICAL OPERATIONS, 3, 6.

65. **Midshipman**—Incurring disease or injury during course at Naval Academy. *See* File 5252—24, Sec. Navy, May 25, 1909.

66. **Misconduct.** *See* MISCONDUCT.

67. **Motorcycle.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 16.

68. **Natural death**—Deceased while on authorized liberty was found dead in a rooming house; board unable to determine cause of death. *Held:* Not line of duty but not misconduct. File 26250-607, Sec. Navy, Nov. 20, 1914; Bd. of Inquest Rec. No. 6089; C. M. O. 6, 1915, 13. *See also* Moore *v.* U. S. (48 Ct. Cls. 110).

69. **Same**—Deceased, while absent with leave from proper authority, died a natural death in a private hospital, from uremia, a complication of acute nephritis which was contracted in line of duty. *Held:* Line of duty and not misconduct. File 26250-673, Sec. Navy, May 22, 1915, Bd. Inquest; C. M. O. 20, 1915, 7.

70. **No general rule**—Each case must be determined upon its own facts—As was stated by the Attorney General in an opinion rendered July 22, 1881, with respect to the question of what constitutes disability incurred in line of duty, "it is impossible to lay down a general rule which will be applicable to cases of this kind, or to the different aspects which the * * * claim might present, as the facts shall be developed by the evidence." The question to be determined in each case is not what was the status of the deceased when the disease was contracted or the injury received, nor whether such disease or injury was the result of his own misconduct, but "Was the cause of disability or death a cause within the line of duty or outside of it? Was that cause appertaining to, dependent upon, or otherwise necessarily and essentially connected with duty within the line or was it unappurtenant, independent, and not of necessary and essential connection?" In other words, to constitute "line of duty," "an act of duty performed must have relation of causation, mediate or immediate, to the wound, the casualty, the injury, or the disease producing disability or death."

71. **On board ship or at a naval station, etc.**—So, also, many cases arise where the injury causing death was received while the deceased was in a duty status, so far as being present on board a vessel or at a station to which he was attached is concerned, and yet the circumstances are such that it can not be held to have been caused by an act of duty. For example, in a case where the death of a man resulted from injuries received

Digitized by Google

by him while "entering a bunker and striking a match there," which acts "were both against orders," the department held that his death was the result of "misconduct or violation of duty" on his part, and was not, therefore, the result of an injury received in the line of duty. (7 Op. Atty. Gen. 150; File 26543-55.) Again, it has uniformly been held that an enlisted man is not in line of duty while engaged in scuffling or squabbling with his companions, or voluntarily engaged in what is commonly known as "horseplay," although at the time on board the ship to which he was attached. (5 P. D., 47; 6 P. D., 22; 14 P. D., 81; P. D., 506; Rhodes *v.* U. S., 79 Fed., 740; File 26250-66.) And "it has repeatedly been held that where the death of the soldier * * * was caused by an *overdose* of a narcotic or other poison, which had been either prescribed originally by a physician in the U. S. service or taken upon the soldier's own responsibility through mistake and with no suicidal intent, such death cause can not be accepted as a competent basis for claim. (1 P. D., 111; File 26250-288:2.)

72. **Operations.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 63; SURGICAL OPERATIONS, 3, 6.

73. **Orders**—Violation of. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 71, 107-112.

74. **Poison**—Deceased by mistake took bichloride of mercury. No evidence of intent to commit suicide. *Held:* Not line of duty but not misconduct. File 26250-657, Sec. Navy, Apr. 10, 1915, Bd. of Inquest; C. M. O. 16, 1915, 5.

75. **Same**—Deceased while on authorized liberty, running from direction of a dance hall fell in street, was picked up by enlisted men, carried to drug store, sent to hospital in patrol wagon, died en route; result of chemist's analysis of stomach showed carbolic acid poisoning; no evidence of intent to commit suicide. *Held:* Not line of duty but not misconduct. File 26250-605:2, Sec. Navy, Dec. 11, 1914; Ct. of Inq. Rec. No. 6098; C. M. O. 6, 1915, 13.

Deceased was administered bichloride of mercury by a hospital apprentice on duty, by mistake for Epsom salts. *Held:* Line of duty and not misconduct. File 26250-593, Sec. Navy, Oct. 8, 1914; Ct. Inq. Rec. 6120; C. M. O. 6, 1915, 12.

76. **Same—Suicide.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 94, 95, 97.

77. **Predisposition**—Death or injury while on duty, resulting from disability existing prior to enlistment, does not come within the "line of duty" category. (16 P. D., 172.) However, when a disability which originated prior to enlistment, but was apparently cured prior to and at the date of enlistment, is revived and aggravated as the immediate result of an accident or of an incident in the line of duty, the injurious consequences of such aggravation may amount to line of duty. (3 P. D., 41.) In such a case it is necessary to establish some cause or injury resulting from or incurred in service in line of duty sufficient to produce a recurrence of said disability—some cause without which the recurrence would not have happened—and not merely natural aggravation of an already existing disability. (3 P. D., 187.)

Predisposition to disease is no bar to pension if the disease did not develop until after claimant's admission to the service. (3 P. D., 228; 16 P. D., 413.) *See* File 7657-116. J. A. G., Mar. 1, 1912. *See also* File 26253-430, J. A. G., Oct. 26, 1915.

78. **Preexisting cause**—An enlisted man was admitted to a naval hospital for treatment with hæmoptysis (spitting of blood) 14 months after he had enlisted, and a history of similar condition existed two years before (prior to enlistment). *Held:* That it is considered that the disease in question was not incident to the service, and also held it to be not in line of duty. File 7657-320, Sec. Navy, Oct. 25, 1915; C. M. O. 35, 1915, 9. *See also* Moore *v.* U. S. (48 Ct. Cls. 110).

79. **Presumption of death.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 18-21.

80. **Prisoners**—While a prisoner may be injured or killed in line of duty, as shown by the examples given by the Attorney General in his opinion (7 Op., 150), such cases must be exceptional ones rather than the rule. Thus, where an enlisted man is performing hard labor under sentence of general court-martial, and an injury received by him is wholly due to execution of such sentence, it can not be held line of duty. (File 26285-30, Sec. Navy, Apr. 7, 1909; File 26543-20, Sec. Navy, Jan. 28, 1909; 15 P. D., 54; 5 P. D., 151.) If an enlisted man is arrested or imprisoned, but on trial is adjudged not guilty, a disease incurred during his arrest and imprisonment is within the line of duty. (4 P. D., 103.) If the man died while awaiting trial, a disease so contracted is held to have been incurred in line of duty. (14 P. D., 213.) But in a case where a private in the Marine Corps was burned to death while in confinement by the civil authorities, before trial, and the evidence showed that his imprisonment was the result of misconduct (drunkenness) while on liberty, his death was held not to have occurred in the line of duty. (File 26250-218.)

Digitized by Google

81. **Same**—Prisoners injured while in confinement. File 26262-12673, A and B, J. A. G., July 6, 1912.

82. **Question not one of status**—The status of an officer or enlisted man at the time of his death or at the time of contracting the disease, or receiving the injury occasioning same, is not controlling upon the question of whether his death occurred in the line of duty. As pointed out by the Attorney General, a person in the Navy, "whilst off duty, or on furlough, or under censure * * * may do or suffer things which are in the line of duty," the same as, on the other hand, "while on active duty, he may do or suffer things not in the line of his duty," and "any rule based on the assumption of its being impossible for an officer or soldier on furlough, on leave of absence, in arrest, under sentence, to perform acts, suffer casualties, receive wounds, or incur causes of disease in the line of his duty is not a truth, and, like all things not true, can not be conformable to justice or wisdom." And, again: "A soldier or sailor, while 'under arrest,' or 'in confinement,' is not discharged from the obligation of duty, and is occasionally called upon to perform duty in which he may distinguish himself and die honorably, and leave, it seems to me, a right of pension to his widow or children; as, for example, in the contingency of a post or a camp attacked by the enemy, or a ship in peril at sea. So, still more, of an officer on furlough. So it may be in the case of a soldier temporarily 'absent on leave,' nay, even of one compromised in some grave military offense."

It has accordingly been held by the department in the case of a man who was stabbed while on liberty that his injuries were incurred in line of duty, it appearing that he was "stabbed by a drunken cabman while endeavoring to get an injured shipmate back to his vessel, an act in the line of his duty performed while on liberty." File 9331, Sec. Navy, Apr. 10, 1908. *See also* File 26250-777: 3.

Ordinarily, however, the injury or death of a person in the Navy while on leave or liberty is not the result of an act of duty. In such cases he is usually in the exercise of his private rights or the performance of private duties, and his injury or death, while coincident with the service in point of time, can not be held to have been caused by the service. "All the consequences of the absence of an officer or a soldier from his post of duty on his own motion for his own purposes of business or pleasure must be regarded as outside the line of duty. While traveling from and returning to the post of duty on an ordinary furlough, given for such purposes, he is at his own risk as to causes of disability to which he may be subjected." (4 P. D., 54; 7 P. D., 102; 16 P. D. 21; House Doc. No. 5, 54th Cong., 2d sess., p. 74.) Surrounding circumstances, however, may work a modification of this rule, as in the example cited above.

83. **Returning from liberty**—When a person returning from leave or liberty, and prior to expiration thereof, enters a boat provided by the Government for his transportation back to his vessel, he is once more within the control of the naval authorities, and if killed or injured without the intervention of any act the result of his own misconduct, a finding of line of duty would be proper. But if he is returning to his vessel in a private conveyance of his own selection, he would not be in a line of duty status, unless actually engaged in the performance of an act of duty.

84. **Self-inflicted wound**—File 9542, Sec. Navy, Mar. 14, 1908. *See also* LINE OF DUTY AND MISCONDUCT CONSTRUED, 89, 99.

85. **Shooting**—Deceased was killed by the accidental discharge of a U. S. Springfield rifle in the hands of another enlisted man who was on duty as guard over a prisoner. *Held:* Line of duty and not misconduct. File 26250-530, Sec. Navy, Mar. 13, 1914; Ct. of Inq. Rec. No. 5961; C. M. O. 10, 1915, 8. *See also* File 26251-9021.

86. **Same**—Deceased was a member of a patrol on duty in Vera Cruz, Mexico, during recent occupation. A member of another friendly patrol fired and fatally wounded deceased under the belief that he was firing at the enemy. *Held:* Line of duty and not misconduct. File 26250-556, Sec. Navy, June 6, 1914; Ct. of Inq. Rec. No. 5980; C. M. O. 10, 1915, 8.

87. **Speeding in automobile**—A deceased naval officer met his heath while driving his automobile at night over the public raods at the excessive speed of about 65 miles an hour in a pleasure race with the driver of another automobile. *Held:* "That this dangerous and reckless speed was the direct and proximate cause of his death, and that his death was not in the line of duty and was due to his own misconduct." File 26543-144, Sec. Navy, Oct. 27, 1915; C. M. O. 35, 1915, 9.

88. **Strangulation**—Deceased, while engaged in duty on board ship, fell into a drum room in such a position that he was unable to release himself. As a result and in the absence of timely aid the deceased was strangled to death. Evidence showed falling to be accidental. *Held:* Line of duty and not misconduct. File 26250-778, Sec. Navy, Apr. 21, 1916; C. M. O. 13, 1916, 8.

Digitized by Google

89. **Suicide**—Not even in the case of death by suicide can it be stated as an unalterable rule that it was not due to an act of duty. Suicide is, however, so unlikely a result of an act of duty that the presumption in such cases must be against line of duty in the absence of evidence affirmatively showing that it was caused by the service. (File 26250-230: 3.) This is in accordance with the Attorney General's opinion of May 17, 1855, in which it is stated that "if the suicide is alleged to have been produced by insanity, and thus insanity be put forward as the *causa causans*, then it must be shown that the insanity was the result of, or incidental to, acts of duty." So, also, in the case of Rhodes *v.* United States (79 Fed. Stat., 740) it will be noted that the court refers to "a wound or injury inflicted upon himself by a soldier" as one of the cases where the injury does not result from the service, although coincident with it in time. Nevertheless, in a proper case, death by suicide may be held to have occurred in the line of duty, but the facts supporting such a conclusion must be definitely ascertained and established. (File 26250-86; 1 P. D., 111; 1 P. D., 108 5 P. D., 32; 17 P. D., 50. *See also* File 26250-132.)
90. **Same**—Nostalgia caused midshipman to commit suicide. *Held:* Not line of duty and misconduct. File 26250-812.
91. **Same**—Deceased on expeditionary duty in Haiti died from a self-inflicted gunshot wound. Brooded and worried over being on tropical duty. *Held:* Line of duty and not misconduct. File 26250-864, Sec. Navy, Dec. 28, 1916.
92. **Same**—Deceased while on authorized liberty died by reason of self-inflicted gunshot wound while in the room of a prostitute. *Held:* Not line of duty and due to his own misconduct. File 26250-753, Sec. Navy, Feb. 5, 1916.
93. **Same**—Death pact. *Held:* Not line of duty and misconduct. File 26250-529.
94. **Same**—Cocaine. *Held:* Not line of duty and misconduct. File 26250-514.
95. **Same**—Hair tonic. *Held:* Not line of duty and misconduct. File 26250-490.
96. **Same**—In the case of an officer who committed suicide his death was *held* to be in line of duty and not due to his own misconduct, since it was affirmatively shown that his act was due to insanity caused by acts of duty. File 26250-567, Sec. Navy, Aug. 5, 1914; Ct. Inq. Rec. 6028.
97. **Same**—Deceased while ashore and absent over leave swallowed carbolic acid with intent to commit suicide. *Held:* Not line of duty and misconduct. File 26250-623, Sec. Navy, Jan. 23, 1915, Bd. of Inquest; C. M. O. 6, 1915, 14.
98. **Same**—Deceased committed suicide by stabbling while intoxicated; was addicted to use of cocaine. *Held:* Not line of duty and misconduct. File 26250-610, Sec. Navy, Dec. 4, 1914, Bd. of Inquest; C. M. O. 6, 1915, 13.
99. **Same**—Deceased, while absent without authority, committed suicide by shooting. *Held:* Not line of duty and misconduct. File 26250-634, Sec. Navy, Mar. 1, 1915, Bd. Inquest; C. M. O. 12, 1915, 9. *See also* File 26250-636.
100. **Same**—While on furlough. *Held:* Not line of duty and misconduct. File 26543-90, J. A. G., Jan. 24, 1913. *See also* File 26543-89, Sec. Navy, Jan. 7, 1913.
101. **Skylarking.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 49, 71.
102. **Surgical operations.** *See* SURGICAL OPERATIONS, 3, 6.
103. **Swimming.** File 2195-63, J. A. G., June 7, 1907. *See also* LINE OF DUTY AND MISCONDUCT CONSTRUED, 25-28, 40, 41, 60.
104. **Trespassing**—Deceased while on authorized liberty trespassed on a transmitting high tension power tower, received an electric shock, and fell 60 feet to ground. *Held:* Not line of duty and misconduct. File 26250-528, Sec. Navy, Mar. 16, 1914; Ct. of Inq. Rec. No. 5941; C. M. O. 10, 1915, 9.

    Deceased was struck by train while a trespasser on railroad tracks in violation of definite law and sign boards. *Held:* Not line of duty and misconduct. File 26250-788, June 6, 1916; C. M. O. 17, 1916, 10.
105. **Same**—Deceased while intoxicated and on authorized liberty was run over by an electric car at night while lying across the tracks. *Held:* Not line of duty and misconduct. File 26250-535, Sec. Navy, Mar. 25, 1914, Bd. of Inquest; C. M. O. 10, 1915, 9.
106. **Turret**—Crushed by. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 17.
107. **Violation of orders**—Deceased while on duty coaling ship repeatedly disregarded the warnings of his immediate superiors by riding around on a revolving vertical coaling drum; his legs caught and he was carried around several times; his head striking a hatch and stanchion. *Held:* Not line of duty and misconduct. File 26250-518, Sec. Navy, Apr. 6, 1914; Ct. of Inq. Rec. No. 5945; C. M. O. 10 1915, 9.

Digitized by Google

108. **Same**—Striking match in bunker. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 71.
109. **Same**—Carrying naked light while cleaning bilges. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 111.
110. **Same**—Deceased had been drinking, but was not intoxicated. Returned to camp from liberty along railroad tracks which was in violation of post regulations. *Held:* Not line of duty and misconduct. File 26250-328.
111. **Same**—Deceased, while on duty cleaning bilges in fireroom, carried an electric portable without steam-tight globe as required by Naval Instructions (Naval Instructions, 1913, I-3377 (3)), which broke, igniting fumes of gasoline carried in open cans, was burned; use of gasoline in open cans was authorized by chief engineer (an ensign) and work was in immediate charge of a chief water tender who did not forbid the use of the gasoline in open cans or the naked light. *Held:* Line of duty and not misconduct. File 26250-619, Sec. Navy, Feb. 1915; Ct. Inq. Rec. No. 6139, 6151, *See also* File 26250-746:1, J. A. G., Feb. 17, 1916.
112. **Same**—Boating in violation of orders. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 38.

LITIGATION PENDING. C. M. O. 6, 1915, 8. *See also* CIVIL COURTS, 2.

LITIGATION IN CIVIL COURTS.
1. **Policy of Department.** *See* CIVIL COURTS, 7.

LLOYDS, BOARD OF SURVEY.
1. **Naval officer—Acting as member of.** *See* MERCHANT VESSELS, 4.

LOAN.
1. **Loaning money is not trading within meaning of R-1509 (2).** C. M. O. 21, 1910, 6-7. *See also* BORROWING MONEY; 1; LENDING MONEY.

LOBBYING.
1. **Contract**—"The general principle is well settled that all contracts which call for what are commonly known as 'lobbying' services, are contrary to public policy, and therefore void. Furthermore, even where the contracts specifically call for only 'professional' or 'proper' services by counsel in procuring enactment of legislation, they are held by the courts to be void where the compensation for such services is contingent upon their success." (*See* 15 A. & E. Enc. Law, 970-971.) File 17789-12:1, J. A. G., Feb. 25, 1910, p. 4. *See also* File 28091-5, Aug., 1911; DEBTS, 18; CLAIMS, 5; LEGISLATION, 1, 2.

LODGE.
1. **Medical officer—Signing death certificate, etc.** *See* MEDICAL RECORDS, 5.

LONGEVITY.
1. **Naval Academy service—Counts for Marine officer—Service in the Naval Academy as midshipman will count as longevity in subsequent service as commissioned officer of the Marine Corps.** File 1326-335, J. A. G., June 6, 1911. *See also* File 26521-148, J. A. G., Aug. 24, 1916, p. 4.
2. **Same**—For the purpose of longevity pay, cadet midshipmen pursuing their studies at the Naval Academy during and since the Civil War were and are considered officers of the Navy. File 19245-43, J. A. G., Mar. 7, 1912.
3. **Pay**—A naval officer is entitled in the computation of his longevity to credit for service as a midshipman at the Naval Academy. File 26255-95:1, J. A. G., Apr. 6, 1910. *See also* CONSTRUCTIVE SERVICE, 1.

LOSS OF NUMBERS. *See also* NUMBERS, LOSS OF.
1. **Additional numbers**—Court-martial sentence. *See* ADDITIONAL NUMBERS, 2.
2. **Promotion**—Officers failing in. *See* PROMOTION, 102, 135, 137, 138, 139, 155, 175, 186, 194-196, 199-203, 207.
3. **Same**—Effect upon promotion of officer, not promoted to fill a vacancy. *See* PROMOTION, 162.
4. **Same**—Suspension from promotion—Administrative officers determine the manner the loss of numbers shall be executed. C. M. O., 42 1915, 12.
5. **Sentence**—Of general court-martial. *See* NUMBERS, LOSS OF.

Digitized by Google

LOSS OF PAY.
1. **Remitted.** *See* ALLOTMENTS, 6, 7; CLEMENCY, 39, 53; PAY, 23.
2. **Sentence—Court-martial.** *See* PAY, 28, 98–110.

LOSS OF RECORDS. *See* RECORD OF PROCEEDINGS, 70; SUMMARY COURT-MARTIAL, 45.

"LUDICROUSLY INADEQUATE SENTENCE." *See* ADEQUATE SENTENCES, 11.

LUNATICS. *See* INSANITY, 9.

LYING. *See also* DECEIT; FALSE STATEMENTS; FALSEHOOD.
1. **Officer.** *See* File 26262-2248.

MACHINISTS AND CHIEF MACHINISTS.
1. **Command**—Not eligible for. *See* COMMAND, 9, 10, 11, 21.
2. **Promotion of**—By the act of March 3, 1909 (35 Stat., 771), the title of warrant machinist was changed to machinist and provision was made for promotion and commission of chief machinist after 6 years' service from date of warrant, to rank with but after ensign. File 17789–15, J. A. G., Dec. 13, 1909.

MAIL.
1. **Clerks.** *See* MAIL CLERKS.
2. **Delay**—Of mail reaching Office of Judge Advocate General from secretary's office. File 26524-166:1, J. A. G., Aug. 10, 1915.
3. **Opening**—Enlisted man tried by general court-martial for opening mail without authority. C. M. O. 6, 1915, 3.
4. **Prisoners' mail.** *See* PRISONERS, 24.

MAIL CLERKS.
1. **Compensation**—Navy mail clerks, Reserve Destroyer Flotilla, Atlantic Fleet. File 26254-1921, J. A. G., Dec. 22, 1915; 26254-1921, J. A. G., Feb. 10, 1916.
2. **Marine Corps**—Detail for. File 26254-1961, J. A. G., Feb. 12, 1916.
3. **Oaths.** File 3980-1185, J. A. G., Jan. 15, 1916.
4. **Trial by general court-martial**—Navy mail clerks should be tried by the authority, civil or naval, first acquiring jurisdiction. File 7538–04, Sec. Navy, Oct. 4, 1909.
5. **Same**—The irregularities of a Navy mail clerk resulted in loss of Government funds from post office on board ship. Court of inquiry recommended trial by general court-martial if the naval authorities possessed jurisdiction, and he was subsequently tried by general court-martial. Ct. Inq. Rec. 5698, Feb. 27, 1913; File 26283-524:1.

MAINMAST, FALLING FROM.
1. **Enlisted man**—Killed. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 48.

MAJOR GENERAL COMMANDANT. *See* MARINE CORPS, 47–50.

MAKING A FALSE AND FRAUDULENT RETURN.
1. **Officer**—Charged with. C. M. O. 203, 1902.

MAKING AND USING FALSE PAPERS IN VIOLATION OF A. G. N. 14, ETC.
1. **Officer**—Charged with. C. M. O. 88, 1895.

MAKING FALSE AND FRAUDULENT OFFICIAL REPORTS.
1. **Officers**—Charged with. C. M. O. 129, 1898; 18, 1907. *See also* C. M. O. 7, 1894; 74, 1894; G. C. M. Rec., 16956.

"MAKING GOOD" TIME BY ENLISTED MEN. *See* ENLISTMENTS, 11; MARINE CORPS, 30.

MALICE.
1. **Absence of**—Requisite in crime of manslaughter. C. M. O., 12, 1911, 6–8; 23, 1911, 2–12. *See also* MANSLAUGHTER, 12, 13; MURDER, 19.
2. **Definition**—The word "malice" in law has a different signification from the popular meaning. In its legal sense it means a wrongful act done intentionally, without just cause or excuse. (*See* Words and Phrases, etc., v. 5, p. 4298, with numerous authorities.) Thus in United States *v.* Reed (86 Feb. Rep. 308, 312) it is said:
"By 'malice' is not necessarily meant in the law a malignant spirit, a malignant intention to produce a particular evil. If a man intentionally does a wrongful act, an act which he knows is likely to injure another, that in law is malice; it is the

Digitized by Google

willful purpose, the willful doing of an act which he knows is liable to injure another, regardless of the consequences. That is malice, although the man may not have had a specific intention to hurt a particular individual * * *."

It is also said, in Davis *v.* Pac. Tel. Co. (Cal.) (57 Pac., 764, 765), and similarly in other cases, that—

"An act is, in contemplation of law, done maliciously where it is wrongful and is done intentionally." C. M. O. 10, 1912, 7.

MALICIOUS.

1. **Assault—Willful and malicious assault.** C. M. O. 47, 1910, 8. *See also* ASSAULT, 28.

MALICIOUS DESTRUCTION OF PUBLIC RECORDS.

1. **Paymaster's clerk—Charged with.** C. M. O. 28, 1887.

MALICIOUSLY.

1. **Assault—An accused was tried by general court-martial under the charges (1) "Using obscene language toward his superior officer" and (2) "Assaulting and striking his superior officer while in the execution of the duties of his office."**

The specification of the second charge alleged that accused did willfully and maliciously and without justifiable cause assault and strike his superior officer who was in the discharge of his duties.

The court found the specification of the second charge proved in part, proved except the words "and maliciously" and the words "assault and," which words the court found not proved.

The court accordingly found the accused of the second charge "guilty in less degree than charged," guilty of "striking his superior officer while in the execution of the duties of his office."

In connection with the finding upon the specification of the second charge, the department is of opinion that by the elimination of the word "maliciously," the gist of the offense and the criminal intent thereof are removed. The fact that a man is only guilty of *willfully* striking another person does not necessarily mean that such a person is guilty of any wrongful act and intentional wrongdoing. Thus, one may be guilty of willfully slapping or striking in a playful manner another person, without, however, being guilty of any criminal wrongdoing.

In Words and Phrases Judicially Defined, volume 5, page 4311, under the caption of "Maliciously," it is stated that "An act is, in contemplation of law, done maliciously where it is wrongful and is done intentionally. (Davis *v.* Pacific Tel. and Tel. Co. (Cal.), 57 Pac., 764, 765.)"

In view of the foregoing it would appear that the word "maliciously" is an important ingredient of the offense as alleged in the specification.

With reference to the finding of the court upon the second charge the department is of opinion that such is inconsistent. In other words, the court goes on record as being of the opinion that accused is guilty of striking but not assaulting his superior officer. It is not apparent to the reviewing authority that a man may intentionally and wrongfully strike another person without assaulting him.

Words and Phrases Judicially Defined, volume 1, page 523, states that an assault is an attempt or even an *offer* to strike the person of another, and of course includes a successful attempt or an actual striking.

The record was therefore returned to the court for the purpose of revising its findings and sentence. C. M. O. 30, 1910, 8-9. *See also* ASSAULT, 19.

2. **Same—"Maliciously" not proved in specification of charge "Assaulting and wounding," etc., but guilty of charge.** *See* ASSAULT, 19.
3. **Defined.** *See* MALICIOUSLY, 1.
4. **Elimination of—"Maliciously" from specification in a charge of assaulting and striking removes gist of offense.** *See* ASSAULT, 3.
5. **Willfully—Differs from "maliciously" in not implying an evil mind.** C. M. O. 23, 1911, 5.

"MALICIOUSLY AND WILLFULLY."

1. **Defined.** G. C. M. Rec. 24983.

MALICIOUSLY UTTERING SEDITIOUS WORDS.

1. **Enlisted man—Charged with.** C. M. O. 40, 1887, 1.

Digitized by Google

MALINGERING. *See also* WORDS AND PHRASES.
1. **Enlisted man**—Charged with (G. C. M. Rec. No. 31194). C. M. O. 42, 1915, 4.
2. **"Refusing to obey the lawful order of his superior officer"**—The accused was tried on a charge "Refusing to obey the lawful order of his superior officer." The court found the specification proved except the words "did refuse to obey and did willfully disobey" substituting therefor the words, "by willfully and persistently feigning illness did avoid obeying," and that the accused was guilty in a less degree than charged, guilty of malingering. The finding of the court is invalid, in that it substitutes a charge of an entirely separate and distinct character, and which is not a lesser degree of the one alleged. C. M. O. 37, 1909, 3.

MALPRACTICE.
1. **Surgeon**—Charged with and acquitted. C. M. O. 14, 1909.

MALTREATING A PERSON SUBJECT TO HIS ORDERS.
1. **Officer**—Charged with. C. M. O. 33, 1915.
2. **Warrant officer (commissioned)**—Charged with. C. M. O. 48, 1914. *See also*, C. M. O. 78, 1896.

MALTREATING AN OFFICER ON SHORE.
1. **Officer**—Charged with. G. C. M. Rec. 8720.

MALTREATMENT OF PERSONS SUBJECT TO HIS ORDERS.
1. **Officer**—Charged with. C. M. O. 29, 1890, 6.

MAN OF WAR. *See* C. M. O. 14, 1879, 3; 43, 1895, 2.

MANDAMUS, WRIT OF. *See* LEGAL LIABILITY, 3; WORDS AND PHRASES.

MANDATORY REGULATIONS AND LAWS.
1. **A. G. N. 32**—Directory rather than mandatory. C. M. O. 18, 1897, 3.
2. **A. G. N. 33**—Directory rather than mandatory. C. M. O. 18, 1897, 3.
3. **A. G. N. 34**—Directory rather than mandatory. C. M. O. 18, 1897, 3.
4. **A. G. N. 45**—Seems to be directory rather than mandatory. C. M. O. 27, 1898, 1.
5. **A. G. N. 47**—Is mandatory. C. M. O. 74, 1899, 2.
6. **A. G. N. 51**—Is mandatory. C. M. O. 132, 1897, 3.
7. **A. G. N. 60**—The 121st Article of War is almost identical with A. G. N. 60, but the latter, however, being made more mandatory in its terms by the use of the word "shall" instead of "may" as in the former. C. M. O. 88, 1895, 13.
8. **Disregard**—Of a directory provision intended to promote method, system, uniformity, and dispatch in the modes of proceedings may render officers guilty thereof liable to legal animadversion, perhaps to punishment for noncompliance, yet compliance is not a condition precedent to the validity of their acts. In general, statutes directing the mode of proceeding by public officers are deemed advisory, and strict compliance with their detailed provisions is not deemed indispensable to the validity of the proceedings themselves unless a contrary intention can be gathered from the statutes construed in the light of other rules of interpretation. C. M. O. 27, 1898, 1.
9. **Regulation**—Navy Regulations, 1913, R-787 (3), held to be not mandatory. C. M. O. 6, 1915, 6; 41, 1915, 10. *See also* C. M. O. 49, 1915, 10, 12, 13-14.
10. **Statutes**—The question whether or not a statute is mandatory or directory depends upon the intention of the legislature, to be ascertained from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or another. File 26260-1244, J. A. G., Apr. 14, 1911, p. 2.

MANDATORY SENTENCES.
1. **Sentences**—Dismissal mandatory on conviction of "conduct unbecoming an officer and a gentleman" in Army. *See* CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN, 6.
2. **Same**—Not mandatory for "court-martial" to impose sentence of dismissal or imprisonment in case of midshipman charged with "brutal or cruel" hazing. *See* HAZING, 6.

MANIFEST IMPEDIMENT. *See* STATUTE OF LIMITATIONS.

MANSLAUGHTER. *See also* MURDER.
1. **Care necessary.** *See* MANSLAUGHTER, 12.
2. **Definition.** *See* MANSLAUGHTER, 12, 13.
3. **Enlisted man**—Charged with, and acquitted. C. M. O. 33, 1914, 8-12; 6, 1915, 4; 49, 1915, 12. *See also* G. C. M. Rec. 24242; 24878.

Digitized by Google

4. **"Feloniously and willfully."** *See* MANSLAUGHTER, 13.
5. **Finding**—Of "Manslaughter" on charge of "Murder." C. M. O. 12, 1911, 5.
6. **Guard**—Member of guard fired at escaping prisoner and killed bystander. *See* MANSLAUGHTER, 9.
7. **Involuntary.** *See* MANSLAUGHTER, 9.
8. **Jurisdiction**—Of naval courts-martial to try an enlisted man on the charge of "Manslaughter," and relative to the jurisdiction of State and Federal courts. File 26250–81, J. A. G., Aug. 4, 1909. *See also* MURDER, 2, 3, 8, 9, 14, 21–27.
9. **Member of guard**—Fired at escaping prisoner and killed bystander—The accused was a member of a guard on duty in Haiti and furnished with a 45-cal. automatic pistol and ammunition. This guard was in charge of prisoners, one of whom was a native Haitien who was being detained on a charge of theft awaiting action of the commanding officer. This prisoner broke from ranks and attempted to escape, running down a public highway toward a bridge. The corporal of the guard and the accused ran after him, the corporal shouting the general order to "stop that man," to which the fleeing prisoner gave no heed. The accused, slightly in advance of the corporal, not gaining upon the prisoner, called out at least twice to the prisoner to halt or he would fire, and finally seeing the prisoner was about to escape fired two shots at him. One of these shots struck and killed a native bystander, who was beyond the fleeing prisoner and not in view of the accused, and it was for the death of this person that the accused was tried by general court-martial on the charge of "Manslaughter."

   There was no evidence that the killing was intentional or that the accused acted maliciously or wantonly or otherwise than in good faith, nor was it established that he fired before the necessity for his doing so had become apparent. It was shown that the circumstances and conditions did not point to a reckless disregard of the safety of innocent bystanders present.

   There was evidence to establish conclusively that the accused acted in the performance of his duty as a member of the guard in obedience to the following orders from the Manual of Interior Guard Duty, United States Army, 1914, page 62, par. 305, which as established by both the evidence and Navy Regulations, 1913, R–4183, govern the Marine Corps on an occasion as the one in question:

   "If a prisoner attempts to escape, the sentinel will call, 'HALT.' If he fails to halt when the sentinel has once repeated the call, and if there be no other possible means of preventing his escape, the sentinel will fire upon him." *See also* PRISONERS, 19.

   The record also disclosed evidence "that every man of the guard should do his part in detaining a prisoner, who attempts to escape."

   Held, under such facts the accused was acting in the performance of his duty as a member of the guard. He fired at the prisoner under the performance of an obligation to prevent his escape by any means in his power. The accused, at the time of the shooting, was engaged in the commission of a lawful act, he acted with "due caution and circumspection," and the department holds that for the reasons advanced in Court Martial Order No. 33, 1914, pp. 8–12 "the occurrence was excusable homicide of the class known as 'homicide by misadventure.'" (*See also* File 7657–125 J. A. G.; Jan. 1912; C. M. O. 37, 1915; Index-Digest, 1914, p. 28; U. S. *v.* Clark, 31 Fed. Rep. 710; U. S. *v.* Lipsett, 156 Fed. Rep. 71.) C. M. O. 49, 1915, 12–11; G. C. M. Rec. 31423.
10. **Midshipman**—Charged with. C. M. O. 128, 1905.
11. **Negligence.** *See* MANSLAUGHTER, 12.
12. **Proof of**—A probationer at the Naval Disciplinary Barracks, Port Royal, S. C., was tried by general court-martial on the charges "Manslaughter," and "Conduct to the prejudice of good order and discipline."

   The substance of the first charge was that the accused, while on duty as a sentinel over a detentioner, did neglect and fail to handle his rifle with due caution and circumspection, in consequence of which neglect and failure he did "kill and slay" the deceased. The gravamen of the second charge was that the accused did "make careless use of firearms," thereby causing the death of the deceased.

   The court acquitted the accused of the charge of "Manslaughter," found him guilty of "Conduct to the prejudice of good order and discipline," and sentenced him to confinement at hard labor for two years, forfeiture of pay, and dishonorable discharge. The evidence, in brief, showed that on the morning of the fatality the accused demonstrated to another enlisted man the working of his rifle, which contained live ammunition in the magazine; that in the course of this demonstration a cartridge probably entered the chamber of the rifle from the magazine without the knowledge of the accused; that two or three hours later the accused, while on duty as sentinel, gave a

Digitized by Google

rifle salute to the deceased; that immediately thereafter the accused started to "shoulder arms"; that when the position of "port arms" was reached the bolt of the rifle came partially open, and, with the rifle pointed toward the deceased, the accused pushed the bolt home, thus discharging the rifle and inflicting a mortal wound upon the deceased; that the accused thought that the rifle was cocked while he was carrying it; and that he knew the firing-pin lock was at "ready," but did not consider it necessary to put the "safety" on, as he was under the impression that the cartridges were all in the magazine.

"Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: First, voluntary—upon a sudden quarrel or heat of passion; second, involuntary—in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (Sec. 274, U. S. Criminal Code, Mar. 4, 1909, 35 Stat., 1088, 1143.)

In the present case the accused did not kill the deceased in a sudden quarrel or heat of passion. He was not, therefore, guilty of voluntary manslaughter. Nor was this occurrence due to an unlawful act of the accused within the meaning of the above definition. "To be unlawful within the meaning of this rule, an act from which death results must have been intentionally wrong in itself, or *malum in se*, and not merely *malum prohibitum*" (a thing prohibited). (3 L. R. A. (N. S.), 1163.) The evidence shows that the accused spoke to the deceased while on duty; that he allowed the detentioner under his charge to get out of his sight, and that he gave the deceased a salute, all of which acts were in violation of post orders; and immediately preceded the fatality. These acts, however, were merely *mala prohibita*, and their connection with the fatality is not directly established by the evidence. On the contrary, it appears that when the rifle was discharged, the accused was engaged in doing a lawful act, namely, bringing his rifle to "shoulder arms." The question thus narrows down to the point whether, at the time of the shooting, the accused was engaged in the "commission of a lawful act which might produce death in an unlawful manner or *without due caution and circumspection.*" If so, he was guilty of manslaughter of the grade defined by the Criminal Code as involuntary. If not, the occurrence was excusable homicide of the class known as "homicide by misadventure." (3 L. R. A. (N. S.), 1153.) In arriving at a conclusion in this case the questions to be considered are: Was the lawful act in which the accused was engaged (bringing his rifle to "shoulder arms") such an act as "might produce death"; and if so, did the accused perform this act "without due caution and circumspection"? As to the first point, the fact that the act in which the accused was engaged "might produce death" is mutely witnessed by the death of the deceased, which resulted therefrom. The sole remaining question, therefore, is whether the accused performed this act "without due caution and circumspection."

As the court, under the second charge, found that at the time in question the accused did "make careless use of firearms," thereby causing the death of the deceased, the department returned the record to the court for reconsideration of its finding and acquittal on the charge of manslaughter; inviting attention to the foregoing matters and continuing as follows:

It is proper to remark, however, that there are authorities to the effect that every careless act in the handling of firearms, which results in the accidental killing of another, is not sufficient to convict an accused of manslaughter. There may be carelessness of such a trivial or slight degree that the accused will not be held criminally responsible for the resulting homicide, but the occurrence will be classified as "homicide by misadventure." The rule deducible from the authorities has been summarized as follows:

"The degree of care and caution to avoid mischief, required to save from criminal responsibility one who accidentally kills another, is that which a man of ordinary prudence would have exercised under like circumstances; mere slight negligence with no intent to do harm, under such circumstances that it could not reasonably be supposed that injury would result, does not furnish a foundation for criminal responsibility for a resulting death." (3 L. R. A. (N. S.), 1163.)

In a previous case (G. C. M. Rec. 24878), the department quoted with approval the following statement on this subject from Cyclopedia of Law and Procedure (21 Cyc., 765):

"A homicide is manslaughter, even though committed in doing an act lawful in itself, if defendant was guilty of gross or culpable negligence, and such negligence was the cause of the death. But the negligence must have been gross or culpable under

Digitized by Google

the circumstances, and not merely such as would impose civil liability for damages, and it must have been the negligence of the defendant personally. Contributory negligence is no answer to a criminal charge of homicide, as it is to a civil action; nor is it any answer that the criminal negligence of others than the defendant contributed to the death."

There is no doubt that the accused was guilty of carelessness in handling of firearms, which is the gravamen of the second charge, and the court, therefore, properly convicted him of that charge. (Conduct to the prejudice of good order and discipline.) Was he not, also, guilty of gross or culpable negligence in killing the deceased, and therefore guilty of manslaughter under the first charge? Is a man in a military service performing duty as a sentinel, guilty of gross or culpable negligence in carrying a loaded rifle without knowing that said rifle is loaded? Is a man in a military service performing duty as a sentinel, guilty of gross or culpable negligence in carrying a loaded rifle, and one which he knew contained live ammunition in the magazine if not in the chamber, without having the firing pin lock at "safe?" Is a man in a military service, performing duty as a sentinel, guilty of gross or culpable negligence when, in bringing his rifle from "order" to "shoulder arms," he points it at another person and discharges it, thereby killing that person? And if so, is his negligence excused or aggravated from a military point of view by the fact that, although on duty as sentinel, he did not know that his piece was loaded; or by the fact that, knowing he had live ammunition in the magazine, if not in the chamber, he neglected the precaution of having his firing pin lock at "safe?" In order to acquit the accused of manslaughter, the court must find that he was *not* guilty of gross or culpable negligence in these respects, but that his several acts of carelessness, which caused the death of the deceased, constituted carelessness of such a trivial or slight character that a man experienced in the naval service is not to be held criminally responsible therefor; in other words, that persons in the naval service whose duties require them to handle dangerous weapons, may nevertheless handle such weapons in a careless and death-dealing manner, and yet, when brought to trial therefor, are to be acquitted of the lowest grade of criminal homicide known to the law.

The court will reconvene for the purpose of reconsidering its findings upon Charge I and the sentence. If the court should be of the opinion *that the carelessness of the accused was slight and trivial*, bearing in mind his status as a person experienced in a military service, the court should properly adhere to its findings upon Charge I. If, on the other hand, the court should decide that the carelessness of the accused in this case, as shown by the evidence, was gross or culpable, the court should revoke its former findings on Charge I and substitute therefor a finding of guilty. In this connection, the court will bear in mind the fact that the accused loaded his rifle without knowing it; that he neglected to have his firing pin lock at "safe;" and that, in bringing his loaded piece from "order" to "shoulder arms" he pointed it at another man and discharged it, thereby causing the latter's death. The court will also bear in mind that casualties of this nature might occur many times a day in a military service but for the exercise of due care and circumspection which the law exacts of all persons armed with a dangerous weapon; and that those charged with the administration of the law can not relax its requirements without violating their duty and increasing the hazards and dangers of the service, which all should be diligent to minimize.

The court in revision decided "respectfully to adhere to its former finding and sentence." In so doing, the court put itself on record to the effect that the carelessness of the accused, although such as to warrant the imposition of a sentence of confinement at hard labor for conduct to the prejudice of good order and discipline, was nevertheless too "slight and trivial" to render the accused guilty of manslaughter. C. M. O. 33, 1914, 8-11; 36, 1914, 6.

13. **Same**—The record in the case of an accused, tried by general court-martial on the charge of "Manslaughter," was returned to the court by the department with the following remarks:

The accused in this case was brought to trial on the charge of manslaughter. The court found the specification not proved and the accused of the charge not guilty, and accordingly acquitted him.

From a review of the evidence adduced at the trial it appears that the accused while skylarking with or teasing some of his fellow marines, threw a piece of paper or pasteboard at another marine private which struck the deceased, whereupon there was an exchange of words, probably including the use of opprobrious epithets by the deceased, and which resulted in a proposition to settle the matter by a fight.

Digitized by Google

While there was testimony indicating that the accused proposed the combat, the weight of evidence is to the effect that the deceased invited the accused to go out and settle the matter "behind the laundry," which was equivalent to the same thing. Whichever proposed the fight, however, the other necessarily acquiesced voluntarily therein, as there is no evidence to show that either was in any way forced by physical means into the encounter.

There were eight witnesses who viewed the combat, and their testimony concerning the material details thereof is fairly clear and uniform. It began with an exchange of blows, the deceased finally being struck by the accused on the nose, after which there was a cessation for a short interval. During this time the accused asked the deceased whether he had had enough, or words to that effect, to which inquiry the deceased responded substantially that he had not, or "No; wait," indicating a desire to continue the encounter. The accused did not say that *he* had had enough, nor did he say to the deceased that he intended to withdraw, nor does the weight of the evidence tend to show that he did endeavor to withdraw; on the contrary five of the witnesses stated substantially that he stood his ground; one that he stepped back two steps; and another that he walked away. But the evidence shows that only a few paces separated the two men.

The combat was then resumed, the deceased advancing upon the accused, and in the subsequent interchange of blows the latter struck the deceased's right temple with his fist, from which blow the deceased died the following morning. It appears from the evidence that at no time during the fight was the accused excited, but, on the contrary appeared calm. He was a considerably larger man than the deceased, and evidently felt himself in no particular danger. There was evidence to the effect that the deceased's skull over the right temporal region was abnormally thin, also that fighting was contrary to the post regulations and the Navy Regulations, although the latter might have been taken judicial notice of by the court.

Manslaughter is unlawful homicide without malice aforethought, either express or implied. It is subdivided into voluntary and involuntary manslaughter according to whether there was an intention to kill or not. (21 Cyc., 734.) Referring to the subject of manslaughter in Clark's Criminal Law (pp. 197, 204) the following statements are found:

"73. Manslaughter is unlawful homicide without malice aforethought, and is either (*a*) voluntary or (*b*) involuntary.

"Manslaughter is a felony."

"VOLUNTARY MANSLAUGHTER.

"75. Voluntary manslaughter is where the act causing death is committed in the heat of sudden passion, caused by provocation.

"(*a*) The provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man.

"(*b*) The act must be committed under and because of the passion.

"(*c*) The provocation must not be sought or induced as an excuse for killing or doing bodily harm.

"INVOLUNTARY MANSLAUGHTER.

"76. Involuntary manslaughter is homicide unintentionally caused.

"(*a*) In the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or

"(*b*) By culpable negligence (1) in performing a lawful act, or (2) in performing an act required by law."

The Federal Criminal Code, act of March 4, 1909 (35 Stat., 1088, 1143), contains the following pertinent section:

"SEC. 274. Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

"First. Voluntary—Upon a sudden quarrel or heat of passion.

"Second. Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

The latter statute is therefore declaratory of the common law as stated by Clark above. An examination of the definitions of manslaughter, as given above, together with the evidence in the case, indicates that the act of the accused falls under the head of involuntary manslaughter. There is nothing in the record to show that his act

Digitized by Google

was committed in the heat of sudden passion, but, on the contrary, that he was smiling and cool.

Excluding "culpable negligence in performing a lawful act, or in performing an act required by law," the offense appears to be embraced within the definition that "involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony nor likely to endanger life." There is no evidence that the killing was intentional, and if the encounter was unlawful and less than a felony nor likely to endanger life, as the evidence appears to show, the definition is satisfied.

With respect to the form of the specification, it is found that it follows practically *verbatim*, in all its essential features, the indictment for manslaughter as given in Joyce on Indictments (pp. 721, 722), including the use of the words "feloniously and willfully." With respect to this form, it was held in People *v.* Butler (3 Park. Cr. R., 377, 378), that under said common-law form the accused might be convicted of manslaughter as defined in the New York statutes in any degree, according to the evidence. Quoting from the Cyclopedia of Law and Procedure (v. 21, p. 852):

"*Wilfulness and unlawfulness.*—It is essential to aver that the killing was unlawful either by express allegation or by the use of terms or statements of fact which conclusively imply it. The words 'wilfully' or 'unlawfully' differing in this respect from such technical words as 'feloniously' and 'malice aforethought' are usually regarded as unnecessary in case their place is supplied by the use of other words. So the killing need not be alleged to have been unlawful, where it is charged to have been done with 'malice aforethought' or 'feloniously.' So also 'wilfully' is supplied by 'feloniously,' or 'malice aforethought,' although it has been held that 'wilfully' as well as 'feloniously' must be employed where both words are inserted in the form of indictment prescribed by statute or in the statute defining the offense."

The use of the word "feloniously" is "still necessary in describing a common-law felony." (Bouvier, *sub voce.* Feloniously.) This rule is supported by numerous authorities (Words and Phrases Judicially Defined, v. 3, p. 2734), and manslaughter is a felonious common-law crime. There is also abundant authority that "feloniously" includes also the sense of "unlawfully." (Ib. v. 3, p. 2734.) This is not intended to indicate that in the specification of an offense to be tried by a court-martial the same technical accuracy is required as in a common-law indictment, for such is not the case (1 Op. A. G., 294; 7 Op. A. G., 601; 28 Op. A. G., 286), but if a specification is actually framed, as in this case, in conformity with a common-law indictment for manslaughter which has received judicial approval, it is a good and sufficient allegation of the offense charged.

With regard to the use of the word "wilfully," its signification in the specification is "intentionally and not by accident," and is distinguished from "maliciously" in not implying an evil mind. (Bouvier, "Wilfully.") Its sense, while different under different statutes or contexts, means that the act was done "knowingly," in opposition to the sense of doing an act unconsciously or without a knowing mind. It does not necessarily imply malice. (Words and Phrases, etc., v. 8, "Wilful," etc.) As held in Barr *v.* Chicago, etc., R. Co. (10 Ind. App. 433):

"There may be a wilful act in a legal sense without a formed and direct intention, and there may be wilfulness where there is no direct or positive intention to inflict injury. In other words, there may be a constructive or implied intent."

The following quotations, supported by authorities, are taken from Cyclopedia of Law and Procedure (v. 21, pp. 852, 858, 859):

Quotation from page 852, *supra:*

"858. *Manslaughter.*—An indictment for manslaughter may, under some statutes, be drawn as for murder, omitting the elements of aggravation. Where the manner and means of the killing are set out, matter differentiating the degrees need not be averred. The absence of apt words characterizing the acts to have been done with malice aforethought and the declaration that the crime intended to be charged is manslaughter is a sufficient declaration that the homicide was accomplished without design to effect death.

"859. So an indictment for manslaughter may employ the term 'kill and murder' instead of 'kill and slay,' as in the statutory form, or the words of the statute may be followed without an express averment that the crime charged was manslaughter."

"Mere words, however abusive or opprobrious, do not amount to such provocation as will preclude the one speaking them from killing in self-defense." (Cyc., v. 21, p. 809.)

Digitized by Google

"Neither insulting and abusive words or gestures" of themselves amount to sufficient provocation for an act of resentment *likely to endanger life.* (Clark's Crim. Law, p. 203.)

To excuse a homicide on the ground of accident, the accused must have been engaged *in a lawful act.* (Ib., p. 176.) Therefore, as appears to be the case here, the fact that the deceased's skull was abornormally thin would not, as a matter of law, excuse the offense as an accident if the act in which the accused was engaged was *unlawful.* It is manslaughter to inflict wounds in rude sport that cause death. (Pa. *v.* Lewis, Add. 279.) Bishop in his Criminal Law (v. 2, sec. 704, 3d ed.) says:

"It appears to be the doctrine of the courts that, if parties become excited by words, and one of them attempts to chastise the other with a weapon not deadly, he will be held for manslaughter, *though death is unintentionally inflicted.*"

As stated in the American Criminal Reports (v. 8, p. 506):

"Manslaughter is the unlawful and felonious killing of another, without malice, either express or implied; and if, therefore, *in doing an unlawful act,* or in carrying out an unlawful design, death happen, but without malice, the offense would be only manslaughter, provided such unlawful act or design be not a felony, because then the law implies the existence of malice."

In this case, therefore, there was no express malice and no implied malice, because the unlawful act in which the two men were engaged, i. e., the mutual combat, was not a felony.

In cases of mutual combat, to reduce the offense of taking life from murder to manslaughter, it must appear that the contest was waged on equal terms and no undue advantage was taken. (People *v.* Sanchez, 24 Cal., 17.) "Prize fighting and boxing matches are unlawful; and if death ensues it is manslaughter. Where a man was challenged to fight, for a public trial of skill in boxing, and was even urged to it by taunts, and he fought and killed his adversary, this was holden to be manslaughter, although the occasion was sudden." (Archbold's Crim. Pr. & Pl., v. 1, p. 829.)

There is no question as to the fact that legally an assault was committed by the accused upon the deceased, and that he struck him the blow which caused his death, constituting a technical battery as well as an actual one. As stated in the Cyclopedia of Law and Procedure (v. 21, pp. 762, 763):

"In accordance with the rule that it is manslaughter to unintentionally kill another in doing an unlawful act, it is well settled that if one commits an assault and battery upon another *not likely to cause death,* and death unintentionally results either to the person assaulted or to a bystander, it is manslaughter. * * *

"The same is true, according to some of the cases, of an unintentional homicide committed while engaged in a riot or unlawful assembly; and it is true of an unintentional homicide in an affray or unlawful fighting, including prize fighting, where such fight is unlawful, or in any unlawful game or sport."

As stated in the Law of Crimes (Clark & Marshall, v. 1, p. 443):

"*Fighting and breaches of the peace.*—By the decided weight of authority, a person can not consent to a breach of the peace or to a beating which may result in serious injury. And it has been held, therefore, both in England and in this country, that if a person engage in a fight by agreement, whether a prize fight or not, their consent does not prevent each from being guilty of an assault and battery upon the other."

The same authors, with respect to offenses against the public peace, say (ib., v. 2, pp. 984, 985):

"In addition to these specific offenses, it may be laid down as a general rule that any other act which constitutes a breach of the public peace, or which has a direct tendency to cause a breach of the public peace, is a misdemeanor at common law.

"It is not necessary that there shall be actual force or violence to constitute an indictable offense. Acts injurious to private persons, which tend to excite violent resentment, and thus produce fighting and disturbance of the peace of society, are themselves indictable."

But aside from the unlawfulness of fighting, as above shown, the Articles for the Government of the Navy provide (art. 8 cl. 3), as follows:

"ART. 8. Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy—who * * *

"(3) * * * quarrels with, strikes, or assaults, or uses provoking or reproachful words, gestures, or menaces toward any person in the Navy; * * *"

Section 1621, Revised Statutes, provides that the Marine Corps shall be subject to the foregoing provision, among others, as follows:

Digitized by Google

"SEC. 1621. The Marine Corps shall, at all times, be subject to the laws and regulations established for the government of the Navy, except when detached for service with the Army by order of the President; * * *"

And, furthermore, fighting was against the post regulations at the marine barracks where this offense was committed. So that whether the combat be regarded as *malum prohibitum*, or *malum in se*, with respect to which a distinction is sometimes made by the courts, the fighting between the accused and the deceased was unlawful. This being so, the offense was proved, and it will now be necessary to give consideration to certain matters of defense.

Apparently there is an effort to show that the accused acted in self-defense, and that in his fight with the deceased he struck the deceased on the skull, the bones of which were abnormally thin. As to this, Bishop, in his Criminal Law (3d ed., v. 2, sec. 651), says:

"If improper force is used for defense, even where force is permissible, he who employs this improper force must answer as for a felonious homicide *should death accidently follow*."

Also (ib., sec. 652):

"It is well known that where one assaults another, or engages with another in a mutual combat, if the party struck by a blow dies, *though death were not intended*, the person giving the blow is guilty of either murder or manslaughter."

The evidence in this case shows that the two participants in the fight, after the combat had progressed for a time during which the deceased received a blow on the nose, resumed fighting. While it is proved that the accused then asked the deceased if he had enough, yet he did not retreat, but evidently stood his ground waiting for the deceased to resume the encounter. He did not retreat nor did he plainly and *bona fide* indicate to the deceased that he intended to withdraw from any further participation in the affray. He did none of these things, but stood there waiting, and when the deceased again advanced to the fight he engaged in the final round, which resulted in the blow that caused the deceased's death.

In the Law of Crimes (Clark and Marshall, v. 1, p. 620) it is said:

"One who commits an assault without malice, or otherwise provokes a difficulty without malice, and thereby brings on a conflict, may withdraw from the conflict and if he does so in good faith, and in such an unequivocal manner as to show his adversary that he desires to withdraw and his adversary follows him and attempts to kill him or do him great bodily harm, he has the same right of self-defense as if he had not originally been the aggressor. If, however, he does not withdraw, or offer to withdraw, he can not successfully plead self-defense, but will be guilty of manslaughter at least."

In Wallace *v.* United States (162 U. S., 466, 472) the court's opinion contained the following as to the right of self-defense in doing an unlawful act, quoting approvingly from Reed *v.* State (11 Tex. App., 509):

"It may be divided into two general classes, to wit, perfect and imperfect right of self-defense. A perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity and was wholly free from wrong or blame in occasioning or producing the necessity which required his action. If, however, he was in the wrong—if he was himself violating or in the act of violating the law—and on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against an attack made upon himself, which was superinduced or created by his own wrong, then the law justly limits his right of self-defense and regulates it according to the magnitude of his own wrong. Such a state of case may be said to illustrate and determine what in law would be denominated the imperfect right of self-defense. Whenever a party by his own wrongful act produces a condition of things wherein it becomes necessary for his own safety that he shall take life or do serious bodily harm, then indeed the law wisely imputes to him his own wrong and its consequences, to the extent that they may and should be considered in determining the grade of offense, which but for such acts would never have been occasioned. * * * How far and to what extent he will be excused or excusable in law must depend upon the nature and character of the act he was committing and which produced the necessity that he should defend himself. When his own original act was in violation of law, then the law takes that fact into consideration in limiting his right of defense and resistance whilst in the perpetration of such unlawful act. If he was engaged in the commission of a felony, and to prevent its commission the party seeing it or about to be injured thereby makes a violent assault upon him, calculated to produce death or seriously bodily harm, and in resisting such attack he slays his

Digitized by Google

assailant, the law would impute the original wrong to the homicide and make it murder. *But if the original wrong was or would have been a misdemeanor*, then the homicide growing out of or occasioned by it, though in self-defense from any assault made upon him would be *manslaughter* under the law."

In Allen *v.* United States (164 U. S., 497, 498) the court says:

"It is well settled by the authorities that mere words, however aggravating, are not sufficient to reduce the crime from murder to manslaughter.

"It is clear that to establish a case of justifiable homicide it must appear that something more than an ordinary assault was made upon the prisoner; it must also appear that the assault was such as would lead a reasonable person to believe that his life was in peril."

It does not appear from the evidence that the accused considered his life was in peril, but instead he was a much larger man than the deceased, and was smiling and cool. He was not pursued by the deceased, nor did he endeavor to retreat as far as he could.

The following remarks are taken from Archbold's Criminal Practice and Pleading (7th Ed., v. 1, pp. 794–796):

"And the true criterion between them is stated to be this: When both parties are actually combating at the time the mortal stroke is given, the slayer is guilty of manslaughter; but if the slayer has not begun to fight or (having begun) endeavors to decline any further struggle and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defense. (4 Bla. Com., 184.)

"In all cases of homicide excusable by self-defense it must be taken that the attack was made upon a sudden occasion and not premeditated or with malice; and from the doctrine which has been above laid down it appears that the law requires that the person who kills another in his own defense *should have retreated* as far as he conveniently or safely could, to avoid the violence of the assault, before he turned upon his assailant (Pierson *v.* State, 12 Ala., 149), and that not fictitiously or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. For in no case will a retreat avail if it be feigned, in order to get an opportunity or interval to enable the party to renew the fight with advantage. (1 Hale, 481, 483; Fost., 277; 4 Bla. Com., 185). *The party assaulted must, therefore, flee*, as far as he conveniently can; either by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit him, for it may be so fierce as not to allow him to yield a step without manifest danger of his life or great bodily harm, and then in his defense he may kill his assailant instantly. (1 Hale, 483; 4 Bla. Com., 185.) * * *

"In order, however, to justify a killing on the ground of necessity, the person committing the act *must be without fault in bringing about that necessity*. (Viaden *v.* Com., 12 Gratt., 717; Haynes *v.* The State, 17 Geo., 465.)

* * * * *

"With regard to the nature of the necessity, it may be observed that the party killing can not, in any case, substantiate his excuse if he kill his adversary even after a retreat unless there were reasonable ground to apprehend *that he would otherwise have been killed himself*. (Fost., 273, 275, 289; 4 Bla. Com., 184.)

* * * * *

"All writers concur in the language of Blackstone (3 Blk. Com., 4) that to warrant its exertion at all the defender must be forcibly assaulted. He may then repel force by force, because he can not say to what length of rapine or cruelty the outrage may be carried unless it were admissible to oppose one violence with another. But care must be taken that the resistance does not exceed the bounds of *mere defense and prevention*, for then the defender would himself become the aggressor. (*See* People *v.* McLeod, 1 Hill N. Y. Rep., 377; U. S. *v.* Vigol, 2 Dallas Rep., 346; Com. *v.* Crauss, 3 Am. L. J., 299.)"

The following from the Cyclopedia of Law and Procedure (v. 21, p. 812) is also pertinent:

"*Voluntary participation in contest or mutual combat.*—Where a person voluntarily participates in a contest or mutual combat for purposes other than protection, he can not justify or excuse the killing of his adversary in the course of such conflict on the ground of self-defense unless before the homicide is committed he withdraws and endeavors in good faith to decline further conflict even though retreating would increase his peril."

Likewise the following (ib., p. 811):

"*Necessity of withdrawal and notice.*—The aggressor's *mere willingness or intent to withdraw is not sufficient;* he must both endeavor to really and in good faith withdraw

Digitized by Google

from the combat and must also in some manner make known his intention to his adversary."

So also the following (Ib., p. 813):

"*Imminence of danger.*—(1) *In general.*—The danger must also be either actual, present, and urgent, or such as the slayer believes on reasonable grounds to be so urgent and pressing that it is necessary for him to kill *in order to save himself from immediate death or great bodily harm* and that there is no other reasonable means of escape."

The following also has an important bearing on the case, as showing the futility of *se defendendo* under the circumstances of this case (Ib., p. 826):

"*Renewal of contest.*—Where after the original difficulty has ceased or defendant has an opportunity of declining further combat and *he instead continues the struggle* or renews the combat, he becomes the aggressor, irrespective of whether he was at fault in bringing on the original difficulty and is not justified or excused in killing in self-defense."

In Bishop on Criminal Law, pages 346–7, it is stated:

"Lord Hale says: 'Regularly it is necessary that the person that kills another in his own defense fly as far as he may to avoid the violence of the assault, before he turns upon his assailant; for though in cases of hostility between two nations it is reproach and piece of cowardice to fly from an enemy, yet, in cases of assaults and affrays between subjects under the same law, the law owns not any such point of honor, because the king and his laws are to be the *vindices injuriarum*, and private persons are not trusted to take capital revenge one of another.' But he goes on to show that this doctrine can not apply where flight is impossible, and, indeed, he explains, as do all the old writers on this branch of our law, that the right to take the assailant's life is only to be exercised when no other means of escape are open. The proposition is admirably laid down in a New York case that, when a man expects to be attacked, the right of self-defense does not arise until he has done everything to avoid the necessity of using it; and this proposition seems clearly to apply to all circumstances of the nature of those now under consideration. One must not have brought on himself the necessity which he sets up in his own defense.

"SEC. 565, 649. There is another class of circumstances to which the doctrine of the last section is more frequently applied. Two or more persons, engage in a mutual combat, without any original intent to proceed to extreme measures; or, after an assailant has been met by his adversary, he becomes weary of a conflict which is likely to be more serious than he anticipated, or too much for him to withstand; and here, if one of the combatants, already in the wrong, either as a beginner or continuer of the fight, wishes to retrace his error, he must retreat. And though, contrary to his original expectation, he finds himself so hotly pressed as renders the killing of the other necessary to save his own life, he is guilty of a felonious homicide if he kills him, unless he first actually puts into exercise *this duty of withdrawing from the place.* Lord Hale expressly states the following case: 'If A assaults B first, and upon that assault B reassaults A, and that so fiercely that A can not retreat to the wall or other *non ultra*, without danger of his life; nay, though A fall upon the ground upon the assault of B, and then kills B; this shall not be interpreted to be *se defendendo*, but to be murder, or simple homicide, according to the circumstances of the case; for otherwise we should have all cases of murders or manslaughters by way of interpretation turned into *se defendendo*.'"

As stated in State *v.* Spears (9 Am. Cr. Rep., 624):

"If the defendant acts from fear of death and great bodily harm, and kills another, he must be freed from fault in bringing on the difficulty. (Kerr, Hom., 201.) In cases of mutual combat both parties are the aggressors, and if one is killed it will be manslaughter, at least, unless the survivor can prove that before the mortal stroke was given *he had refused any further combat, and retreated as far as he could with safety, and that he killed his adversary from necessity to avoid his own destruction or great bodily harm to him.*"

The foregoing is supported by the authority of the decisions of many eminent courts. And again, in Dolan *v.* State (6 Cr. Rep., 524), it was held that—

"Where parties fight and separate, and afterwards meet, and one slays the other he is guilty of criminal homicide if he could, at any time from the beginning of the first to the end of the second difficulty, have reasonably withdrawn from or avoided the difficulty without immediate danger to himself, and he can not set up self-defense until he has done *everything reasonable in his power to prevent, abandon, and decline any further contest with his adversary.*"

Digitized by Google

There is no evidence in this case to show that the accused was in "fear of death or great bodily harm," and there *is* evidence that he, in fact, brought on the difficulty. He did not refuse further combat before the mortal blow was given, abandon, and decline further fighting. He did not retreat as far as he could with safety, and it is not shown that he struck the deceased the fatal blow to avoid his own destruction.

In view of all the foregoing considerations, and quotations from authorities, it appears that the specification should have been found proved and the accused of the charge guilty.

However, should the court still believe nevertheless that the specification in its present form is not fully proved and that the accused is not guilty of the charge of manslaughter, yet it still possesses ample authority to find the specification proved in part and the accused guilty in a less degree than charged, as of "Conduct to the prejudice of good order and discipline," and to adjudge a sentence commensurate as the facts warrant.

The court revoked its former finding and substituted therefor the finding of guilty of involuntary manslaughter. C. M. O. 23, 1911, 2-12.

MANUAL FOR GOVERNMENT OF NAVAL PRISONS, PRISON SHIPS, AND DISCIPLINARY BARRACKS. C. M. O. 49, 1915, 21.

MANUAL FOR THE MEDICAL DEPARTMENT.

1. **Regulations**—Full force and effect of. C. M. O. 12, 1915, 11.

MANUAL GOVERNING THE TRANSPORTATION OF ENLISTED MEN.

1. **Regulations**—Full force and effect of. C. M. O. 12, 1915, 11.

MANUAL LABOR.

1. **Officers**—Ordered to perform. *See* ORDERS, 41.

MANUAL OF INTERIOR GUARD DUTY, U. S. ARMY, 1914.

1. **Judicial notice.** *See* JUDICIAL NOTICE, 6.

MARINE BAND. *See* BANDS, 1-3.

MARINE BRIGADES. *See* CONVENING AUTHORITY, 27; COURTS OF INQUIRY, 10; MARINE CORPS, 10.

MARINE CORPS.

1. **Absence, unauthorized**—Making good time lost by. *See* MARINE CORPS, 30.
2. **Appeal to department**—By officer to be given a higher place on the Navy list. *See* MARINE CORPS, 65, 73.
3. **Applicants for enlistment**—Prosecution of. *See* APPLICANTS FOR ENLISTMENT, 2; ENLISTMENTS, 18; MARINE CORPS, 29.
4. **Appointments to second lieutenant**—May be made from civil life. *See* APPOINTMENTS, 20.

   "The law does not contemplete the issuance of probationary appointments to former officers of the Marine Corps reinstated as second lieutenants." File 13261-544:1, J. A. G., Oct. 10, 1916. *See also* MARINE CORPS, 71.

   In the cases of reinstatement of former officers as second lieutenants, under the act of August 29, 1916, boards may be instructed that the professional records of such candidates may be accepted as evidence of the candidates' professional qualifications, provided that the records are such as to indicate that the candidates in question are properly professionally qualified to perform the duties of the grade to which they seek appointment. File 26521-151, Sec. Navy, Sept. 9, 1916.
5. **Same**—From enlisted men. *See* APPOINTMENTS, 22.
6. **Army**—Marine serving with Army committed offense and tried by naval court-martial. *See* MARINES SERVING WITH ARMY, 7.
7. **Same**—Marines serving with. *See* MARINES SERVING WITH ARMY.
8. **Army Transport**—Status of Marines on. *See* ARMY, 7.
9. **Brigade**—Marine Brigade, P. I. *See* JURISDICTION, 77.
10. **Same**—Convening of general courts-martial and courts of inquiry by Brigade Commanders. *See* CONVENING AUTHORITY, 27; COURTS OF INQUIRY, 10.
11. **Brigadier General**—Grade of, established by Act, Aug. 29, 1916 (39 Stat. 609.) *See* File 26521-148, J. A. G., Aug. 18, 1916; 26521-148; 28687-7.
12. **Bureau**—The Marine Corps is not one of the Bureaus of the Navy Department. It is a part of the Naval Establishment, but it is not a part of the Navy Department as established at the seat of the Government; it is under the supervision of an executive

Digitized by Google

department, but that relation to the department is not the same as a part of it. (11 Comp. Dec. 558. *See* also 28 Op. Atty. Gen. 487) File 4600, Apr. 10, 1906; 21686, Apr. 11, 1906; 6770-12, J. A. G., May 8, 1912.

13. **Campaign Badges**—Revocation of by Major General Commandant. *See* CHINA CAMPAIGN BADGES, 1.
14. **Clerks**—The employment of enlisted men of the Marine Corps on clerical duty at Headquarters, Marine Corps, is permitted by law. File 4600, Apr. 10, 1906; 21686, Apr. 11, 1906.
15. **Clerks to Assistant Paymasters.** *See* PAYMASTER'S CLERKS, MARINE CORPS.
16. **Command**—Authority of a Marine officer commanding a battalion afloat. *See* JURISDICTION, 75, 76.
17. **Same**—Naval station. *See* JURISDICTION, 86.
18. **Commandant.** *See* MARINE CORPS, 47-50.
19. **Commissions**—Change of date of retired officers' commissions requested. *See* COMMISSIONS, 17.
20. **Same**—Date of. *See* COMMISSIONS, 14, 17, 18.
21. **Courts of Inquiry**—Convened by Brigade Commanders. *See* CONVENING AUTHORITY, 27, COURTS OF INQUIRY, 10; MARINE CORPS, 10.
22. **Court-Martial Orders**—Indorsement of Major General Commandant published in. C. M. O. 24, 1914, 24; 14, 1915, 2; 19, 1915, 2. *See also* C. M. O. 31, 1915, 7.
23. **Death Gratuity.** *See* DEATH GRATUITY, 21, 22.
24. **Deposits.** *See* DEPOSITS, 3; MARINE CORPS, 88.
25. **Desertion**—As a branch of the United States naval service, marines are subject to the same laws regarding desertion as enlisted men of the other branches of the service. File 5621-4, Sec. Navy, Apr. 10, 1907.
26. **Detentioners**—Clothing allowances for. File 28267-126, J. A. G., Mar. 30, 1912. *See also* DETENTIONERS, 2.
27. **Enlisted men**—Strength of Marine Corps. *See* MARINE CORPS, 100-102.
28. **Same**—May legally be employed on clerical duty at Headquarters. *See* MARINE CORPS, 14.
29. **Enlistments, applicants for**—Fraudulently receiving transportation. *See* File 7657-180 and 180:1, Sec. Navy, June 4, 1913. *See also* APPLICANTS FOR ENLISTMENT, 2; ENLISTMENTS, 18.
30. **Enlistment in**—Making good time lost by unauthorized absence—The Comptroller of the Treasury has held that the act of May 11, 1908 (35 Stat. 109), stating that an enlistment in the Army shall not be regarded as complete until the soldier shall have made good time lost during an enlistment period by unauthorized absences exceeding one day, applies to the Marine Corps.

    But a man who enlisted prior to the passage of the above act and who is, by absence, *not regarded* as a deserter, can not be held in service to make good the time lost by unauthorized absence. He may, however, be tried for the offense. File 26287-458, J. A. G., July 2, 1910, p. 2. *See also* ENLISTMENTS, 11.
31. **Examining Boards**—*See* MARINE EXAMINING BOARDS; PROMOTION.
32. **Extension of enlistments.** *See* EXTENSION OF ENLISTMENTS; MARINE CORPS, 96.
33. **"Field duties"**—The paramount duties of the Marine Corps are "field duties." File 28687-14, J. A. G., Dec. 14, 1916, p. 3.
34. **Floating battalion**—Jurisdiction. *See* JURISDICTION, 75, 76.
35. **General courts-martial**—Convening of by brigade commanders. *See* CONVENING AUTHORITY, 27.
36. **General officers**—Number authorized by Act, Aug. 29, 1916 (39 Stat., 609). File 28687-1.
37. **Good conduct medals**—Extension of enlistments. File 3980-1255. *See also* GOOD CONDUCT MEDALS.
38. **Grades, overfilling of.** *See* MARINE CORPS, 66.
39. **Guard duty.** *See* MANSLAUGHTER, 9.
40. **Headquarters**—Status of. *See* MARINE CORPS, 12.
41. **Increase of officers**—May not be obtained by implication. *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 47.
42. **Jurisdiction**—By Army summary court over Marines traveling on Army transports. *See* ARMY, 7.
43. **Same**—Marines serving with Army. *See* MARINES SERVING WITH ARMY.
44. **Same**—Marine battalion afloat. *See* JURISDICTION, 75, 76.
45. **Same**—Marines on naval transports. *See* JURISDICTION, 75, 76.
46. **Mail clerks, Navy**—Detail of from Marine Corps. File 26254-1961, J. A. G., Feb. 12, 1916. *See also* MAIL CLERKS.

Digitized by Google

47. **Major General Commandant**—The retirement of a Commandant of the Marine Corps creates a vacancy in that office which can be filled only by appointment of an officer of the Marine Corps on the active list, by and with the advice and consent of the Senate, or under an *ad interim* commission. A retired officer can not be detailed to perform the duties nor can an officer on he active list be detailed to temporarily perform the duties of commandant, but can sign orders and correspondence "By direction of the Secretary of the Navy." 15 J. A. G. 25, Nov. 15, 1910. *See also* File 27231-23:1; Op. Atty. Gen., Nov. 30, 1910; MARINE CORPS, 50.

48. **Same**—As the tenure of office of the Commandant of the Marine Corps terminates upon retirement of the incumbent (Act July 1, 1902, 32 Stat. 686) that officer could not be ordered to active duty as Commandant after he is retired, since the office can only be filled by the appointment of an officer on the active list. (Act May 13, 1908, 35 Stat. 155).

No provision is made by law for the *temporary* appointment of a Commandant of the Marine Corps.

But the office could remain vacant until the President was ready to appoint an eligible officer therefor, by and with the advice and consent of the Senate. 15 J. A. G. 28, Dec. 1, 1910. *See also* MARINE CORPS, 50.

49. **Same**—The Act of Dec. 19, 1913 (38 Stat., 241) designates the officer holding the office of Commandant of the Marine Corps as "Commandant of the Marine Corps;" (File 3980-1075, J. A. G., Apr. 5, 1915) but the Act of Aug. 29, 1916 (39 Stat., 609) designates him as "Major General Commandant."

The proper designation of the Major General Commandant in official correspondence is "The Major General Commandant, Marine Corps." File 20400-68, Sec. Navy Sept. 6, 1916. *See also* DESIGNATIONS.

50. **Same**—Act of Dec. 19, 1913 (38 Stat., 241) provides that when a vacancy shall exist in the position of Commandant of the Marine Corps the President may appoint to such position, by and with the advice of the Senate, an officer of the Marine Corps on the active list not below the grade of field officer, who shall hold office as such Commandant for a term of four years, unless sooner relieved, and who, while so serving shall have the rank, pay, and allowances of a major general in the Army; and any officer appointed under the provisions of this Act who shall be retired from the position of Commandant of the Marine Corps, in accordance with the provisions of sections 1251, 1622, and 1623, Revised Statutes of the United States, or by reason of age or length of service, shall have the rank and retired pay of a major general; if retired for any other reason, he shall be placed on the retired list of officers of the grade to which he belonged at the time of his retirement: *Provided*, That an officer serving as Commandant shall be carried as an additional number in his grade while so serving, and after his return to duty in his grade until said grade is reduced to the number authorized by law: *Provided further*, That nothing herein contained shall operate to increase or reduce the total number of officers in the Marine Corps now provided by law. *See* File 26255-300, J. A. G., Dec. 22, 1913. The Act of Aug. 29, 1916 (39 Stat. 609), amends the above law by providing that appointments hereafter made to the position of Major General Commandant under the provisions of the Act of Dec. 19, 1913 (38 Stat. 241), shall be made from officers of the active list of the Marine Corps not below the rank of colonel. *See* File 26521-148, J. A. G., Aug. 18, 1916; 26521-148; for promotion of officer while detailed as Major General Commandant. *See* PROMOTION, 83.

51. **Marine examining boards.** *See* MARINE EXAMINING BOARDS.

52. **Marines serving with Army.** *See* MARINES SERVING WITH ARMY.

53. **"Marine summary court-martial"**—There is no tribunal known to the law as a marine court-martial. Circular Sec. Navy, July 5, 1877. *See also* COURT, 114.

54. **Midshipmen**—Appointment of midshipmen to Marine Corps as second lieutenants. File 13261-486, Sec. Navy, June 8, 1916. *See also* the Act of August 29, 1916 (39 Stat. 611) which provides that no midshipman at the United States Naval Academy or cadet at the United States Military Academy who fails to graduate therefrom shall be eligible for appointment as a commissioned officer in the Marine Corps until after the graduation of the class of which he was a member. *See also* MIDSHIPMEN, 43, 83.

55. **Same**—Enlisted men of the Marine Corps may be appointed. *See* MARINE CORPS, 88; MIDSHIPMEN, 52.

56. **Mounted marine officers.** *See* ALLOWANCES, 12.

57. **Naval Academy**—Enlisted men of the Marine Corps may be appointed to. *See* MARINE CORPS, 88; MIDSHIPMEN, 52.

58. **Same**—The Act of July 9, 1913 (38 Stat. 103), "makes the Naval Academy in effect a training school for the Marine Corps as fully as for the Navy proper." File 5252-66, J. A. G., May 12, 1915.

Digitized by Google

59. **Naval Reserves**—Service in Marine Corps may be included in. *See* NAVAL RESERVE, 1.
60. **Officers**—Midshipmen eligible as. *See* MIDSHIPMEN, 53, 55, 66.
61. **Same**—Appointments may be made from civil life. *See* APPOINTMENTS, 20.
62. **Same**—Enlisted men of the Navy, as well as noncommissioned officers, may be appointed as second lieutenants. *See* APPOINTMENTS, 22.
63. **Same**—Rank and precedence. *See* PRECEDENCE, 14–18.
64. **Same**—Resigned midshipman's status. *See* MARINE CORPS, 54.
65. **Same**—Request rearrangement of positions on Navy list. *See* File 6817-02; 11130-34, Sept. 2, 1916. *See also* File 1957-03, Sec. Navy, Feb. 27, 1903; 8171-03, J. A. G., Oct. 13, 1903; 7151-03, J. A. G., 1903; MARINE CORPS, 73; COMMISSIONS, 14–18.
66. **Overfilling grades**—The Secretary of the Navy declined to recommend the appointment of an additional second lieutenant in the Marine Corps while said grade contained the full number allowed by law, although informed by the Major General Commandant, Dec. 20, 1913 (File 372), that the resignation of a first lieutenant had been accepted to take effect Jan. 1, 1914, which would cause a vacancy "in the commissioned personnel of the Marine Corps;" at the same time the Major General Commandant was directed to present the matter again to the department "when a vacancy occurs in the grade of second lieutenant." (File 13261-486, Sec. Navy, June 3, 1916, quoting File 942-310, Bu. Nav., Sec. Navy, Dec. 29, 1913, with approval.) From the above it will be seen that where the number of officers allowed in a given grade, as in the case of a second lieutenant, is fixed by law, this is a provision of statute which is binding upon the department, and not a rule of the department which may be waived. Accordingly the department is without power to authorize the appointment of officers in the grade of second lieutenant in excess of the number fixed by law, even though the result would over-fill said grade "at most only for a period of a few days." File 13261-486, Sec. Navy, June 8, 1916. *See also* PROMOTION, 109.
67. **Pay clerks.** *See* PAYMASTERS' CLERKS, MARINE CORPS.
68. **Porto Rico**—A citizen of Porto Rico is not eligible for appointment as a second lieutenant in the Marine Corps. File 6730-04. *See also* Downes *v.* Bidwell, 182 U. S. 244; CITIZENSHIP, 31; PORTO RICO, 4.
69. **Precedence**—When Marines are landed with bluejackets. *See* MARINE CORPS, 81.
Precedence between officers of Navy and Marine Corps. *See* PRECEDENCE, 16–18.
70. **"Primary" relation**—Finally settled to be with Navy. *See* MARINES SERVING WITH ARMY, 7.
71. **Probationary second lieutenants**—The law (act of Aug. 29, 1916, 39 Stat. 610) does not contemplate the issuance of probationary appointments to former officers of the Marine Corps reinstated as second lieutenants, after successfully passing the required examinations, and the purpose of Congress to this effect is manifested by the difference in the nature of the examinations prescribed for former officers as compared with those of original appointees. File 13261-544:1, J. A. G., Oct. 10, 1916. *See* Stirling *v.* U. S. (48 Ct. Cls., 386) as to difference between "original appointment" and "reinstatement."

The second lieutenants in question will undoubtedly be commissioned officers in the Marine Corps, the same as any other second lieutenant in said corps, with the exception that they must serve the probationary period mentioned in the law, and the Secretary of the Navy is authorized to revoke their appointments at any time during said probationary period. The Secretary of the Navy is the administrative officer specifically designated in the law as the authority by whom the appointments may be revoked. File 26521-152, J. A. G., Sept. 22, 1916.

These second lieutenants are, when appointed, to be commissioned officers in the Marine Corps; the Secretary of the Navy may legally sign their commissions; but "it is proper" that the commissions should declare the act to be the act of the President performed by the Secretary of the Navy as his representative; it would also appear proper that the commissions further declare that they are for the probationary period of two years. File 26521-152, J. A. G., Sept. 22, 1916.
72. **Promotion of officers.** *See* PROMOTION.
73. **Rearrangement of officers appointed from civil life**—"No rearrangement will be made of the officers heretofore appointed to the Marine Corps from civil life." (File 1957-03, Sec. Navy, Feb. 27, 1903. *See also* File 7794-02; Marine Corps file 4043-1902; 6817-02; 1957-03.) File 11130-34, Sec. Navy, Sept. 20, 1916. *See also* COMMISSIONS, 14–18; MARINE CORPS, 65; File 11130-35, Sec. Navy, Dec. 20, 1916.
74. **Recruiting**—Comments upon proposed change in system of recruiting. File 7657-94, Sec. Navy, Dec. 31, 1910; 7657-103, J. A. G., Apr. 25, 1911; 7657-103:1, J. A. G., June 23, 1911; 7657-103:2, J. A. G., July 18, 1911.
75. **Recruiting officer**—Tried by general court-martial. C. M. O. 19, 1915.

Digitized by Google

76. **Reserve.** *See* MARINE CORPS, 88; MARINE CORPS RESERVE, 1, 2.
77. **Retired officers**—Active duty. *See* MARINE CORPS, 91; RETIRED OFFICERS, 1, 2, 45.
78. **Same**—Request to change date of commission. *See* COMMISSIONS, 17.
79. **Retirement of officers.** *See* RETIREMENT OF OFFICERS, 35, 36.
80. **Retiring Boards.** *See* MARINE RETIRING BOARDS.
81. **Right of line**—"When companies of seamen and marines are united for battalion drill, or infantry service afloat or ashore, the marine company will take the right of the line. "The companies of seamen shall be formed in the order of rank of the company officers according to the authorized tactics." Circular, Sec. Navy, Aug. 9, 1876.
82. **Senior officer present**—Action on records of summary courts-martial. *See* SENIOR OFFICER PRESENT; SUMMARY COURTS-MARTIAL, 22, 38.
83. **Sentences of officers**—Approved by the Secretary of the Navy in accordance with the recommendation of the Major General Commandant. C. M. O. 24, 1914, 24; 14, 1915, 2; 1915, 2.
84. **Ships**—Removal of Marines from. *See* File 27109, Nov. 6, 1908; 27 Op. Atty. Gen. 259; REGULATIONS, NAVY, 3.
85. **Staff officers**—Officers of the staff departments of the Marine Corps are not, either from the inherent nature of their duties, nor by training, presumably qualified to pass an examination "confined to problems involving the higher functions of staff duties and command." File 26521-144:1, Sec. Navy, July 10, 1916, p. 4. *See also* PROMOTION, 180, 181.
86. **Status of**—In Wilkes *v.* Dinsman (7 How. 88) in 1849 it was decided that marines were included in the denomination of "persons enlisted for the Navy," as used in the act of March 2, 1837, now embodied in section 1422 of the Revised Statutes, and amendments thereto, concerning the detention of enlisted men after expiration of enlistment, or their reenlistment abroad to serve until their return to the United States. In its opinion the Supreme Court said:

"This new law, to be sure, speaks in its title of the 'enlistment of seamen;' but in the body of it provision is made as to the 'service of any person enlisted for the Navy, * * * though marines are not, in some senses, 'seamen,' and their duties are in some respects different, yet they are, while employed on board public vessels, persons in the naval service, persons subject to the orders of naval officers, persons under the government of the naval code as to punishment, and persons amenable to the Navy Department. Their very name of 'marines' indicates the place and nature of their duties generally. And, beside the analogies of their duties in other countries, their first creation here to serve on board ships expressly declared them to be a part 'of the crew of each of said ships.'" File 26280-61, Sec. Navy, July 10, 1915; 5252-66, J. A. G., May 13, 1915; 26521-148, J. A. G., Aug. 29, 1916, p. 2.

It was decided by the Supreme Court in U. S. *v.* Dunn (120 U. S. 252) in 1887 that service as an enlisted man of the Marine Corps was service as an enlisted man of the Navy within the meaning of the law then under consideration, the court stating in its opinion:

"It must be conceded that the Marine Corps, a military body in the regular service of the United States, occupies something of an anomalous position, and is often spoken of in statutes which enumerate 'the Army, the Navy and the Marine Corps,' or 'the Army and the Marine Corps,' or 'the Navy and the Marine Corps,' in a manner calculated and intended to point out that it is not identical with either the Army or the Navy. And this argument is the one very much pressed to show that service in the Marine Corps is not service in the Army or in the Navy. On the other hand, the services rendered by that corps are always of a military character, and are rendered as a part of the duties to be performed by either the Army of the Navy. * * *

"It seems to us that these provisions of the Revised Statutes, bringing together the enactments of Congress on the subject of the Marine Corps, show that the primary position of that body in the military service is that of a part of the Navy, and its chief control is placed under the Secretary of the Navy, there being exceptions, when it may, by order of the President, or some one having proper authority, be placed more immediately, for temporary duty, with the Army and under the command of the superior army officers." File 262:0-61, Sec. Navy, July 10, 1915; 5252-66, J. A. G., May 13, 1915, 26521-148, J. A. G., Aug. 29, 1916, p. 2.

87. **Same**—The law embodied in section 1621 of the Revised Statutes was cited by the Supreme Court in the case of Wilkes *v.* Dinsman (7 How. 88) as an additional reason for holding that enlisted men of the Marine Corps might be employed on active duty after expiration of enlistment under laws relating to enlisted men of the Navy. In its opinion the court expressly stated that "the term 'the better government of the

Digitized by Google

Navy.'" as used in the law as it then read, "need not be restricted to mere punishment, or to courts-martial."

In the case of U. S. *v.* Dunn (120 U. S. 252). the Supreme Court, in discussing its former opinion in the Wilkes case, stated with reference to that opinion: "And referring to the act of June 30, 1834, the provision of which is found in section 1621 of the Revised Statutes, * * * the opinion says that this strengthens the conclusion of the court, and that the corps thus in some respects became still more closely identified with the Navy."

Referring to the Dunn case, the Attorney General stated in an opinion to the Secretary of War: "The Supreme Court thus states what Revised Statutes, section 1621, makes altogether clear, that the Marine Corps is a part of the Naval Establishment and is subject to the laws and regulations for the government of the Navy, save in the single case when it has been 'detached for service with the Army by order of the President.' * * * The statute leaves no room for doubt. The Marine Corps is stated to be 'at all times' subject to the laws and regulations established for the government of the Navy, except when detached for service with the Army by order of the President. Nothing but such order by the President, or by his authority, can alter the ordinary connection of the Marine Corps with the Navy and connect that corps with the Army." (28 Op. Atty. Gen. 19, followed, 28 Op. Atty. Gen. 490.)

"In many cases statutes relating to the Navy are obviously inapplicable to the Marine Corps, either because of express language used therein or because of the manifest purpose of Congress as apparent from a reading of the law itself or from a consideration of the conditions and circumstances surrounding its enactment. The word 'Navy' may be given an extended meaning to embrace the Marine Corps, as has been done in many cases, while on the other hand, the facts of a particular case may be such as to show that it was used in a more restricted sense as referring to the Navy proper, as has likewise been held in many cases. Accordingly, each statute must be construed with reference to specific questions arising thereunder; and the word 'Navy' thus being susceptible of two interpretations, it is always permissible to consider the purpose and the spirit of the law and the object which it was intended to accomplish, as indicated not only by the language used in the statute but by other recognized aids to interpretation." (File 5252-66, J. A. G., May 13, 1915.) File 26280-61, Sec. Navy, July 10. 1915.

Section 1621 of the Revised Statutes "does not mean that the Marine Corps shall be subject to *every* law that relates to the Navy—but only to such laws as expressly or by reasonable implication include the Marine Corps within their terms, and more especially to the Articles for the (better) Government of the Navy." File 3980-575:17, J. A. G., Aug. 19, 1911, p. 10.

88. **Same**—In the Judge Advocate General's opinion above quoted, the conclusion was that the law then under consideration, relating to appointments to the Naval Academy from "enlisted men of the Navy," authorized such appointments to be made from enlisted men of the Marine Corps. On the other hand, one month later, it was held by the Judge Advocate General that the law creating a naval reserve did not authorize the creation of a Marine Corps reserve, for the reason that several provisions contained in said legislation clearly manifested that Congress did not intend to include the Marine Corps therein; and that this case was within the principles announced by the Attorney General in an opinion holding that a law providing for deposit of savings by enlisted men of the Navy did not authorize such deposits by enlisted men of the Marine Corps (file 28550-1:3, June 15. 1915, citing 19 Op. Atty. Gen., 616).

So, also, the Supreme Court in Wilkes *v.* Dinsman (7 How. 88), after showing by forcible argument that enlisted men of the Marine Corps were embraced by the law authorizing reenlistment of persons "enlisted for the Navy," added:

"The reason of the law on such occasions for reenlistment applies with as much force to them as to ordinary seamen, because, when serving on board public vessels where the first term seems likely to expire before the cruise ends, their services may, under the public necessities, be equally needed with those of the seamen till the cruise ends; and hence all of them may rightfully reenlist for the cruise, at any time, in anticipation of this."

Under the decisions of the Supreme Court, Court of Claims, etc., there is nothing strained in holding that the term "any naval officer in the act of August 2, 1912 (37 Stat. 329), embraces a marine officer, who is an officer in the naval service," attached to a corps which is a "constituent," or "component" part of the Navy. File 26280-61.

89. **Same**—"Notwithstanding this intermediate character of the Marine Corps, and these several provisions allying it in several respects with the military service, I am satisfied

Digitized by Google

that it is properly classed with, and is a part of, the naval service of the United States. The question was discussed and so determined by the Attorney General in 1820. (*See* 1 Op. Attys. Genl. 381) and this opinion has been since repeatedly followed. Op. Attys. Gen. vol. 11, p. 100; vol. 10, pp. 118. 129; In re Bailey, 2 Taney, 200.

"In various acts of Congress making appropriations, the marines are frequently referred to as a part of the naval service, and are sometimes described as 'marines of the United States Navy'. See 10 St. at Large, p. 100, c. 109, sec. 1; 22 St. at Large, c. 97, pp. 472, 479; c. 141, p. 589; c. 391, p. 284." (In re Doyle (18 Fed. Rep. 369) (1883.))

In 1904 the Doyle case was approved and followed by the Court of Appeals of the District of Columb.a in the case of Elliott *v.* Norris (24 App. D. C., 11). In this case the decisions of the Supreme Court of the United States and the statutes relating to the Marine Corps were reviewed and the conclusion of the court stated as follows:

"These provisions. together with many others that might be cited, indicate beyond doubt that the Marine Corps, in the contemplation of Congress, constitutes a constituent part of the naval service of the country, subject to the laws and regulations that govern that arm of the service. And this, we think, has been so held by the Supreme Court of the United States." File 26280-61, Sec. Navy, July 10, 1915; 5252-66 J. A. G., May 13, 1915; 26521-148, J. A. G., Aug. 29, 1916, p. 3.

90. **Same**—"The Marine Corps is a part of the Naval Establishment and is subject to the laws and regulations for the government of the Navy, save in the single instance when it has been 'detached for service with the Army by order of the President.'" (28 Op. Atty. Gen. 15; *see also*, 28 Op. Atty. Gen., 490.)

"The Marine Corps is a component part of the Navy, and its members, when on board ships of the Navy, perform many of the same duties required of seamen of the Navy, such as those of great gun crews, boat drill, and, on occasion, signalmen, fire control," etc. (21 Comp. Dec. 700; *see also* 3 Comp. Dec. 659.) *See* File 26280-61, Sec. Navy, July 10, 1915; 5252-66, J. A. G., May 13, 1915; 26521-148, J. A. G., Aug. 29. 1916, pp. 3, 4; 28550-1:2.

91. **Same**—The latest judicial decision bearing on the question whether or not the words "naval service" embraces the Marine Corps is the case of Jonas *v.* U. S. (50 Ct. Cls. 281), in which it was held that retired officers of the Marine Corps are embraced by the words "any naval officer on the retired list" appearing in the act of August 22, 1912 (37 Stat. 329), with reference to the detail of retired officers to active duty.

The act of June 7, 1900 (31 Stat. 703), which authorized the Secretary of the Navy to assign to active duty "any naval officer on the retired list" included retired officers of the Marine Corps. The act cited was reenacted with some modification in the act of August 22, 1912 (37 Stat. 329), the latter act also applying in terms to "any naval officer on the retired list." It was held by the Comptroller of the Treasury, contrary to the decision of the Navy Department, that retired officers of the Marine Corps were not embraced by the terms of said act of August 22, 1912 (37 Stat. 329). The question was taken to the Court of Claims by a retired Marine officer and was decided by said court in accordance with the decision of the Navy Department, May 10, 1915, the Court of Claims after reciting various statutes on the subject saying:

"A perusal of the above statutes will indicate the somewhat anomalous position occupied by the Marine Corps in the military service. It looks to the Army statutes for its rate of pay and to the Navy for its laws and regulations except where detached for service with the Army, and the same uncertainty as to its position runs all through the statutes relating to the Army and Navy. Notwithstanding this fact, in the construction of these statutes we must keep in mind the further and perhaps superior fact that generally speaking, and as its name indicates, the *Marine Corps is a part of the Navy.* It is that part of the Navy which may upon occasion become a part of the Army. The courts have kept this fact in mind in the construction of other statutes relating to the military service." File 27231-47, J. A. G., May 31, 1912, cited with approval in File 5252-66, J. A. G., May 13, 1915, and File 26521-148, J. A. G., August 29, 1916.

92. **Same**—The Marine Corps, when not detached for service with the Army, is a part of the naval service (Wilkes *v.* Dinsman, 7 How., 89; U. S. *v.* Dunn, 120 U. S., 249). C. M. O. 1, 1911, 6.

The Secretary of the Navy stated March 31, 1906, in referring to the contention that the Marine Corps is an "anomalous body intermediate between the Army and the Navy": "For this impression there is, properly speaking, no warrant in law. * * * Its legal status is, beyond all doubt or question, a part of the naval forces of the country, if not a part of the Navy in the strictest sense." 14 Sol. 25, May 27, 1908.

Digitized by Google

93. **Same**—"Inasmuch as only detachments of the Marine Corps have ever been or will in any likelihood ever be separated and sent out on service with the Army, and as such separation occurs but seldom, and as the main body of the corps embracing the headquarters and the majority of the personnel—in fact the essence of the corps, the organization itself—would remain in its normal condition; and as the service of such detached parts with the Army would be merely temporary, operating to suspend only and not to terminate their original status to which they would soon return, it is evident that the Marine Corps, in its official character and mode of existence, partakes essentially and permanently of the Navy rather than of the Army—in other words, that it is in reality a branch of the Navy. Consequently, if there be any doubt as to the applicability of the law or a lack of law affecting this corps, the interpretation of the law or the prescribing of regulations in the premises, as the case might require, would, it seems, naturally be viewed as, to all intents and purposes, a naval question." 13 J. A. G. 462–463, Aug. 18, 1905. *See also* File 28550–1:2; 4792–04, J. A. G.; 21277 (J. A. G. No. 5530); 27231–10, J. A. G., Feb. 9, 1910; 6770–12, May 8, 1912; 27231–47 J. A. G., May 31, 1912; 26280–61, July 10, 1915; 5252–66, J. A. G., May 13, 1915; 5460–81, J. A. G., May 12, 1916; 13261–486, Sec. Navy, June 8, 1916.
94. **Same**—The trend of recent legislation and departmental regulations has been in the direction of fixing the status of the Marine Corps definitely as an integral part of the naval service. Thus, in the act of June 30, 1914 (38 Stat. 403), the following provision appears: "That hereafter the number of men of the Navy and Marine Corps provided for shall be construed to mean the daily average number of enlisted men *in the naval service* during the fiscal year." (*See* MARINE CORPS, 96, 97.) The new form of sentence for general court-martial prescribed in Navy Regulations, 1913, R–816 (4), provides for dishonorable discharge of marines from the "naval service" instead of from the "Marine Corps" as before. File 5252–66, J. A. G., May 13, 1915, p. 5.
95. **Same**—As marine officers perform their duties in connection with the Navy, at sea or on shore, and under the orders of the Secretary of the Navy, except when detached by the President for service with the Army, there is not only every reason to regard marine officers as embraced by the purpose of the act of August 22, 1912 (37 Stat. 329) but it would be difficult to suggest any reason why Congress should have intended to exclude them from the terms of that act, thus making an exception with reference to a very small number of the retired officers in the naval service, without any apparent motive for the distinction. File 26280–61. *See also* MARINE CORPS, 91.
96. **Same**—Enlisted men of the Marine Corps may be allowed to extend their enlistments in accordance with the act of August 22, 1912 (37 Stat. 331), which in terms applied to "any enlisted man in the Navy." File 26507–214:8, J. A. G., April 5, 1915, quoted with approval in File 5252–66, J. A. G., May 13, 1915, p. 5.
97. **Same**—The word "Navy" may be given an extended meaning to embrace the Marine Corps, as has been done in many cases, while on the other hand the facts of a particular case may be such as to show that it was used in a more restricted sense as referring to the Navy proper, as has likewise been held in many cases. (File 5252–66, J. A. G., May 13, 1915.) File 5460–81, J. A. G., May 12, 1916.
98. **Same**—Abstract of retirement laws showing difference between the laws relating to retirement of officers of the Army, Navy, and Marine Corps. File 27231–10, J. A. G., Feb. 9, 1910.
99. **Same**—When detached for service with Army. *See* MARINES SERVING WITH ARMY.
100. **Strength of**—The number of enlisted men in the Marine Corps is limited by law. File 26524–263:2, Sec. Navy, July 17, 1916. By the Act of August 29, 1916 (39 Stat. 612), the enlisted strength was increased to 14,981. File 26521–148, Sec. Navy, Sept. 1916. *See also* MARINE CORPS, 94; Navy Dept. G. O. 241, Oct. 23, 1916, p. 2.
101. **Same**—The maximum strength of the Marine Corps, when its full quota is available for duty, is not now sufficient for the duties required at the various posts and stations. File 26524–263:2, Sec. Navy, July 17, 1916. *See also* MARINE CORPS, 94, 100.
102. **Same**—Method of computing number of commissioned officers in the various grades and ranks authorized for the Marine Corps by the Act of August 29, 1916 (39 Stat. 610). File 26521–148, J. A. G., Aug. 29, 1916.
103. **Summary courts-martial**—Convening of. *See* SUMMARY COURTS-MARTIAL, 22.
104. **Same**—Action of senior officer present. *See* SENIOR OFFICER PRESENT.

MARINE CORPS RESERVE.

1. **Act of March 3, 1915 (38 Stat. 940)**—Establishing a Naval Reserve did not authorize the establishment of a Marine Corps Reserve. File 5460–81, J. A. G., May 12, 1916. *See also* MARINE CORPS, 88; NAVAL RESERVE, 1.
2. **Act of August 29, 1916 (39 Stat. 593)**—Established a Marine Corps Reserve.

Digitized by Google

MARINE DIVISIONS OF ORGANIZED MILITIA.

1. **Naval Militia act of February 16, 1914 (38 Stat. 283)**—Applies to. *See* NAVAL MILITIA, 19.

MARINE DIVISIONS OF THE NAVAL MILITIA.

1. **Naval Militia act of February 16, 1914 (38 Stat. 283)**—Applies to. *See* NAVAL MILITIA, 19.

MARINE EXAMINING BOARDS. *See also* NAVAL EXAMINING BOARDS; PROMOTION.

1. **Acting Assistant Surgeons**—Not eligible as members. *See* ACTING ASSISTANT SURGEONS, 4.
2. **Approved but officer admonished**—In a case where an officer had unfavorable matters on his record, including disrespect and insubordination in his manner toward his commanding officer, the department stated that although approving the finding of the board that the candidate was qualified "it does not, in any way condone the offenses. * * * You are hereby admonished to exercise due diligence that there be no repetition of such serious offenses during your service" in the future. File 26260-3629, Sec. Navy, Aug. 24, 1916.

   Civil courts—Where a complaint of nonsupport has been made against an officer who has instituted divorce proceedings against the complainant, and pending the result of such suit the officer became a candidate for promotion the department stated in a letter to the Marine Examining Board, after quoting C. M. O. 13, 1916, pp. 6-7: The board has the duty devolved upon it of making a thorough investigation into the matters which are the subject of the correspondence referred to, examining witnesses with reference thereto if necessary, and of determining as the result of such investigation, together with any other matters of an unfavorable character which may be upon the candidate's record, whether or not the candidate is morally qualified for promotion; and is not authorized to delay its proceedings pending a determination of litigation in the civil courts involving the relations between this candidate and his wife. It is possible that a final adjudication upon the merits of the controversy may never be reached in the civil proceedings, and even it it were, this would not relieve the board of its duty to make an independent investigation of the matters at issue, in so far as they may affect the moral fitness of the candidate for promotion in the Marine Corps. File 26260-3628:1, J. A. G., Aug. 25, 1916.
3. **Constitution of**—Marine Examining Boards shall in all cases consist of not less than five officers, three of whom shall, if practicable, be officers of the Marine Corps, senior to the officer to be examined, and two of whom shall be medical officers of the Navy. When not practicable to detail officers of the Marine Corps as members of such examining boards, officers of the line of the Navy shall be so detailed. (Act, July 28, 1892, 27 Stat. 321). File 28027-17, J. A. G., April 25, 1911.
4. **Same**—Line officers of the Navy may serve as members of a Marine Examining Board if the Marine officers senior to the candidate are not available. File 26260-1368, June 1, 1911.
5. **Same**—Acting Assistant Surgeons are not eligible for duty as members of a Marine Examining Board. *See* ACTING ASSISTANT SURGEONS, 4.
6. **Same**—A naval officer may be detailed for duty upon a Marine Examining Board, although not upon a Marine Retiring Board. File 28027-17, J. A. G., Apr. 25, 1911. *See also* MARINE RETIRING BOARDS, 2.
7. **Same**—It is a fatal defect for a member of a Marine Examining Board to be junior to the candidate. *See* MARINE EXAMINING BOARDS, 16; PROMOTION.
8. **Divorce.** *See* MARINE EXAMINING BOARDS, 3.
9. **Domestic trouble.** *See* MARINE EXAMINING BOARDS, 3.
10. **Junior**—Member junior to candidate. *See* MARINE EXAMINING BOARDS, 8, 16.
11. **Legal questions**—Navy Regulations, 1913, R-334 (11) provides that "any question of law arising before the board, and any communication relative to its proceedings, shall be submitted to the Judge Advocate General of the Navy." This article is applicable to Marine Examining Boards (Naval Instructions, 1913, I-3664). File 26260-3628:1, J. A. G., Aug. 25, 1916.
12. **Members, absence of**—A member was "temporarily and unavoidably absent on duty," but "as a quorum was present the board" proceeded. During a later stage of the proceedings this member reported; the candidatewas given an opportunity to object and the member was sworn. Department approved without comment. File 26260-281. (Board convened Oct. 2, 1908, and received in department Nov. 12, 1908. *See also* File 26260-2407.) To avoid any possible adverse action by the department this should not be followed as a precedent.

Digitized by Google

14. **Moral examination of candidate**—The attention of a certain Marine Examining Board was invited to Naval Instructions, 1913, I–3673, concerning the moral examination of candidates for promotion in the Marine Corps, and to Navy Regulations, 1913, R–334 (10), which contains general instructions concerning the duty of each member of the board with reference to determining the moral fitness of candidates for promotion in the naval service, with which instructions Marine Examining Boards are required to acquaint themselves by Naval Instructions, 1913, I–3664. File 2660–3628:1, J. A. G., Aug. 25, 1916.
15. **Navy Regulations, 1913, R–334(11)**—Applies to Marine Examining Boards. *See* MARINE EXAMINING BOARDS, 12.
16. **Rank of**—Record of proceedings of a Marine Examining Board are fatally defective if one of the members is junior to candidate. File 26260–1368, June 1, 1911. *But see* File 26260–1512, Sec. Navy, Oct. 12, 1911; PROMOTION.
17. **Records**—The department desires that the records of the proceedings of the examining board which conducted the last examination of candidates for appointment as second lieutenants, U. S. Marine Corps, be forwarded to the Judge Advocate General of the Navy, to be recorded and filed. File 13261–414:5, Sec. Navy, March 22, 1913.
18. **Resolving**—Itself into a Marine Retiring Board. *See* MARINE RETIRING BOARDS, 3.
19. **Witnesses.** *See* NAVAL EXAMINING BOARDS, 25, 26.

MARINE LEAGUE.

1. **Naval Militia**—Service of Naval Militia outside of the "three-mile limit." *See* NAVAL MILITIA, 20.
2. **Target practice**—Within marine league of a foreign state. *See* TARGET PRACTICE.

MARINE RETIRING BOARDS.

1. **Constitution of**—In case of an officer of the Marine Corps, the retiring board shall be selected by the Secretary of the Navy, under the direction of the President. Two-fifths of the board shall be selected from the Medical Corps, of the Navy and the remainder shall be selected from officers of Marine Corps, senior in rank, so far as may be, to the officer whose disability is to be inquired of. (Sec. 1623, R. S.)

   A retiring board shall consist "of not more than nine nor less than five officers, two-fifths of whom shall be selected from the Medical Corps." (Sec. 1246, R. S.) File 28027–17, J. A. G., April 25, 1911.
2. **Same**—Although naval officers may be detailed on Marine Examining Boards, there is not authority to appoint such officers on a Marine Retiring Board. Except the medical members of a Marine Retiring Board, all members shall be selected from officers of the Marine Corps, and, while it is discretionary with the convening authority to appoint members junior to the officer before the board, yet they should be "senior in rank as far as may be." File 28027–17, J. A. G., April 25, 1911. *See also* MARINE EXAMINING BOARDS, 7.
3. **Marine Examining Board**—Resolved into a Marine Retiring Board. *See* File 26260–3237. *See also* PROMOTION, 27, 85, 86, 165.
4. **Rank of.** *See* MARINE RETIRING BOARDS, 1, 2.

MARINES SERVING WITH ARMY.

1. **First Brigade**—Detached for service with the Army—

   224

   "FLAG OFFICER, 'ARKANSAS,' "APRIL 27, 1914.

   "Vera Cruz, Mexico.

   "Pursuant to order of the President of the United States, the First Brigade of Marines is hereby detached from duty with the U. S. Atlantic Fleet and detailed for service with the U. S. Army.

   "You will issue the necessary orders to the brigade commander and direct him to report, with the brigade under his command, to the officer in command, U. S. Army, forces at Vera Cruz, Mexico.

   "While thus detached for service with the Army, the marines so serving will be governed by the provisions of section 1621, Revised Statutes.

   "The First Brigade includes all officers and enlisted men of the Marine Corps now at Vera Cruz, except those forming parts of regular complement of ships. Those marines now en route to Vera Cruz will join the First Brigade.

   "DANIELS."

   See File 26251–9965.
2. **Jurisdiction**—An enlisted man of the Marine Corps is not amenable to trial by a naval court-martial for an offense alleged to have been committed by him while the organization of which he is a member was detached for service with the Army by order of

Digitized by Google

the President. Accordingly, *held*, that when a marine was brought to trial by a naval court-martial under the above circumstances, and at the outset of the trial pleaded to the jurisdiction of the court, such plea should have been sustained. File 26251-9965:3, J. A. G., Mar. 24, 1915; C. M. O. 31, 1915, 6. *See* MARINES SERVING WITH ARMY, 3, for converse. *See* ARMY, 7, for jurisdiction of Army.

3. **Same**—The records of the department show that members of the First Brigade of Marines were tried by naval courts-martial after detachment of said brigade for service with the Army for offenses committed before they reported to the commanding officer of the Army for duty. The order detaching the First Brigade for service with the Army was issued by the Secretary of the Navy April 27, 1914, and pursuant thereto, on May 1, 1914, the commanding officer of said brigade reported to the officer in command of the United States Army forces at Vera Cruz. After the latter date, three men were tried, one on May 16, 1914, and two on May 22, 1914 (*see* G. C. M. Rec. No. 28775; 28782; 28783). File 26251-9965. *See* MARINES SERVING WITH ARMY, 2, for converse.

If a marine serving with Army is placed under arrest upon a charge while still serving with the Army, then such action is taken by officers of the Marine Brigade in their capacity as subordinates of the War Department, Army jurisdiction thereby attaches, and can not be divested by any subsequent change in the status of the accused. He would accordingly still be amenable to Army jurisdiction for all purposes of trial and punishment upon said charge. (*See* Carter *v.* McClaughry, 183 U. S. 365; Barrett *v.* Hopkins, 7 Fed. Rep. 312.) File 26251-9965.

4. **Medical department**—Officers and enlisted men of the Medical Department of the Navy, serving with a body of marines detached for service with the Army in accordance with the provisions of section sixteen hundred and twenty-one of the Revised Statutes, shall, while so serving, be subject to the rules and articles of war prescribed for the government of the Army in the same manner as the officers and men of the Marine Corps while so serving. (Act of August 29, 1916, 39 Stat. 573.)

5. **Previous convictions**—While detached for service with Army. *See* PREVIOUS CONVICTIONS, 3.

6. **Sentence imposed by Army court-martial**—Mitigated by President after return of accused to naval jurisdiction—A private of the U. S. Marine Corps, while serving with the Army at Vera Cruz, Mexico, was tried by an Army general court-martial and sentenced "to be dishonorably discharged from the service of the United States, forfeiting all pay and allowances due him, and to be confined at hard labor at such place as the reviewing authority may direct, for one (1) year."

The foregoing sentence was approved by the convening authority July 3, 1914, but the period of confinement was reduced to hard labor for six months and the forfeiture of pay reduced to $10 a month for the same period. As thus mitigated, it was directed that the sentence "be duly executed at the station of his company."

The above-named man was returned to naval jurisdiction and it was recommended by the commandant of the Marine Corps "that the unexecuted portion of the confinement and loss of pay in this case be remitted on the date of expiration of * * * enlistment, and that he be discharged on that date—namely, November 11, 1914."

In view of the fact that this man had passed from the jurisdiction of the War Department, it was held by the Judge Advocate General of the Army "that the War Department has no authority now to take any action with regard to the sentence." (War Bulletin No. 50, Nov. 14, 1914; War Bulletin No. 52; Dec. 14, 1914, p. 7).

The act of February 16, 1909 (35 Stat. 621), section 9, reads as follows:

"That the Secretary of the Navy may set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court-martial convened by his order or by that of any officer of the Navy or Marine Corps." (Navy Regulations, 1913, R-847 (1).)

While it was undoubtedly the spirit of this law to empower the Secretary of the Navy to remit or mitigate sentences imposed by courts-martial upon all persons in the naval service serving under the jurisdiction of the Navy Department, yet in view of the specific language of the act quoted, a doubt arose as to whether the Secretary of the Navy was authorized to remit the unexpired sentence in this case, the court-martial not having been convened "by his order or by that of any officer of the Navy or Marine Corps," and not being a "naval court-martial."

The power to remit sentences of this character is, of course, possessed by the President. It was accordingly recommended to the President that so much of the sentence in the case of this man, involving confinement and loss of pay as remained unexecuted on November 11, 1914, be remitted, in order that he could be discharged from the

Digitized by Google

service on that date, and on November 11, 1914, the President approved this recommendation. File 26267-127; C. M. O. 49, 1914, 4-5.

7. **Status**—The accused was charged with "Assaulting with a deadly weapon and wounding another person in the Navy," November 22, 1914, while said brigade of the Marine Corps was detached for service with the Army by Executive order issued in accordance with section 1621, Revised Statutes. [Navy Regulations, 1913, R-4101 (2).]

From a report of the War Department it appears that the First Brigade of marines, including the accused, was detached by Executive order from service with the Army and returned to naval jurisdiction, November 23, 1914, that is, the day following the alleged offense of the accused.

A report of the offense was made in due course and forwarded through official channels to the Commandant of the Marine Corps, and by him transmitted to the Secretary of the Navy with recommendation that the accused be brought to trial by naval court-martial.

It was not specifically brought to the attention of the department that the alleged offense was committed by the accused while the marine brigade to which he belonged was detached for service with the Army. Accordingly, charge and specification covering the offense was preferred by the Secretary of the Navy, against the accused, December 23, 1914, for trial by a naval general court-martial at Philadelphia, Pa., the case being handled by the department in the routine manner, no consideration being given to the question of jurisdiction, which, as stated, was not at that time presented.

At the outset of his trial, the accused, through his counsel, pleaded to the jurisdiction of the court, citing section 1621, Revised Statutes, and Navy Regulations, 1913, R-4105, in support of the contention that the Secretary of the Navy was not empowered to convene a court-martial for the trial of the accused under the circumstances above stated.

The court decided that "the plea of want of jurisdiction is overruled, and the trial will proceed." The accused thereupon pleaded "not guilty"; the trial was proceeded with, he was found guilty by the court, and a sentence imposed involving confinement at hard labor fo 18 months and dishonorable discharge from the Marine Corps.

The Judge Advocate General of the Navy held that the naval court-martial was without jurisdiction. Thereafter the Secretary of the Navy, with the concurrence of the Secretary of War, referred the matter to the Attorney General for his opinion. No official opinion was rendered by the Attorney General as in the meantime, after a conference between the Secretary of the Navy and the Attorney General, it was decided by the Secretary of the Navy to approve the proceedings and sentence of the naval court-martial and to execute the sentence, which, however, was mitigated.

The accused, shortly after the sentence was approved, instituted habeas corpus proceedings before the United States judge for the Eastern District of Pennsylvania, on the ground that, as originally alleged by him, the proceedings of the naval court-martial were null and void owing to lack of jurisdiction, and that his confinement pursuant thereto was accordingly illegal. This contention was sustained, as shown by the following opinion:

This case comes before us as in effect a case stated to have section 1621 of the Revised Statutes (Comp. St. 1913, § 2948) judicially construed. We dispose of it as a case in which the facts appear of record by the pleadings. There is no controversy over the facts. We state them as presented by counsel for the United States.

The relator belonged to the Navy, serving in the Marine Corps. The brigade in which he was a private was detached for service with the Army by order of the President. While the brigade was on this detached service he was charged with having committed an act which is made an offense both by "the rules and articles of war prescribed for the government of the Army" and by "the laws and regulations established for the government of the Navy." For this he was placed under guard by military order. The next day the brigade to which he belonged was "by Executive order withdrawn from the detached service of the Army." Subsequently he was brought "before a naval court-martial for trial," and was tried, convicted, and sentenced for an offense against the laws and regulations of the Navy. When arraigned for trial he entered a plea to the jurisdiction of the court. The pleas was based upon the fact that at the time the offense was charged to have been committed he, as a private in a brigade of the Marine Corps, was serving with the Army, his brigade being on detached service with the Army by order of the President, and on the proposition of law that the Marine Corps, when on such service, is not subject to the laws

Digitized by Google

and regulations of the Navy. The plea was overruled. He is now seeking to raise the same question through the present proceedings.

The fact is admitted. The legal conclusion is denied. The officials of the Army and Navy Departments, who have considered and passed upon the question, agree only in this: That it is one of doubt and difficulty, and that it turns upon the meaning of R. S. § 1621. That section is as follows:

"The Marine Corps shall, at all times, be subject to the laws and regulations established for the government of the Navy, except when detached for service with the Army by order of the President; and when so detached they shall be subject to the rules and articles of war prescribed for the government of the Army.

The question is:

"Was the relator subject to the laws and regulations established for the government of the Navy, or to the rules and articles of war prescribed for the government of the Army?"

The arguments presented in support of the opinions given during the court-martial proceedings, and since the finding, are so full and exhaustive that nothing of value can be added, unless perhaps it be this trite observation: The question is one the answer to which must be found by a resort to the statute. The moment one goes outside of the statute, and into the general considerations which surround the subject there is evoked at once a flood of conflicting arguments of almost equal plausibility, which serve only to produce doubt and confusion of mind. We have stated the question. What answer does the statute give? It is that the relator was subject to the Naval Code unless he was on service with the Army, in which latter event he was subject to the Army Code. There is really nothing to be added to this clear answer. Some aid might possibly be gained by a view of the answer from another angle. This is afforded by transposing the clauses in the sentence quoted from the act. If we do this, we have this as the result:

"The Marine Corps is subject to the articles of war while on service with the Army by order of the President. At all other times it is subject to the laws and regulations of the Navy."

We were impressed with this as the true meaning of the statute at the hearing. At the request of counsel for the United States a decision was withheld awaiting the submission of paper books. These have been submitted. As we interpret that on behalf of the United States, it is an admission that the argument at bar against the above construction of the act of Congress was unsound, but that the jurisdiction of the naval court-martial can be upheld by the distinction between laws which define the offense and laws which constitute the tribunal by which the offense is to be tried. The logic of this is that it admits the relator could not be tried for an offense against the Navy regulations and drives us to the position that, although he could be tried only for an offense defined by the articles of war, he might be tried by either a Navy or Army court-martial.

The argument has more plausibility than convincing power. The distinction between the offense defined by a law and the court constituted by the same law to try the offender is clear enough and is recognized. The argument concedes, however, that the offender can not be tried for any act not made an offense by the body of laws and regulations to which he is subject. The same laws and regulations which defined the offense constitute and designate the court which is to try the offender. By what token, then, can it be said that the offender is subject to some of these laws and regulations, but not to others?

The reference to prior legislation gives no comfort of aid to the argument. Granted that the status of the Marine Corps was at first doubtful. It rendered service at times with the Navy and at times with the Army, without being definitely or permanently attached to either department. Its "primary" relation was finally settled to be with the Navy, but it had special and temporary Army relations when on service with the Army. The early statutes gave recognition to this by providing that it should be subject to the laws and regulations of the Navy, except when detached by order of the President for service with the Army. The present statute added the clause that when so detached it should be subject to the articles of war. This does not weaken, but confirms the inference that Congress has expressed the meaning above given to the statute. The conclusion reached is that the relator was not subject to the laws and regulations of the Navy, and that a court established by these laws was without authority of law to impose or enforce the sentence pronounced.

Digitized by Google

This conclusion indicates the disposition which should in the usual course be made of this proceeding. A very practical feature of the case, however, is that through the remission of a part of the sentence imposed it is about to expire. The relator has already undergone imprisonment while his case was under consideration. He was charged with the commission of an act which was an offense under the Articles of War. For this he was arrested by being placed under guard by the military authorities. The conclusion reached involves the thought that this restraint of his liberty was in accordance with law. The relator, rather than submit himself to an order of the court, might prefer to await the time of his release by expiration of his sentence. We have therefore concluded to dispose of the question submitted to us as has been done, and grant leave to relator to move for such order as he may ask to have made.

In this connection, also, we wish to add that we have not considered the question of the power of the district courts to issue writs of habeas corpus in cases of this general character. When the cause was argued at bar, we understood that no such question was raised; but a ruling on the question we have discussed was desired by the authorities of both the War and Navy Departments, as well as the relator. We have therefore disposed only of the question raised at the argument. (United States ex rel. Davis *v.* Waller, 225 Fed. Rep. 673.)

The accused, through counsel, moved for an order discharging him from custody under the sentence of the naval court-martial, which order was accordingly made by the judge. (*See* G. C. M. Rec. No. 30533; File 26251–9965.) C. M. O. 31, 1915, 6–10.

8. **Same**—Section 1621 of the Revised Statutes is "explicit in saying that when such an order is made by the President, the Marine Corps shall be subject to the rules and articles of war prescribed for the government of the Army, and then of course it becomes a 'corps of the Army.'" This situation is to be distinguished from that in which the Marine Corps may cooperate with the Army without an order of the President detaching it for service with the Army, which is a case "of cooperation but not of incorporation." (28 Op. Atty. Gen. 19.) File 26251–9965:17, J. A. G., Aug. 31, 1915.
9. **Same**—An analysis of section 1621 shows that it contains three parts, namely, 1. It provides that under normal conditions marines shall be subject to the laws and regulations of the Navy; 2. That when detached by the President for service with the Army, marines shall not be subject to naval jurisdiction; and 3. It makes provision for the special condition existing when marines are so serving with the Army by providing that they shall then "be subject to the rules and articles of war prescribed for the government of the Army." File 26251–9965:17.
10. **Same**—It is well established that the Marine Corps occupies a dual status; that under normal conditions it is a part of the Navy, but that when detached for service with the Army it becomes a part of the Army. Therefore the status of a marine detached does undergo a change in consequence of his transfer to Army jurisdiction. In other words, it is not merely a change in the laws to which he is subject, but a change in his status, and while serving with the Army he is a part of the Army just as fully as are privates who have actually enlisted in the Army. File 26251–9965.

MARK OF DESERTION. *See also* REMEDIAL LAWS.

1. **Civil War cases.** *See* File 19974–3, Sec. Navy; 26539–551, J. A. G., 17, 1913; 26539–458:2, J. A. G., Apr. 25, 1912; 26539–750, J. A. G., Nov. 8, 1916.
2. **Clemency promised**—In a case where it appeared from the record of proceedings and from the files of the department that through inadvertence an accused convicted of desertion was given to understand that if he surrendered himself the mark of desertion in his case would be removed, so much of the sentence as provided for confinement was remitted and he was dishonorably discharged in accordance with the sentence. C. M. O. 6, 1894. *See also* DESERTION, 130.
3. **Definition**—The entry on the enlistment [service] record that the party was charged with having deserted on a certain date. File 26251–1963:1, J. A. G., Aug. 17, 1910, pp. 4, 5.
4. **Pardon issued to a deserter**—A pardon issued to a deserter from the Navy does not authorize the Navy Department to remove the mark of desertion entered on its records, the entry being one of fact, which is not altered by the pardon. File 26251–1963:1, Aug. 17, 1910; *compare*, file 1768–D, 1902.
5. **Removal of**—From records. *See* File 26539–458:2, J. A. G., Apr. 25, 1912.
6. **Same**—The mark of desertion can not under the law be removed unless it be conclusively shown to have been erroneously entered. File 7657–209, J. A. G., Nov. 17, 1913. *See also* File 26251–12396:2, J. A. G., Oct. 30, 1916.

Digitized by Google

7. **Same**—In the absence of legislative requirement, the mark of desertion should not be removed from the department's records in any case unless it is made to appear, as a matter of fact, that such mark was erroneously entered. File 26251-1963:1, J. A. G., Aug. 17, 1910. *See also* File 26251-12396:2, J. A. G., Oct. 30, 1916.
8. **Same**—Where it was recommended that the charge of desertion be removed from the record of a deceased enlisted man the department stated: "In the absence of evidence showing that the charge of desertion appearing upon the records against the name of * * * was erroneously entered or retained, it is not within the power of the President to remove such charge. The official record of a fact of this nature, where no error has been made therein, can not be changed by Executive authority." File 3846-98, Sec. Navy, June 10, 1898.
9. **War**—Act of August 14, 1888, does not authorize removal of mark of desertion. File 19475-5, Sec. Navy, Nov. 17, 1915.

MARRIAGE. *See also* WEDDINGS; WIFE.
1. **Common law.** *See* DEATH GRATUITY, 12; WIFE, 5.
2. **Prisoner**—Permission granted by the Secretary of the Navy to general court-martial prisoner to marry, should both parties consent and should the girl appear for that purpose at the Naval Prison, Portsmouth, N. H. File 26251-11340:18, Sec. Navy, Feb. 15, 1916.

MARSHAL, U. S. *See* REWARDS, 3.

MARTIAL LAW.
1. **Haiti.** *See* 5526-File 30, J. A. G., Mar. 7, 1916.

MARTYR.
1. **Accused as.** *See* CHALLENGES, 23.

MAST. *See* C. M. O. 86, 1898, 1.

MASTERS.
1. **General court-martial**—Tried by. G. O. 211, June 7, 1876; C. M. O. 39, 1880; 20, 1881; 16, 1882; 21, 1882.
2. **Grade of**—By act March 3,1883 (22 Stat. 472), the title of the grade of master was changed to that of lieutenant. G. O. 305, Mar. 31, 1883.

MASTER-AT-ARMS.
1. **Superior officer.** C. M. O. 31, 1908, 3.

MATES. *See also* DISMISSAL, 12.
1. **Deposits.** *See* DEPOSITS, 4.
2. **General court-martial**—Tried by. C. M. O. 54, 1892; G. C. M. Rec. 28932.
3. **Retirement.** *See* File 3031-57, J. A. G., June 25, 1908.
4. **Sentences of dismissal**—Approval by President unnecessary. *See* MATES, 5; File 26255-14/A, etc., J. A. G., May 4, 1909.
5. **Status of**—Mates are neither commissioned nor warrant officers, and their status may be compared with that of paymasters' clerks, i. e., the approval of the President of a sentence involving dismissal of a court-martial is unnecessary, the sentence becoming operative upon the approval of the convening authority.
6. **Same**—Mates have been held by the Attorney General to be officers of the Navy within the meaning of the act of June 29, 1906 (34 Stat. 554). File 26509-33, J. A. G., Mar. 24, 1910, p. 5.
7. **Same**—Mates are officers not holding commissions or warrants, and not entitled to them, but are petty officers promoted by the Secretary of the Navy from seamen of inferior grades. They are distinguished from other petty officers only in the fact that their pay is fixed by statute instead of by the President. From this it would seem to follow that, although their pay is fixed by law instead of by the President they are in other respects entitled to the emoluments of petty officers. (U. S. *v.* Fuller, 160 U. S. 593.) File 3031-57, J. A. G., June 25, 1908, p. 3. *See also* R. S. 1409, 1410.
8. **Superior officer**—A mate is held by Navy Regulations, 1913, R-64, to be a superior officer within the meaning of the Articles for the Government of the Navy. C. M. O. 49, 1915, 19. *See also* OFFICERS, 33.

MAYHEM. *See also* WORDS AND PHRASES.
1. **Enlisted man**—Charged with. C. M. O. 22, 1916, 2.

Digitized by Google

MEDALS.
1. **Foreign Governments**—Acceptance by officers and enlisted men of the naval service. *See* DECORATIONS.
2. **Good conduct medals.** *See* GOOD CONDUCT MEDALS.
3. **Honor**—Medals of honor. *See* MEDALS OF HONOR.

MEDALS OF HONOR.
1. **Act of March 3, 1915 (38 Stat. 931)**—Provides in part, "The President of the United States is hereby empowered to prepare a suitable medal of honor to be awarded to any officer of the Navy, Marine Corps, or Coast Guard who shall have distinguished himself in battle or displayed extraordinary heroism in the line of his profession."
   Under the authority of the foregoing statute the Secretary of the Navy awarded medals of honor to officers of the Navy and Marine Corps who participated in the occupation of Vera Cruz, Mexico, in 1914. *See* File 8627-189, J. A. G., May 12, 1915. *See also* White *v.* U. S., 191 U. S. 552.
2. **Clemency**—Medals of Honor as grounds for clemency in court-martial cases. *See* CLEMENCY, 34.
3. **Coast Guard**—In so far as concerns the award of medals of honor to the Coast Guard, under the provisions of the act of March 3, 1915 (38 Stat. 931), it may be remarked that, except when serving as a part of the Navy in time of war or when the President shall so direct, this appears to be a matter under the Secretary of the Treasury, who would be empowered to construe the law for his department. File 8627-189, J. A. G., May 12, 1915.
4. **Corean Forts**—An enlisted man was given a medal of honor for personal valor in the engagement connected with the capture of the Corean Forts, June 9, 10, 1871. *Held:* that the expedition which resulted in the capture of the Corean Forts, June 9, 10, 1871, comes within the meaning of the words "in any war" as used in the act of April 27, 1916 (39 Stat. 53). File 28653-1, Sec. Navy, July 24, 1916. *See* G. O. 169, Feb. 8, 1872, which awarded medals of honor to six marines and five bluejackets for heroism "In the attack on and capture of the Corean Forts, *June 11, 1871:*" G. O. 180, Oct. 10, 1872, which awarded medals of honor, as above, to two landsmen.
5. **Desertion**—Forfeiture of medals of honor by desertion. *See* G. O. 59, June 22, 1865.
6. **Laws relating to.** *See* File 7741-58. *See also* File 8627-189:1, J. A. G., March 23, 1916.
7. **Vera Cruz, Mexico**—Medals of Honor awarded. *See* MEDALS OF HONOR, 1.

MEDICAL ATTENDANCE. *See also* FAMILIES.
1. **Families of officers**—There is no provision of law which prohibits professional attendance by medical officers upon families of officers of the naval service, and if such attendance does not interfere with the necessary service to officers and men of the Navy and Marine Corps, it is not contrary to law. File 28019-17, J. A. G., Jan. 26, 1912.

MEDICAL BOARD OF SURVEY. *See* C. M. O. 24, 1914.

MEDICAL CERTIFICATES.
1. **Accident policy of officers**—Surgeons can not sign unofficial medical certificates on accident policy of officer. File 26806-15; 5195-61:1. *See also* ACCIDENT POLICY, 1.
2. **Record of proceedings.** *See* CONFINEMENT, 5.
3. **Insurance policy.** *See* MEDICAL RECORDS, 3.

MEDICAL EXAMINERS.
Board of. *See* BOARD OF MEDICAL EXAMINERS.

MEDICAL EXPERT WITNESSES. *See* EXPERT WITNESSES.

MEDICAL OFFICERS AND ENLISTED MEN.
1. **Army**—Serving with a body of Marines detached for service with Army. *See* MARINES SERVING WITH ARMY, 4.

MEDICAL OFFICERS OF THE NAVY.
1. **Disbursing officer, special**—Appointment as. *See* File 7039-279, J. A. G., Jan. 18, 1913.
2. **Drunk**—A medical officer might be called at any time to render professional services of vital importance, and if he is drunk he is incapacitated for such work. C. M. O. 43, 1915, 2. *See also* DRUNKENNESS, 57, 58; MEDICAL OFFICERS OF THE NAVY, 4, 11.
3. **Same**—Only one on board ship. C. M. O. 52, 1882.
4. **Same**—"Every naval officer, and especially a medical officer, whose use of intoxicants is carried to such an extent that his superiors cause him to be tried and who is con-

Digitized by Google

victed of drunkenness on duty, should be sentenced to dismissal from the Navy and such sentence should be inexorably carried into execution. Whatever charity or assistance may be extended to such officers should be given when they reach some other walk in life than the naval service. They are worthless members of their profession, and should, in every case, be forced off the list of officers of the Navy." C. M. O. 101, 1906.

5. **Duty of**—Includes attendance upon families of officers of Navy and Marine Corps. *See* FAMILIES; MEDICAL ATTENDANCE, 1.
6. **Hospital ships**—Command of. *See* File 15285-59:3.
7. **Neglect of duty**—Tried by general court-martial for failing to proceed on board a torpedo boat when directed to render medical assistance to an enlisted man who was seriously ill, C. M. O. 12, 1908, 1.

   In a case where a medical officer neglected his duty in that he wilfully neglected to go on board a vessel and attend to a sick enlisted man when he had "ample time and opportunity to perform such service," the department in part stated: "In his profession, more than in any other branch of the service, prompt attention to the calls of duty is especially demanded. Its neglect may at any time prolong or increase suffering, and even involve the sacrifice of life.

   "A surgeon should never be deaf to the appeals of those who have the legal right to his aid and services." C. M. O. 1, 1882, 3.
8. **Private practice.** *See* File 17088-8, Jan. 4, 1910; 6320-9, 15, and 15:1, Bu. Nav.
9. **Retired officers**—May be employed on active duty. C. M. O. 22, 1915, 10.
10. **Unprofessional conduct**—A medical officer attempted to shield a commanding officer's abandonment of post "by the execution of * * * two unprofessional and disingenuous certificates." C. M. O. 59, 1882, 7.
11. **Vulgar and indecent acts**—Medical officers of the Navy are professionally brought into the most confidential and intimate relations with other officers of the Naval Service where they may be stationed, the families of such officers, and members of the Nurse Corps (female) of the Navy, who may be so situated that they can not, if they would, receive medical treatment other than that furnished them by such officers.

    Therefore a medical officer guilty of vulgar and indecent acts and associations should be sentenced to dismissal. Any other sentence would put the members of the general court-martial on record as considering him a fit and proper person to treat said members, their associates in the Naval Service, and the ladies of their families, in a professional capacity.

    The department could not assume the responsibility of ordering to duty in the Navy a medical officer who had been found guilty by general court-martial of such offenses, even though he should not be sentenced to dismissal. File 26251-11181, Sec. Navy, Dec. 17, 1915; G. C. M. Rec. No. 31436.

MEDICAL RECORDS.

1. **Hospital records**—Where satisfactory reasons are given by a man formerly in the naval service, in his request for a copy of the medical record of his case, the department will furnish such to the man *himself* or, if dead to his next of kin, upon proof of identity, if such a record is available. But such records are considered private and confidential by the department. File 5195-61:1, J. A. G., March 21, 1912.
2. **Line of duty entries (R-2902).** *See* File 7657-313, J. A. G., Sept. 28, 1915; 7657-298, J. A. G., Sept. 28, 1915; 7657-309, Sec. Navy, Sept. 30, 1915.
3. **Private and confidential**—It has been the practice of the department to consider a man's medical record as private and confidential and that it should be given to no one but the man himself, or if dead, to his next of kin, and furthermore, that such action is to be taken only upon application to the department direct.

   The department, therefore, held that the filling out of a blank certificate for an insurance company, giving the medical history of an enlisted man while a patient at a naval hospital by a naval medical officer, without authority of the department, was an unwarranted and unauthorized act on the part of the medical officer. File 12475-52:8, Sec. Navy, Dec. 12, 1914; C. M. O. 6, 1915, 14. *See also* File 5942-262:1, Sec. Navy, June 17, 1916. *See also* 12475-70:2 and 3, Sec. Navy, Feb. 25, 1916, in which information was furnished in answer to interrogatories submitted to a commission duly issued to take the testimony of the Surgeon General of the Navy at Washington, D. C.

Digitized by Google

4. **Same**—The provisions of Court-Martial Order No. 6, 1915, page 14, do not prohibit the Bureau of Medicine and Surgery from supplying to an enlisted man, or, after his death, to his next of kin, his medical record, as heretofore. The instructions contained in the order above cited, "that such action is to be taken only upon application to the department direct," were not intended as a restriction upon the action of the Bureau of Medicine and Surgery, which acts for the department, but only upon the action of officers other than the Chief of the Bureau. File 26510-1207, Sec. Navy, June 14, 1915. *See also* G. O. 121, Sept. 17, 1914, p. 9, sec. 18 (c); C. M. O. 22, 1915, 9.
5. **Same**—Navy Regulations, 1913 R-2958 provides that "the medical officer shall not give an unofficial certificate of ill health or of inability to perform any duty." Therefore, a medical officer is not authorized, without approval by the department in each specific case, to (a) sign the form used in secret fraternal orders to secure sick dues; (b) to sign a death certificate, for presentation to a secret society or lodge having death benefits; or (c) fill out insurance blanks in the case of death of a naval patient. It is to be understood that this opinion relates to the medical records of officers and enlisted men in the naval service who have been patients of the medical officer of whom the certificates are requested. Where certificates of death, required by State laws, in connection with the transportation of remains are required, such certificates would be "official certificates," and would not come under the prohibition of Navy Regulations, 1913, R-2958. (*See* C. M. O. 6, 1915, p. 14; 22, 1915, p. 9.) File 12475-52: 10, J. A. G., Aug. 5, 1915; C. M. O. 29, 1915, 7. *See also* File 12475-70:2, 3, Sec. Navy, Feb. 25, 1916; 12475-71, J. A. G., March 16, 1916; 12475-52:10, Aug. 5, 1915; 12475-52:8, Dec. 5, 1914; 26806-15, April 8, 1909; Naval Instructions, 1913, I-26; File 12475-90, J. A. G., Sept. 25, 1916.
6. **Same**—"You are hereby authorized to attend the Surrogates' Court of King's County, New York, if duly subpœnaed, and to furnish all such information as the court may hold proper as to the mental and physical condition of late. * * *, Chief Carpenter, U. S. Navy, retired." File 12475-70:1, Sec. Navy, Feb. 9, 1916.

MEDICAL RESERVE CORPS OF THE ARMY.

1. **Act establishing.** *See* MEDICAL RESERVE CORPS OF THE NAVY, 1.

MEDICAL RESERVE CORPS OF THE NAVY.

1. **Appointment of officers to**—The act of August 22, 1912 (37 Stat. 344), established a Medical Reserve Corps in the Navy "under the same provisions, in all respects, * * * as those providing a Medical Reserve Corps for the Army." The act establishing a Medical Reserve Corps for the Army provides in part:

"That nothing in this act shall be construed * * * to prohibit an officer of the Medical Reserve Corps not designated for active duty from service with the militia, or with the volunteer troops of the United States, or in the service of the United States in any other capacity, but when so serving with the militia or with volunteer troops, or when employed in the service of the United States in any other capacity, an officer of the Medical Reserve Corps shall not be subject to call for duty under the terms of this section." (35 Stat. 68.)

The law authorizing the appointment of Acting Assistant Surgeons reads in part as follows:

"The President is hereby authorized to appoint for temporary service twenty-five acting assistant surgeons, who shall have the relative rank and compensation of assistant surgeons." (30 Stat. 380.)

In view of the above, officers of the Medical Reserve Corps, not on active duty, are available for appointment as Acting Assistant Surgeons, but while so serving they can not be called into active service as officers of the Medical Reserve Corps. File 28407-13, J. A. G., March 24, 1915; C. M. O. 12, 1915, 10. *See also* File 28407-16, J. A. G., July 31, 1915.

2. **Board of Medical Examiners**—Medical Reserve Corps officers eligible as members. *See* BOARDS OF MEDICAL EXAMINERS, 3, 4.
3. **Dental Reserve Corps**—Not established by act, August 22, 1912 (35 Stat. 68), but authority is contained in such act for appointment of dental surgeons to Medical Reserve Corps. *See* DENTAL RESERVE CORPS. *See also* File 13707-2:2, J. A. G., Dec. 28, 1912; C. & S. C., 4, 6. *But see* Act, Mar. 4, 1913 (37 Stat. 903), and Act, Aug. 29, 1916 (39 Stat. 574), which did establish a Dental Reserve Corps.
4. **Discharge**—"The President is authorized to honorably discharge from the Medical Reserve Corps any officer thereof whose services are no longer required." (Act August 22, 1912 (35 Stat. 68).) This provision, while permissive in form, might well

Digitized by Google

be construed as mandatory, under settled rules of statutory construction. File 28407-16, J. A. G., July 31, 1915.

5. **Government Hospital for the Insane**—Pay while at. File 10060-74:2, Sec. Navy, June 19, 1916.
6. **Indian, American.** *See* INDIANS, 4.
7. **Retirement.** *See* File 26256-413:2, Sec. Navy, July 14, 1916.
8. **Title of Officers.** *See* File 13707-21, J. A. G., Nov. 8, 1912.

MEDICAL TREATMENT.

1. **Families of officers.** *See* FAMILIES; MEDICAL ATTENDANCE, 1.
2. **Prophylactic treatment.** *See* PROPHYLACTIC TREATMENT.
3. **Refusal to submit to.** *See* SURGICAL OPERATIONS, 3, 6.

MEDICINE AND SURGERY, BUREAU OF. *See* BUREAU OF MEDICINE AND SURGERY

MEMBERS OF COURTS-MARTIAL.

1. **Absent**—Not attending court by virtue of written permission of president of genera court-martial—A certain officer of the Navy did not sit as a member of the court although the precept under which the court was constituted ordered him to duty thereon.

   He appears to have been absent by virtue of a letter addressed to him on the date of trial and signed by the president of the court, in which it is stated, in part: "You are hereby authorized to absent yourself from the court-martial meeting aboard this vessel to-day to try the case of * * *, coal passer, United States Navy."

   It is specifically provided in article 1703 (1), United States Navy Regulations [Navy Regulations, 1913, R-704 (1)], that an officer detailed for duty on a general court-martial or court of inquiry is, while so serving, exempt from other duty, except in cases of emergency, to be judged of by his commanding officer, who shall, in case he requires such officer to perform other duty, at once communicate with the convening authority assigning the reasons for his action.

   A member or judge advocate becomes or is relieved as such only by order of a lawful convening authority. (Forms of Procedure, 1910, p. 18.)

   The president of the court was therefore without any authority in relieving this officer from duty to which he had been assigned by superior authority.

   However, in view of the fact that six members remained on the court and the court was not reduced below the legal requirement, the foregoing irregularity was not deemed of sufficient importance to invalidate the proceedings. C. M. O. 30, 1910, 7. *See also* MEMBERS OF COURTS-MARTIAL, 12.
2. **Same**—"No explanation can be offered, he having been detached from this station"—In reviewing the record of proceedings of a general court-martial it was observed that one of the members of the court was not present, the record stating "No explanation can be offered, he having been detached from this station June 11, 1912."

   The detachment of an officer from his ship or station does not, of itself, relieve him from duty as a member or judge advocate of a general court-martial; specific orders for such relief are necessary. (Navy Regulations, 1913, 727 (3); Forms of Procedure 1910, p. 19; A. G. N. 46.) The foregoing also appeared in the precept.

   In case of an order from a superior officer, the provisions of Navy Regulations [Navy Regulations, 1913, R-1513 (2)] shall be complied with. The report of circumstances shall be forwarded by the member receiving such order to the convening authority through the president of the court, and a copy of such report shall be attached to the record of each case to which it applies. (Navy Regulations, 1913, R-727 (2); Forms of Procedure, 1910, p. 19.) Undoubtedly, it was the duty of the absent member to have furnished the report required in this case, but when he failed to do so the president of the court should have addressed to him a request for the necessary report. (Navy Regulations, 1909, R-207 [Navy Regulations, 1913, R-1501].) Provided the absent member had no order from a superior officer suspending or modifying his orders from the convening authority as contained in the precept, whatever statement he had to make in the premises should have been obtained and forwarded by the president of the court to the convening authority and a copy thereof attached to the record. C. M. O. 23, 1912, 5. *See also* ORDERS, 3, 42, 43, 44.
3. **Same**—In case a member is sick he shall, if able, request the attending medical officer to report the fact of his sickness to the convening authority and such request shal be complied with. The report shall be forwarded through the president of the court, and a copy thereof shall be attached to the record of each case to which it applies. When the member is able to resume his duties, the attending medical officer shal l report such fact in the same manner as above provided. (R-727 (4).)

Digitized by Google

In a case where the above report was not appended to the record, the record of proceedings was returned and the court in revision appended the necessary certificate. C. M. O. 98, 1893.

4. **Same**—Absence of president of a general court-martial on leave of absence without knowledge or permission of convening authority. File 28025-417:4.
5. **Same**—No member of a general court-martial shall, after the proceedings are begun, absent himself therefrom, except in case of sickness, or of an order to go on duty from a superior officer, on pain of being cashiered. (A. G. N. 46.) *See* COURT, 170; MEMBERS OF COURTS-MARTIAL, 2.
6. **Same**—A court-martial has no authority to excuse any of its members from sitting in a case except upon challenge duly made and sustained by the court. C. M. O. 127, 1900, 1. *See also* CHALLENGES, 1.
7. **Abuse of Power**—Although the members of a duly constituted and organized court-martial can not be dictated to or interfered with in their proceedings by the highest military authority, yet they are collectively and individually responsible in civil courts for abuse of power or illegal proceedings. (R-722.) *See also* Spalding *v.* Vilas, 161 U. S. 483; Bradley *v.* Fisher, 13 Wall. 335; Dynes *v.* Hoover, 20 How. 65; Johnson *v.* Duncan, 6 Am. Dec. 679, 3 Martin (La.) 530; APPEALS, 8; COUNSEL, 29, 36; HABEAS CORPUS, 17; REVISION, 24.
8. **Accused as witness**—A member should not in general object to a question the answer to which would incriminate accused. C. M. O. 49, 1910, 9; 8, 1913, 5.
9. **Additional member.** C. M. O. 34, 1901, 2.
10. **Appeals**—By member of general court-martial from criticism of convening authority. *See* CRITICISM OF COURTS-MARTIAL, 35.
11. **Same**—By members of summary court-martial from criticism of senior officer present. *See* CRITICISM OF COURTS-MARTIAL, 36.
12. **Authentication**—The omission of one signature of the members of the court to the findings and sentence will have no effect provided a legal quorum remained and signed. G. C. M. Rec. 24534. *See also* COURT, 175; MEMBERS OF COURTS-MARTIAL, 1.
A member may be ordered to sign the findings and sentence. *See* MEMBERS OF COURTS-MARTIAL, 48.
13. **Binding of records**—Responsibility of members. *See* BINDING OF COURT-MARTIAL RECORDS.
14. **Challenges.** *See* CHALLENGES.
15. **Civil liability.** *See* HABEAS CORPUS, 17; MEMBERS OF COURTS-MARTIAL, 7.
16. **Convening authority**—Should not detail himself as a member. *See* COURT, 36.
17. **Clemency**—Recommendations to clemency should be made by members, not court. *See* CLEMENCY, 35; COURT, 19.
18. **Competency as witnesses.** *See* MEMBERS OF COURTS-MARTIAL, 54-56.
19. **Criminating questions**—Not function of member to object to witness being asked criminating questions. C. M. O. 49, 1910, 9; 8, 1913, 5. *See also* SELF-INCRIMINATION, 16.
20. **Conduct of the proceedings**—Members of the court are responsible for the dignified, orderly, and legal conduct of the proceedings of the court. C. M. O. 49, 1915, 10.
21. **Court-martial order**—Names published in. C. M. O. 38, 1915, 3.
22. **Same**—Members should consult, study, etc. *See* COURT-MARTIAL ORDERS, 17, 18.
23. **Criticism by convening authority and department.** *See* CRITICISM OF COURTS-MARTIAL.
24. **Death of member before signing record**—In a case where a member of a summary court-martial died before signing the record, the department *held*, that the death of one of the members of a summary court-martial after sentence had been imposed, but before he had appended his signature to the sentence as required by law and regulations, does not render the sentence void. It is sufficiently authenticated if attested by the other members of the court-martial. Accordingly the record in such a case should be authenticated by the signatures of the other members of the summary court-martial and forwarded to the department in accordance with Navy Regulations, 1913, R-34, R-624 (1). File 26287-2817, Sec. Navy, Mar. 2, 1915, citing 23 Op. Atty. Gen. 550. C. M. O. 12, 1915, 8.
25. **Duty**—Court-martial duty same as any other—The fact that an officer serving as member of a court-martial is individually as responsible for the performance of that duty as of any other duty with which he is charged is not open to question. File 25675-9-10-11, Sec. Navy, Oct. 28, 1915, p. 5. *See also* COURT, 170.
A member swears to "well and truly try, without prejudice or partiality, the case now depending, according to the evidence *which shall come before the court* * * *," and if he allows his vote to be controlled by facts known to himself or communicated

Digitized by Google

to him by another member, but not in evidence, or by his personal notions, prejudices or feelings, he is chargeable with a grave dereliction of duty. C. M. O. 4, 1913, 59.

In determining the questions of fact the members of the court must arrive at their conclusions solely from the evidence that is adduced or comes before the court and not from any knowledge or information otherwise acquired. In exercising this part of its function a court is assisted by a knowledge and application of the rules of evidence, but no considerable knowledge of the law is required. It is to this duty of deducing the facts from a consideration of the evidence that the part of the oath administered to members requiring them to try a case "according to their own consciences" refers. The facts having been found, it remains for the court to apply the law to them. The exercise of this function depends not on the consciences of the members but upon a knowledge of the law. A comprehensive knowledge of this subject is a profession in itself, and, while officers of the naval service are accountable for the information promulgated by court-martial orders and other official publications, it is to be expected that cases will arise in which naval courts will require assistance in applying the more intricate provisions of law. Therefore, if by reason of a lack of knowledge of the law a court arrives at an incorrect finding or unjustified sentence, there has been provided, in the interests of justice, a means of correcting such error. The department may return the record for further consideration, pointing out what the law is and how it should be applied. In such event the court is not justified in disregarding the law because an application of the same may reach a result at variance with the individual beliefs of a majority of its members. It is only right and just for the court to accept the law as laid down to it by proper authority and then to come to its findings and sentence anew accordingly. C. M. O. 25, 1916, 4.

26. **Exception**—Should not be entered on record by members. *See* EXCEPTIONS, 2.
27. **Excusing members from attending court.** *See* MEMBERS OF COURTS-MARTIAL, 6.
28. **Findings and sentence**—Quorum has to sign. *See* MEMBERS OF COURTS-MARTIAL, 12, 48.
29. **Forms of procedure**—Members of courts-martial required to conform to, and to follow strictly the Forms of Procedure by which they are governed. *See* COURT, 90.
30. **Incompetent**—A member appointed after case tried and completed is not qualified to sit in revision. *See* MEMBERS OF COURTS-MARTIAL, 44.
31. **Jurors**—Capacity of members as. *See* COURT, 106; JURORS, 1.
32. **Legal liability.** *See* COUNSEL, 36; HABEAS CORPUS, 17; MEMBERS OF COURTS-MARTIAL, 7; REVISION, 24.
33. **New members.** C. M. O. 74, 1899, 2; 53, 1901, 1. *See also* MEMBERS OF COURTS-MARTIAL, 44.
34. **Oaths.** *See* OATHS.
35. **Objections.** *See* COURT, 121; MEMBERS OF COURTS-MARTIAL, 52; OBJECTIONS.
36. **Orders**—To duty as members of courts-martial. *See* CONVENING AUTHORITY, 32; COURT, 33-51; SUMMARY COURTS-MARTIAL, 48, 61.
37. **Same**—An order issued by the Secretary of the Navy relieving an officer from duty at a particular station, will be assumed as intended to relieve such officer from duty as a member of a general court-martial of which the Secretary of the Navy is the convening authority. C. M. O. 125, 1900, 1.
38. **Protest**—Improper to enter on record. *See* EXCEPTIONS, 2.
39. **Qualifications**—An officer of the Navy is presumed to be qualified by education and experience to serve as a member of a court-martial; it is also presumed that he has informed the lawful authority of any material facts which might disqualify him and that it has rightfully found him to be qualified. The practice of interrogating jurors on their *voir dire* applies to persons whose fitness for service is not established, prima facie, by similar presumptions. The department held that for the above reasons the accused can not challenge members of court for prejudice unless he has information warranting a charge of prejudice. C. M. O. 128, 1905.

That an officer discharging the high functions resting upon a member of a general court-martial will disregard the obligations of his oath and duty, can not be accepted as a matter of assumption, but must be positively and affirmatively shown if it is to be established. As members of courts-martial, officers are independent of higher authority, certainly in the exercise of their judicial functions, and the recent history of courts-martial shows that officers generally fully understand and appreciate their independence while in the discharge of those duties. Instances are not uncommon where courts, after having been instructed by the convening authority (the commander in chief or the department) to reconvene for the purpose of reconsidering a sentence deemed inappropriate or inadequate, have, notwithstanding such expression by higher authority, adhered to their action. 13 J. A. G., 325, June 11, 1904.

Digitized by Google

40. **Questions**—All questions originating with members, and which have been received are recorded as "by the court," but when made the subject of discussion and rejected they are recorded as "by a member." C. M. O. 17, 1910, 7; 19, 1915, 3. *See also* WITNESSES, 40.
41. **Record of proceedings.** *See* RECORD OF PROCEEDINGS.
42. **Reports on fitness**—Summary court-martial members' protest against entry as to manner of performing duty. *See* REPORTS ON FITNESS, 3.
43. **Responsibility for abuse of power.** *See* COUNSEL, 36; HABEAS CORPUS, 17; MEMBERS OF COURTS-MARTIAL, 7; REVISION, 24.
44. **Revision**—An officer who was not a member of the general court-martial which tried the accused, but subsequently was appointed to such, renders the proceedings in revision illegal if he sits upon the court during the proceedings in revision. C. M. O. 47, 1910, 10. *See also* REVISION, 22.
45. **Seating**—Should be seated in the order in which their names appear in the precept. File 26504-192, Sec. Navy, Oct. 28, 1913.
46. **Suit for damages.** *See* COUNSEL, 36; HABEAS CORPUS, 17; MEMBERS OF COURTS-MARTIAL, 7; REVISION, 24.
47. **Service on courts-martial**—Duty of the highest order. *See* COURT, 170; MEMBERS OF COURTS-MARTIAL, 25.
48. **Signing record of proceedings**—An officer, a member, who fails to sign the record of proceedings of a summary court-martial, may be ordered to do so by the convening authority, as the signature required by A. G. N. 52 is for the purpose of authentication and does not necessarily import unanimous concurrence in rulings, findings, decisions, and other action taken. File 1434-04, J. A. G.
49. **Title**—Wrong title in precept does not invalidate. *See* CHALLENGES, 15.
50. **Vote, revealing.** *See* OATHS, 47.
51. **Witnesses**—Examination of, by members—Scope of. *See* WITNESSES, 40-42.
52. **Witness, as**—Resuming status to consider objections—While a member of the court was testifying counsel for the accused entered an objection to a question (Rec. p. 3), and the witness resumed his status as member to deliberate upon the objection. Since the court consisted of only five members this action was proper. If, however, there had been present five or more members in addition to the member who was testifying, the department holds that such member should be excluded from deliberation upon the objection as a matter of propriety. C. M. O. 49, 1915, 15; overruling C. M. O. 14, 1911, 4. *See also* MEMBERS OF COURTS-MARTIAL, 55.
53. **Same**—Not to be shown as warned or withdrawing. The record shall state that he resumed his seat. C. M. O. 15, 1910, 5; 26, 1910, 8; 31, 1910, 3.
54. **Same**—While not illegal, it is considered inadvisable to have among the members constituting a court-martial officers who appear as principal witnesses for the prosecution, as was done in this case. Whenever the exigencies of the service will permit, a court should as far as possible be composed of officers who are not cognizant of detailed circumstances attendant upon offenses for which an accused may be brought to trial. (*See* Navy Regulations, 1913, R-702(2); G. C. M. Rec. No. 25157.) G. C. M. Rec. 31874; C. M. O. 9, 1916, 8.
55. **Same**—As to the competency of members of courts-martial to act as witnesses, it is, in general, well recognized that they are so competent.

The president or any member of a court-martial, as also the judge advocate, may legally give testimony before the court. That the court, at the time of a member's testifying, is composed of but five members will not affect the validity of the proceedings, since in so testifying he does not cease to be a member. It is in general, however, most undesirable that the judge advocate, and still more that a member, should appear in the capacity of a witness, except perhaps where the evidence to be given relates simply to the good character or record of the accused.

While it is in general undesirable that a member of a military court should testify as a witness at a trial had before such court, unless perhaps his testimony relates to character merely, yet the fact that he is called upon to testify, while it does not affect the validity of the proceedings, does not operate to debar the member himself from the exercise of any of the duties or rights incident to his membership. He remains entitled to take part in all deliberations, including indeed those had in regard to the admissibility of questions put to himself or of his answers to questions. (*See* Army Digest, 1901.) C. M. O. 14, 1911, 4. *See also* MEMBERS OF COURTS-MARTIAL, 52.

Digitized by Google

56. **Same**—Members of naval courts-martial may testify as witnesses in a case and then resume their seats as members. (Navy Regulations, 1913, R–782.)

The procedure of a member of a court-martial testifying as a witness has been sustained by the Supreme Court of the United States as well as by the Court of Claims and the Attorney General; it has been judicially upheld in many of the States, as well as being expressly authorized by statute in at least one State. It has been practiced and upheld in the highest court of England. It has been announced by all the best military authorities, both American and English, from the earliest times, and its legality is expressly upheld by Greenleaf on Evidence, 16th edition, 456, as well as by many other authorities. Under the settled law of evidence members of a jury are competent witnesses in a criminal case on trial before them, and it has been held that "the analogy of a court-martial is that of a jury in the trial of a civil case, the approving power in the former occupying the relation of the judge in the latter." (6 Op. Atty. Gen. 206.) File 26251–6020:11, Sec. Navy, July 7, 1913. *See also* G. C. M. Rec. 25157; Keyes *v.* U. S., 15 Ct. Cls. 533, affirmed, 109 U. S. 336; 15 Op. Atty. Gen. 434.

57. **Witnesses examined in absence of members**—Whenever any member of a court-martial, from any legal cause, is absent from the court after the commencement of a case, all the witnesses who have been examined during his absence must, when he is ready to resume his seat, be recalled by the court, and the recorded testimony of each witness so examined must be read over to him, and such witness must acknowledge the same to be correct and be subject to such further examination as the said member may require. Without a compliance with this rule, and an entry thereof upon the record, a member who shall have been absent during the examination of a witness shall not be allowed to sit again in that particular case. (A. G. N. 47.)

These requirements are, in both letter and spirit, applicable to the case of an officer taking his seat as a member of a court during the progress of the trial, as well as to that of one temporarily absent after the proceedings have commenced. Their purpose is to place the new member in substantially the same attitude as other members of the court with respect to the testimony adduced, and unless this be done, he is not qualified t o act. C. M. O. 74, 1899, 2. *See also* C. M. O. 53, 1901, 1.

MEMBERS OF BOARDS. *See* BOARDS, 2; PRECEDENCE, 10.

MEMORY.

1. **Lapse of**—As a defense in "Fraudulent enlistment." *See* FRAUDULENT ENLISTMENT, 23.
2. **Leading questions**—To aid defective memory. *See* LEADING QUESTIONS, 5, 15.
3. **Refreshing memory**—Of Witnesses. *See* COUNSEL, 56; JUDGE ADVOCATE, 129; WITNESSES, 95–99.

MENTAL IRRESPONSIBILITY. *See* INSANITY, 27.

MERCHANT VESSELS.

1. **Collision**—Enlisted man disappeared. *See* COLLISION, 13; LINE OF DUTY AND MISCONDUCT CONSTRUED, 29.
2. **Crews**—Status of merchant crews in time of war. File 5194–9, J. A. G., May 22, 1913.
3. **Officer as expert witness**—The Navy Department has no objection to a certain retired officer testifying "as an expert witness in the case of the collision between two steamships in the Savannah River, neither of said steamships being Government vessels." File 26276–125, Sec. Navy, Nov. 22, 1915.
4. **Officer serving as a member of board of survey for Lloyds**—An officer acted as a member of a Lloyds board of survey on a merchant vessel. He received a $25 check, which he deposited with the paymaster and requested a decision of the department as to his right to retain the check. *Held:* Officers of the Navy may not "without permission of the Executive" claim fees for services rendered by them on "the time of the United States," and because of their character as such officers, as members of boards of survey on merchant steamers, whether of American or foreign registry. The department is authorized to grant or deny permission to this officer to accept this fee. (*See* 7 Op. Atty. Gen. 756.) File 27601–116, J. A. G., May 17, 1915. (Permission was granted to accept the fee. Bu. Nav. File 4189–95, June 5, 1915.) C. M. O. 42, 1915, 10–11. *See also* File 5194–230, J. A. G., Aug. 24, 1916.

MERRIMAC, U. S. S.

1. **Clemency**—Extended because accused (enlisted man) had been a member of the crew of the U. S. S. Merrimac. C. M. O. 69, 1904, 2. *See also* CLEMENCY, 62.
2. **Same**—A chief boatswain was sentenced to "dismissal." The convening authority approved but in forwarding the record to the President recommended the sentence be

Digitized by Google

mitigated to confinement for one year to the limits of his ship or station and to lose pay, in consideration of the "gallant conduct of the accused, then a coxswain, on board the U. S. S. Merrimac on June 3, 1898, when he was a member of the volunteer crew which sank that vessel in the entrance to the harbor of Santiago, Cuba." In view of this recommendation the recommended clemency was extended. C. M. O. 32, 1905. *See also* CLEMENCY, 62.

MESSES.

1. **Members of**—Liability of members for debts contracted by a majority vote. File 4824–1 and 2, 1906.
2. **Same**—In a case where a wardroom mess steward had irregular dealings with certain firms the Bureau of Navigation in part stated: "Firms employ those methods principally because they feel that no matter what use such credit is put to, the threat to take the matter to higher authority usually leads to the payment of any claim. The principle is now at stake in this case as to the responsibility of the wardroom for unauthorized bills contracted in their name. Legal methods for determining this responsibility are at the disposal of this company, and I recommend that they be informed to that effect. The fact once firmly established that officers' messes are not responsible for unauthorized bills would lead to the elimination of irregularities on the parts of stewards and firms with whom they deal, which no amount of care can wholly eliminate." "It is a matter which should be adjusted between the parties directly concerned, with resort to the civil courts if necessary." File N–32/W, 1187–120, Bu. Nav., Apr. 12, 1916.

   "If they are of the opinion that they have a just claim, the same legal methods of obtaining judgment can be used against naval officers as against other citizens." File N–32/W, 1187–118, Bu. Nav., Feb. 8, 1916.

MESS CATERER. *See* C. M. O. 98, 1894, 2.

MESS COOK.

1. **Extra pay as**—Not to be included in actual pay in court-martial sentence. C. M. O. 24, 1909, 3.

MESSMEN.

1. **Naval Reserve.** *See* NAVAL RESERVE, 3.

MESTIZO. *See* C. M. O. 49, 1915, 23.

METEOROLOGIST.

1. **Retired naval officer**—Assigned to active duty. While serving and receiving pay for active duty he was appointed by the Secretary of the Navy "meteorologist" at the Mare Island Navy Yard. File 9736–18, J. A. G., June 25, 1910, p. 13.

MIDDLE NAMES IN SPECIFICATIONS. *See* CHARGES AND SPECIFICATIONS, 60.

MIDSHIPMEN.

1. **"Absence from station and duty without leave"**—Midshipmen tried by general court-martial. C. M. O. 77, 1905.
2. **Academic Board.** *See* ACADEMIC BOARD OF THE NAVAL ACADEMY.
3. **Age limit**—Executive is without authority to waive the age limit, as the age of candidates for admission is fixed by law. File 5252–43:1, J. A. G., May 7, 1913.
4. **Same**—As to constitutionality of special legislation, *see* 18 Op. Atty. Gen. 18; Messages and Papers of the President, vol. 8, p. 221. File 5252–73, J. A. G., Oct. 1, 1915, p. 4.
5. **Same**—An appointee is none the less a "candidate for admission" subject to examination, because he has already been a member or inmate of the Naval Academy, and subject to age limit. File 5252–43:1, J. A. G., May 7, 1913. *See also* MIDSHIPMEN, 70.
6. **Same**—Legal residence and age—Section 1517, R. S., as amended by act March 2, 1899 (25 Stat. 879) requires that a candidate for appointment to the Naval Academy be an actual resident of the district from which nominated, and must be between the ages of 15 and 20 when examined for promotion.

   The department leaves such matters as the actual residence of the candidate to the Representative appointing him and, the candidate having once been appointed and become a midshipman, the question of residence is regarded practically as *res judicata*.

Digitized by Google

As a matter of policy, the department should not reopen the matter in a case where the candidate's eligibility is attacked after he has otherwise qualified and been appointed to the Naval Academy.

If the matter was decided during a "previous administration" it will not properly be reopened under the doctrine of *res judicata*. File 5252-32, J. A. G., Jan. 26, 1910. *See also* File 26543-87:2, Sec. Navy, Apr. 28, 1913, p. 3, citing 28 Op. Atty. Gen., 180.

7. **Agreement and oath**—Signed by midshipmen appointed to Naval Academy. File 5252-77, J. A. G., July 20, 1915.
8. **Aliens**—Appointment of—There is no statute specifically making citizenship a condition precedent to eligibility to appointment to the Naval Academy as a midshipman, but inasmuch as officers of the Navy must be citizens, a midshipman can not be commissioned an ensign if he be an alien. (File 26252-71, Nov. 1, 1907). The above decision of the department was cited with approval in a recent case. While the statutes do not specifically prohibit the appointment of an alien to the Naval Academy, such prohibition is purely an administrative question which it is competent to handle in the Navy Regulations, and it was therefore recommended that the regulations be so amended as to prohibit the appointment to the Naval Academy of any except citizens of the United States. File 5252-68, J. A. G., May 15, 1915. *See also* File 26252-71, Sec. Navy, Nov. 26, 1912; 26252-71:1, J. A. G., Mar. 22, 1913; 8879-03, J. A. G., Oct. 19, 1903; RES JUDICATA, 10.
9. **Same**—Admission to Naval Academy of students from foreign States. *See* MIDSHIPMEN, 8.
10. **Allowances**—Suspension of. *See* MIDSHIPMEN 62.
11. **Appointments of**—Under the law, appointments to the Naval Academy are allowed for the office of Senator, Representative and Delegate in Congress, and not for the individual holding such office. Accordingly, if a Senator representing a State, or a Member of Congress representing a congressional district has two appointments to the Naval Academy made on his recommendation, his successor can not, while such appointees are at the Academy, be allowed two additional appointments made to the Academy on his recommendation. The foregoing opinion is fully supported by the long continued departmental construction of the law, which is known to Congress and which should be accepted as conclusive. (Brown *v.* U. S., 113 U. S. 568). The right of Representatives in Congress to have appointments made upon their recommendations has been denied even where it was contended that the midshipmen at the Academy appointed by their predecessors were not *bona fide* residents of the district from which appointed (28 Op. Atty. Gen. 180) or where a Member who had appointed a midshipman was later unseated by contest of election. (21 Op. Atty. Gen. 342. *See also* 10 Op. Atty. Gen. 46.) File 5252-67:1, J. A. G., July 12, 1915; C. M. O. 27, 1915, 8. *See also* File 5252-67, J. A. G., May 3, 1915, with reference to appointment by Members of Congress at Large.
12. **Same**—Aliens. *See* MIDSHIPMEN, 8.
13. **Same**—Boys enlisted in Navy. *See* File 5252-59, J. A. G., Feb. 6, 1914.
14. **Same**—Enlisted men—R. S. 1513, as amended by act, March 3, 1903 (32 Stat. 1197), and act, June 30, 1914 (38 Stat. 410). C. M. O. 31, 1915, 2. Enlisted men of Marine Corps under act, June 30, 1914 (38 Stat. 410). *See* MIDSHIPMEN, 52.
15. **Same**—Influence. *See* CONGRESS, 11; NAVAL ACADEMY, 12.
16. **Same**—Marine Corps. *See* MIDSHIPMEN, 52.
17. **Arrest, under**—Status of—Under a regulation of the Naval Academy providing that "The commandant of midshipmen will prescribe in each case the nature of restrictions to be imposed upon the midshipmen placed under suspension to await investigation or action," (Regulations of the U. S. Naval Academy, 1911, p. 116, article 583, as amended) a midshipman may properly be placed under arrest pending action on a recommendation by the Superintendent of the Navy Academy for his dismissal. The fact that a court of inquiry may be ordered to investigate the allegations against him does not of itself require his being released from arrest. To release him from arrest because the court of inquiry was investigating allegations against him, which were the basis for recommending his dismissal, would retract the above regulation, which has been approved by the department, and exert a very pernicious influence upon the discipline at the Naval Academy. File 28028-203:1, Sec. Navy, June 8, 1915, and J. A. G., June 7, 1915; C. M. O. 22, 1915, 9.
18. **Assignment**—Midshipmen on graduation shall be commissioned ensigns in the Navy, or may be assigned by the Secretary of the Navy to fill vacancies in the lowest commissioned grades of the Marine Corps or Staff Corps of the Navy. (Act July 9, 1913, 38 Stat. 103.) File 5252-66, J. A. G., May 13, 1915, p. 1.

Digitized by Google

19. **Board of Investigation**—Investigated irregularities of a midshipman, who was represented by counsel of his own choosing. File 5252-73, Oct. 2, 1915.
20. **Boys enlisted in Navy.** *See* MIDSHIPMEN, 13.
21. **"Breaking arrest"**—Midshipman charged with. *See* BREAKING ARREST, 6.
22. **Cheating**—A midshipman having taken final examination as midshipman, turned in his papers but subsequently in an unauthorized and surreptitious manner secured access to the papers and made changes in answers to certain questions. Was marked zero on these subjects and when tried by court-martial for "scandalous conduct tending to the destruction of good morals," pleaded that he had already been punished by the action of the Academic Board in marking, and the court sustained that plea. The Secretary of the Navy stated that the accused must be punished in accord with the action of the Academic Board or go altogether unpunished, and as such conduct should not go unpunished, "his resignation will be, therefore, accepted." 13 J. A. G. 457, Aug. 18, 1905. *See also* BLOTTER; GOUGING, 3; OFFICERS, 13.
23. **Citizenship of.** *See* MIDSHIPMEN, 8.
24. **"Conduct to the prejudice of good order and discipline"**—Charged with. C. M. O. 77, 1905.
25. **"Conduct unbecoming an officer and a gentleman"**—Charged with. C. M. O. 9, 1909; 7, 1912: 8, 1912.
26. **Court of inquiry**—Convened to investigate alleged irregularities. *See* COURTS OF INQUIRY, 33.
27. **"Court-Martial"**—A midshipman, member of the third class at the United States Naval Academy, was tried by a "court-martial" on the charge of "Hazing, in violation of an act of Congress approved June 23, 1874," under which were six specifications. The proceedings, findings, and recommendation of the "court-martial" were approved by the Superintendent of the Naval Academy, who convened the "court-martial." The midshipman was dismissed "from the U. S. Naval Academy and the naval service."

    The case went to the Court of Claims, the midshipman contending that the act of June 23, 1874 (18 Stat. 203) was incompatible with, or repealed by, subsequent acts of Congress approved March 2, 1895 (28 Stat. 838) and March 3, 1903 (32 Stat. 1198), respectively. *Held:* That the act of June 23, 1874 (18 Stat. 203) was not repealed by the later statutes. File 4051-3, J. A. G., July 1, 1909. *See also* Melvin. *v.* U. S., Ct. Cls., No. 30095; 25 Op. Atty. Gen. 543.

    The act of June 23, 1874 (18 Stat. 203) provides that a midshipman may be tried by a "court-martial," composed of "not less than three commissioned officers," and any midshipman found guilty of "hazing" by such a "court-martial" shall be dismissed; "and such finding, when approved by said superintendent shall be final."
31. **Dismissal**—May not be dismissed for a "single" act of hazing without trial by "court-martial." *See* HAZING, 6.
32. **Same**—As a midshipman is neither a commissioned nor warrant officer, it seems that he may be dismissed pursuant to a sentence of a court-martial without the express approval thereof by the President, unless there be some explicit statutory provision requiring such executory approval. The act of April 9, 1906 (34 Stat. 104), required the approval of the President for the dismissal of a midshipman from the Naval Academy whenever the continued presence of a midshipman at the Naval Academy is contrary to the best interests of the service. 16 J. A. G. 65, Nov. 2, 1911; File 26262-198, J. A. G., Nov. 13, 1908. *See also* C. M. O. 77, 1905; 9, 1909; 10, 1909; 36, 1909, 2.
33. **Same**—Power of Secretary of the Navy to dismiss. *See* MIDSHIPMEN, 80.
34. **Same**—Form letter for dismissing midshipmen. *See* File 26283-925, Sept. 18, 1915.
35. **Same**—"That it shall be the duty of the Superintendent of the United States Naval Academy, whenever he shall believe the continued presence of any midshipman at the said academy to be contrary to the best interests of the service, to report in writing such fact, with a full statement of the facts upon which are based his reasons for such belief, to the Secretary of the Navy, who, if after due consideration of the said report he shall deem the superintendent's said belief reasonable and well founded, shall cause a copy of the said report to be served upon the said midshipman and require the said midshipman to show cause, in writing and within such time as the said Secretary shall deem reasonable, why he should not be dismissed from the said academy; and after due consideration of any cause so shown the said Secretary may, in his discretion, but with the written approval of the President, dismiss such midshipman from the said academy. And the truth of any issue of fact so raised, except upon the record of demerit, shall be determined by a board of inquiry convened by

Digitized by Google

the Secretary of the Navy under the rules and regulations for the government of the Navy." (Act, Apr. 9, 1906, 34 Stat. 104, sec. 1). File 5252–73, J. A. G., Oct. 1, 1915.

36. **Dismissed midshipmen**—Question as to whether a dismissed midshipman may hold a State office is not under jurisdiction of Navy Department. File 5252–79, J. A. G., June 19, 1916.
37. **Same**—It is understood that under the civil service rules and regulations any person who has been dismissed from the military or naval service is barred from examination for the United States civil service within one year from the date of such dismissal. File 5252–79, J. A. G., June 19, 1916.
38. **Same**—Dismissal of midshipman, when once accomplished, is final and can not be revoked. It has been deemed necessary in the past to obtain special authority of Congress for the reinstatement of midshipmen who have been legally dismissed. (*See* File 1897–1904, Sec. Navy, Mar. 21, 1904; act, Mar. 3, 1905, 35 Stat. 1263.) Thus it will be seen that not only have the courts, the Department of Justice, and the Navy Department concurred in the conclusion that reinstatement can not be effected by revocation, but that this view has received the concurrence of Congress and the President with reference to specific cases of midshipmen. File 5252–73, J. A. G., Oct. 1, 1915. *See also* MIDSHIPMEN, 75; 25 Op. Atty. Gen. 579; File 5252–60, J. A. G., Feb. 2, 1914.
39. **Same**—Not for hazing nor pursuant to sentence of court-martial, but in accordance with section 1, act April 9, 1906 (34 Stat. 104)—No law prohibiting his appointment as an officer of the Navy. The question as to whether he is ineligible to hold a commission in the Army is one for determination of the War Department. File 26283–925; 4, J. A. G., Aug. 7, 1916.
40. **"Drunkenness"**—Midshipmen charged with. C. M. O. 77, 1905.
41. **Enlisted men of Navy**—Appointment as midshipmen. *See* MIDSHIPMEN, 14.
42. **Enlisted men of Marine Corps**—Appointment as midshipmen. *See* MIDSHIPMEN, 52.
43. **Expelled, summarily**—Any midshipman summarily expelled from the Naval Academy for hazing shall not thereafter be reappointed or be eligible for appointment as a commissioned officer in the Army, Navy, or Marine Corps, until two years after the graduation of the class of which he was a member. File 5252–79, J. A. G., June 19, 1916. *See also* MARINE CORPS, 54.
44. **Foreigners**—Admission to Naval Academy of foreigners. *See* MIDSHIPMAN, 8.
45. **Form letter**—For dismissing midshipmen. *See* File 26283–925, Sept. 28, 1915.
46. **General court-martial**—Midshipmen tried by. C. M. O. 77, 1905; 9, 1909; 10, 1909; 36, 1909, 2; 12, 1913, 3.
47. **Gouging.** *See* MIDSHIPMEN, 22.
48. **Hazing.** *See* HAZING.
49. **Legal residence.** *See* MIDSHIPMEN, 6.
50. **Letter**—Form letter for dismissing midshipmen. *See* File 26283–925, Sept. 28, 1915.
51. **Longevity**—Service at Naval Academy counts. *See* LONGEVITY.
52. **Marine Corps**—Enlisted men of the Marine Corps may be appointed to the Naval Academy in the discretion of the Secretary of the Navy, under the authority conferred by the act of June 30, 1914 (38 Stat. 410; G. O. 124, Oct. 19, 1914) which authorizes such appointments from "enlisted men of the Navy." File 5252–66, Sec. Navy, May 13, 1915; C. M. O. 20, 1915, 7.
53. **Same**—Two midshipmen, graduates of the Naval Academy, having since resigned from the naval service, sought appointments as second lieutenants in the Marine Corps. *Held*, that their status was the same as any other civilian and that they would be required to take the ordinary entrance examination for the commission as second lieutenant. The only benefit which they receive is that the service in the Naval Academy would be counted in determining the amount of their longevity pay. File 13261–335, J. A. G., June 6, 1911. *See also* File 13261–486, Sec. Navy, June 8, 1916.
54. **Same**—Precedence when appointed to Marine Corps. *See* MIDSHIPMEN, 66.
55. **Same**—The provision of the act of March 3, 1899 (30 Stat. 1008) for at least one appointment to the Marine Corps, annually from graduates of the Naval Academy is still in force, although not observed for a number of years. 15 J. A. G. 135, April 4, 1911.
56. **Naturalization.** *See* MIDSHIPMEN, 8.
57. **Oath**—And agreement—Signed by midshipmen appointed to Naval Academy. File 5252–77, J. A. G., July 20, 1915.
58. **Officer**—A midshipman is not an officer within the meaning of R. S. 1229, providing that no officer in the military or naval service shall, in time of peace, be dismissed from the service except upon and in pursuance of the sentence of a court-martial. File 26262–198.
59. **Same**—Midshipmen are "officers" within the meaning of R. S. 1486. File 11130–2b, J. A. G., July 31, 1909. *See also* File 5252–73, J. A. G., Oct. 1, 1915.

Digitized by Google

60. **Pardon**—Of dismissed midshipman by President where dismissal has not been consummated. *See* File 5252-73, J. A. G., Oct. 1, 1915, pp. 4-5; Op. Acting Atty. Gen., Aug. 14, 1888, Exec. Press Copy Book, Navy Dept. No. 7, p. 245.
61. **Pay**—Congress provided in 1893 that any midshipman commissioned within six months after graduation should be paid "from the date he takes rank *as stated in his commission* to the date of qualification and acceptance of his commission." (Act Mar. 3, 1893, 27 Stat. 715.) File 5460-76, J. A. G., July 12, 1915. *See also* File 13261-486, Sec. Navy, June 8, 1916.
62. **Pay**—Suspension without pay for due cause by Secretary of the Navy—Where it is within the power of the Secretary of the Navy, with approval of the President, to dismiss a midshipman, he may, with the approval of the President, suspend a midshipman for one year, without pay for due cause. Since the power to suspend it derived from the power to dismiss absolutely, only such midshipmen as may be subject to dismissal can be so suspended. File 5252-72, J. A. G., Sept. 20, 21, 1915. [In this case comptroller held that midshipman suspended without pay was not entitled to allowances. (177 S. and A. Memo., 3830.)]. C. M. O. 31, 1915, 12.
63. **Physical disqualification**—For commission as ensign—Waiver. File 5252-50, J. A. G., May 14, 1912.
64. **Physically incapacitated**—Promotion. *See* RETIREMENT OF OFFICERS, 50.
65. **Postgraduate courses**—Engagements entered into by midshipmen and candidates for postgraduate courses regarding future service in the Navy. File 5252-77, Sec. Navy, April 12, 1916.
66. **Precedence when appointed to Marine Corps**—Graduates of the Naval Academy who are appointed second lieutenants in the Marine Corps should take rank with their classmates who are appointed ensigns in the Navy from the same date, in accordance with their final standing upon graduation from the Naval Academy. File 11130-27, J. A. G., Aug. 26, 1915; C. M. O. 29, 1915, 7.
67. **Precise designation of**—In the case of a midshipman at the Naval Academy tried by general court-martial for "Hazing" the department stated: "The more precise designation of the rank of the accused would be 'Midshipman, United States Navy, member of the third class at the United States Naval Academy,' instead of 'a midshipman of the third class in the United States Navy.'" C. M. O. 12, 1913, 3.
68. **Promotion**—When physically incapacitated for duty. *See* RETIREMENT OF OFFICERS, 50.
69. **Same**—Effect of the recommendation of the Academic Board that a midshipman be dropped. *See* ACADEMIC BOARD OF THE NAVAL ACADEMY, 4.
70. **Reappointment**—There is no provision of law expressly prohibiting the reappointment of a midshipman who has been dismissed from the Navy, except in the single case of hazing. However, the spirit of the law is against the reappointment of any person who has been dismissed from the Navy. File 5252-43, J. A. G., Oct. 5, 1911.
71. **Same**—As to reappointment of midshipmen dismissed for hazing, *see* act Mar. 3, 1903 (32 Stat. 1198), as amended by act Apr. 9, 1906 (34 Stat. 104). C. M. O. 31, 1915, 12.
72. **Same**—A midshipman who has satisfactorily completed the course for the first (or fourth-class) year at the Naval Academy, but who, in the following year, is found deficient and allowed to resign, need not be required, when given a new appointment, to go over the course for the fourth-class year a second time, but may legally rebegin the course for the third-class year provided that such action is recommended by the academic board. File 5252-65, J. A. G., Mar. 12, 1915; C. M. O. 12, 1915, 10.
73. **Same**—A midshipman who has been dismissed from the Naval Academy for "intoxication and inaptitude" and who had other reports on record against him, was given a new nomination. *Held*, that if the candidate's moral qualifications are not satisfactory and such as are required for the admission of candidates generally, he may be legally rejected, and whether or not he is so qualified is a question of fact. File 5252-43, J. A. G., Oct. 5, 1911.
74. **Regulations of the U. S. Naval Academy, 1911**—Issued under authority of R. S. 161—Midshipmen are subject to. J. A. G., June 7, 1915.
75. **Reinstatement**—A midshipman, who has been dismissed for misconduct by order of the President pursuant to law, can not be legally reinstated in his former position by revocation of the order of dismissal. The only way in which such a former midshipman can legally obtain readmission to the Naval Academy would be in the manner provided for any other candidate in civil life, as authorized by sections 1515, 1516, and 1517 of the Revised Statutes, and by the act of Congress approved July 9,

Digitized by Google

1913 (38 Stat. 103). [*See* 25 Op. Atty. Gen. 579; Op. Atty. Gen. Oct. 15, 1915. *See also* with reference to appointments from enlisted men, R. S. 1513 as amended by act Mar. 3, 1903 (32 Stat. 1197), and act June 30, 1914 (38 Stat. 410). As to reappointment of midshipmen dismissed for hazing, *see* act Mar. 3, 1903 (32 Stat. 1198), as amended by act Apr. 9, 1906 (34 Stat. 104).] File 5252-72, J. A. G., Sept. 27, 1915; C. M. O. 31, 1915, 12. *See also* MIDSHIPMEN, 38.

76. **Same**—Can not be effected by revocation. *See* MIDSHIPMEN, 38; 75.
77. **Residence, LEGAL.** *See* MIDSHIPMEN, 6.
78. **Rules governing admission**—The pamphlet issued by the Bureau of Navigation entitled "Regulations Governing the Admission of Candidates into the U. S. Naval Academy as Midshipmen" is of official character. File 5252-4, J. A. G., Oct. 5, 1911, p. 4.
79. **Sea duty**—As part of the course at Naval Academy. *See* NAVAL ACADEMY, 22.
80. **Secretary of the Navy**—Power of to dismiss—The Secretary of the Navy, with the written approval of the President, has the power to dismiss midshipmen for due cause in any case except that in which the cause consists in a "single act of hazing." In such cases the law expressly provides that a midshipman can be dismissed only pursuant to the sentence of a "court-martial" which the Superintendent of the Naval Academy, "in his discretion, and with the approval of the Secretary of the Navy," has convened. (Acts of June 23, 1874, 18 Stat. 203, and Mar. 3, 1903, 32 Stat. 1198, as amended by the act of Apr. 9, 1906, 34 Stat. 104.) A midshipman who is recommended for punishment for a "single act of hazing" is thus in the unique position, as compared with other offenses against Naval Academy Regulations, of being protected by statute against dismissal, except by sentence of a "court-martial." File 5252-72, J. A. G., Sept. 20, 21, 1915; C. M. O. 31, 1915, 12. *See also* File 5252-60, J. A. G., Feb. 2, 1914.
81. **Sentence**—Unnecessary that President should confirm sentence of general court-martial involving the dismissal of a midshipman. *See* MIDSHIPMEN, 32.
82. **"Single act of hazing"**—By midshipmen. *See* HAZING, 6; MIDSHIPMEN, 31, 80.
83. **Status of**—Midshipmen are classed as "being of the line" but are eligible for appointment as second lieutenants in the Marine Corps, but this does not manifest the deliberate intent of Congress that graduates of the Naval Academy are to be regarded as anything but midshipmen—much less that their status partakes at all of the nature of that of marine officers. They are also eligible, upon passing the required examination, for appointment as assistant paymasters, but this is not indicative that their present status is changed. File 3980-629, J. A. G., July 13, 1911, p. 4. *See also* PAYMASTER'S CLERKS, 10.
84. **Statutory history**—Of midshipmen and naval cadets. (*See* Weller *v.* U. S., 41 Ct. Cls., 324.) File 26262-198, J. A. G., Nov. 13, 1908, p. 2; 16 J. A. G., 65, Nov. 2, 1911.
85. **Suicide**—Midshipmen while suffering from acute nostalgia committed suicide. *See* NOSTALGIA.
86. **Suspension without pay**—For due cause by the Secretary of the Navy. *See* MIDSHIPMEN, 62.
87. **Third classman**—At Naval Academy tried by general court-martial for "hazing." *See* MIDSHIPMEN, 67.
88. **Trial by court-martial**—Midshipmen are subject to trial by court-martial convened by order of the Secretary of the Navy. File 9687 and 9688, Jan., 1902; 9689, Feb., 1902; 9690, Apr. 1902.
89. **Waiving age limit.** *See* MIDSHIPMEN, 3, 4, 5, 6.
90. **Warrant officer**—Midshipman is not. 16 J. A. G., 70, Nov. 2, 1911.

MIDWAY ISLAND.

1. **Jurisdiction**—Of United States over. File 4679-04; 2479-3-07; Executive order of Jan. 20, 1903; G. O. 120, Jan. 21, 1903; File 11369-02; 754-03.

MILEAGE.

1. **Abroad**—Annual appropriations under "Pay, Miscellaneous," provide "for actual personal expenses of officers while traveling abroad under orders." File 13707-48, J. A. G., Aug. 2, 1915. *See* in this connection G. O. 268, Apr. 2, 1881; G. O. 295, May 2, 1882; G. O. 298, Aug. 5, 1882. *See also* File 26251-150, J. A. G., Sept. 1, 1916.
2. **"Government transportation"**—The act of June 30, 1914 (38 Stat. 393), provides "that hereafter no mileage shall be paid to any officer where Government transportation is furnished." File 13707-48, J. A. G., Aug. 2, 1915.
3. **Same**—Defined—The Comptroller of the Treasury has decided that the words "Government transportation" in the act of June 30, 1914, above quoted, means "transporta-

Digitized by Google

tion on vessels owned or employed by the Government or by conveyance on land, so owned or employed, but not transportation furnished on transportation request." (Comp. Dec. Mar. 30, 1915, 169 S. & A. Memo. 3562.) File 13707–48, J. A. G., Aug. 2, 1915.

4. **Naval Militia**—Naval Militia members subpœnaed as witnesses before naval general courts-martial. See NAVAL MILITIA, 45, 46.
5. **Rate for officers**—The act of March 3, 1901 (31 Stat. 1010, 1029), provides "that in lieu of traveling expenses and all allowances whatsoever connected therewith, including transportation of baggage, officers of the Navy traveling *from point to point within the United States* under orders shall hereafter receive mileage at the rate of eight cents per mile, distance to be computed by the shortest usually traveled route * * *." File 13707–48, J. A. G., Aug. 2, 1915. *See also* File 26251–150, J. A. G., Sept. 1, 1916.
6. **Travel performed**—To be present as witness in private litigation—An officer ordered to perform travel in order that he might be present to testify if needed in a suit to which the Government is not a party, but its interest in the result of the litigation is sufficiently great in the opinion of the Secretary of the Navy to cause the officer to be present, is entitled to mileage for the travel performed. (Comp. Dec., July 28, 1915; 173 S. & A. Memo. 3729.) File 26254–1855; C. M. O. 35, 1915, 10.
7. **Within United States.** *See* MILEAGE, 5, 6.
8. **Witness in private litigation.** *See* MILEAGE, 6.

MILITARY COMMISSIONS.

1. **Conduct of military commissions and other exceptional military courts when held by naval authority**—When exceptional military trials, whether by military commissions or provost courts, are held by naval authority, the commission or court conducting such trials shall be constituted and organized, and shall conduct its proceedings in the manner provided for naval courts-martial or deck courts, so far as the exigencies of the service may permit. Similarly, records shall be kept of the proceedings, which upon completion shall be transmitted to the Judge Advocate General of the Navy to be revised and recorded. No sentence of death shall be carried into execution until confirmed by the Secretary of the Navy; all other sentences may be executed upon approval of the convening authority.

   The jurisdiction of every such commission or provost court, in the matter of the punishments which it may adjudge, shall be limited in the discretion of the convening authority and shall be expressly stated in his order convening such commission or provost court. File 5526–39; C. M. O. 13, 1916, 6.
2. **Haiti**—Authority of commander-in-chief of cruiser squadron to try political (military) prisoners by military commissions or provost. File 5526–39, J. A. G., Mar. 7, 1916. *See also* Treaty between United States and Haiti, proclaimed May 3, 1916, Art. 14.

MILITARY COURTS. *See* MILITARY COMMISSIONS, 1.

MILITARY TRIALS. *See* MILITARY COMMISSIONS, 1.

MILITIA. C. M. O. 49, 1915, 26. *See also* NAVAL MILITIA.

MILITIA, NAVAL. *See* NAVAL MILITIA.

MINISTERIAL ACTS. *See also* ADMINISTRATION.

1. **President**—Can not be required to perform in person. C. M. O. 12, 1915, 11.

"MINISTERIALLY." *See* C. M. O. 127, 1900, 1.

MINORS.

1. **Agreement**—To reenlist or waive transportation. *See* APPRENTICES, 2.
2. **Allotments to**—Should be made to guardian. *See* ALLOTMENTS, 5.
3. **Citizenship.** *See* CITIZENSHIP.
4. **Death gratuity**—A minor is competent to designate a beneficiary. *See* DEATH GRATUITY, 15.
5. **Same**—A minor may be designated as beneficiary. *See* DEATH GRATUITY, 16.
6. **"Desertion"**—Accused pleaded "Not Guilty." Prosecution proved conclusively the offense charged.

   The above proof was not disputed by the accused, whose counsel confined the defense to the introduction of evidence showing that the accused was only 16 years of age when he enlisted in June, 1902, and not 21 years old, as stated by him under oath at that time. The accused himself took the stand and testified that his

Digitized by Google

age was wrongly stated by him when he enlisted, as above set forth, adding that his parents knew nothing of his enlistment at the time. He said that he left his ship and returned to them at their request, to help support them by working on his father's farm, such aid being necessary on account of the age and infirmity of his parents.

The accused's sister was called for the defense, and corroborated his testimony as to his age and the circumstances of their father and mother.

Finally, at the request of the court for further evidence as to the date of birth of the accused, his counsel procured a certificate of baptism from the accused's home town, from which it appears that the accused was about 16 years and 8 months of age when he enlisted in the Navy.

The counsel followed up this testimony by an argument in which he maintained that the evidence showed conclusively that the accused enlisted when 16 years old, without the consent or knowledge of either of his parents, and contended that said enlistment was illegal and void, and that therefore the accused was not amenable to Navy regulations and discipline, and should be discharged from the naval service accordingly, referring to certain decisions of the courts in support of such view.

In reply to the above argument the judge advocate cited a number of cases similar to the one being tried, in which the United States courts, including the Supreme Court, have decided that the enlistment of a minor without the consent of his parents or guardian required by the statute is not void but voidable only, and while he remains in the service under such enlistment, the minor is amenable to the discipline of the service, and can not be discharged by a civil court on a writ of *habeas corpus* while undergoing a court-martial sentence or awaiting trial by such court.

The court found the specification proved, and that the accused was guilty of the charge, and sentenced him to the punishment usual in such cases, viz, confinement for one year, with corresponding penalties and forfeitures, and dishonorable discharge at the expiration of said period. All the members, however, recommend him to clemency "under the existing circumstances as shown by the evidence."

It is beyond question from numerous decisions of both Federal and State courts, and particularly of the Supreme Court of the United States, that the position taken by the defense in the foregoing case is untenable. In the Morrissey case the court said that the provision of section 1117, R. S., requiring the consent of parents or guardians to the enlistment in the Army of a minor, "is for the benefit of parent or guardian, * * * but it gives no privilege to the minor. * * * An enlistment is not a contract only, but effects a change of status. It is not, therefore, like an ordinary contract, voidable by the infant. * * * The contract of enlistment was good so far as the petitioner is concerned. He was not only *de facto*, but *de jure*, a soldier—amenable to military jurisdiction." (*In re* Morrissey, 137 U. S., 157.) C. M. O. 217, 1902. *See also* Ex parte Rock, 171 Fed. Rep. 240; File 26251-6972: 2, J. A. G., Jan. 25, 1913.

7. **Domicile**—What affects. *See* File 5252-32, J. A. G., Jan. 26, 1910, 6.
8. **Same**—Midshipmen. *See* MIDSHIPMEN, 6.
9. **Enlistment of**—A minor enlisted in the Navy when 15 years old, alleging that he was 18. To straighten out his record he now submits the consent of his father. The Bureau of Navigation requires if it is legal to accept the evidence and retain him under his four-year enlistment (there being no provision of law for the enlistment for four years of any one under 18 years of age), or whether it is necessary to secure the agreement of the father and boy to remain in the service during minority. *Held*, that the enlistment is a valid one unless voided by the United States, and it is legal to retain him under his four-year term of enlistment. File 24368-7, Sec. Navy, Feb. 14, 1912.
10. **Same**—Consent of guardian—A minor enlisted with consent of his guardian; a different guardian subsequently appointed requested minor's discharge. *Held*, the department would not be justified in granting such request. File 7657-332, J. A. G., Dec. 29, 1915; C. M. O. 49, 1915, 25. *See also* File 9750-04, J. A. G., Nov. 30, 1904.
11. **Same**—Consent of father necessary when living—The consent of the father, when living, is necessary to the enlistment in the Navy of a minor under the age of 18, except where the mother or other person is the legal guardian of such minor. File 7657-293, J. A. G., June 19, 1915; C. M. O. 22, 1915, 9. *See also* section 1419 of the Revised Statutes; G. O. 81, Nov. 21, 1866.
12. **Same**—Formerly discharged under writ of habeas corpus. *See* FRAUDULENT ENLISTMENT, 17.
13. **Same**—During minority—Extension of, *See* EXTENSION OF ENLISTMENTS, 5.
14. **Same**—Error in service record. C. M. O. 6, 1915, 11.

Digitized by Google

15. **Extension of enlistment**—Original enlistment for minority. *See* EXTENSION OF ENLISTMENTS, 5.
16. **Fraudulent enlistment.** *See* FRAUDULENT ENLISTMENT, 57–60.
17. **Naturalization.** *See* CITIZENSHIP, 25.
18. **Pay**—Upon reenlistment. *See* PAY, 86.

MISAPPLICATION OF LAW.
1. **Court, by.** *See* C. M. O. 37, 1915, 10.

MISAPPROPRIATION. *See* C. M. O. 17, 1910, 3–5; 12, 1911, 5; 27, 1913; 1, 1914, 5.

MISAPPROPRIATION OF MEDICAL STORES ENTRUSTED TO HIS CHARGE.
1. **Surgeon**—Charged with. G. C. M. Rec., 6171.

MISCARRIAGE OF JUSTICE. *See* CRITICISM OF COURTS-MARTIAL, 16, 35.

MISCONDUCT. *See also* LINE OF DUTY AND MISCONDUCT CONSTRUED.
1. **Board of inquest**—Should state in its opinion whether death was result of misconduct. *See* BOARDS OF INQUEST, 5.
2. **Death gratuity**—Effect of misconduct on death gratuity. *See* DEATH GRATUITY, 21.
3. **Defined**—In a recent case where it appeared that the death of the deceased was due to his carelessness or negligence in stumbling over the string piece at the head of a dock in the navy yard while returning to his ship from liberty and falling upon a float eighteen or twenty feet below, it was held by the department that the death of the deceased was not due to his own misconduct. In accordance with precedent it must be held in such cases that, as the deceased was absent from his station and duty on liberty at the time of his death and was not actually engaged in the performance of duty, his death did not occur in the line of duty, and, under the circumstances above related, was not due to his own misconduct. However, negligence is not necessarily misconduct. "The term 'misconduct' implies a wrongful intention and not a mere error of judgment." (Smith *v.* Cutler (N. Y.), 10 Wend., 590, 25 Am. Dec., 580; United States *v.* Warner, 28 Fed. Cas., 404.) "In usual parlance misconduct means a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand; and carelessness, negligence, and unskillfulness are transgressions of some established but indefinite rule of action, where some discretion is necessarily left to the actor. Misconduct is a violation of definite law: carelessness, an abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act, and is necessarily indefinite." (Citizens Ins. Co. *v.* Marsh, 41 Pa. (5 Wright), 386, 394; 5 Wds. & Ph., 4531.)
4. **Line of duty and misconduct cases.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED.
5. **Midshipmen**—Dismissed for. *See* C. M. O. 31, 1915, 10–12. *See also* HAZING.
6. **Missing ship**—Caused by misconduct of accused. C. M. O. 49, 1915, 8.

MISINTERPRETATION OF EVIDENCE.
1. **By court.** C. M. O. 37, 1915, 10.

MISLEADING REPORT.
1. **General court-martial specification.** C. M. O. 52, 1910, 1.

MISSING SHIP.
1. **Aggravated offense**—The department takes occasion to call attention to the fact that the offense of leaving the ship just on the point of sailing is an aggravated one. C. M. O. 50, 1900, 1
2. **"Conduct to the prejudice of good order and discipline"**—"Missing ship" should be charged under. *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 12; CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE, 1, 12–14.
3. **"Deliberately and willfully."** *See* "DELIBERATELY AND WILLFULLY," 3.
4. **Intent**—Necessity of proving. C. M. O. 49, 1915, 8.
5. **Misconduct**—Of accused as a cause of missing ship. C. M. O. 49, 1915, 8.
6. **Officer**—Tried by general court-martial under "Conduct to the prejudice of good order and discipline." C. M. O. 1, 1908; G. C. M. Rec. 31984.
7. **Same**—Accused (officer) in consequence of his misconduct, missed the sailing of his ship on important duty, thereby making it necessary for the department to order another officer telegraphically to fill his place at the expense and inconvenience of the Government. File 26251-11181, Sec. Navy, Dec. 17, 1915, p. 3.

Digitized by Google

MISSING VESSELS.
1. **Fixing date**—U. S. S. *Nina*. *See* File 264-B.

MISSPELLED WORDS.
1. **Record**—General court-martial. C. M. O. 27, 1913, 11; 28, 1915.

MISTAKES OF LAW.
1. **Recovery of money**—"In a large number of cases it has been decided that the Government can not recover money voluntarily paid by its officers in consequence of an erroneous construction of law. (*See* 19 Op. Atty. Gen., 429; 21 Op. Atty. Gen., 323; Hedrick's Case, 16 Ct. Cls., 88; Arthur *v.* United States, 16 Ct. Cls., 433; Miller *v.* United States, 19 Ct. Cls., 353; Badeau *v.* United States, 130 U. S., 439; United States *v.* Ala. R. R. Co., 142 U. S., 621; Walker *v.* United States, 139 Fed. Rep., 409, affirmed 148 Fed. Rep., 1022; 20 Comp. Dec., 182, 185.)" File 26254-1451:11 J. A. G., Apr. 12, 1915, p. 14. *See* act of Aug. 29, 1916 (39 Stat. 581), which reimbursed an officer for $360 paid by him under a mistake of law.

MISTY WEATHER.
1. **Navigation in.** C. M. O. 2, 1915; 3, 1915.

MITIGATION OF SENTENCES. *See* COMMUTING SENTENCES, 1, 2; CONVENING AUTHORITY, 39, 62; REVIEWING AUTHORITY, 12; SECRETARY OF THE NAVY, 49–56.

MITIGATION OF SENTENCES AFTER FINAL ACTION. *See* CONVENING AUTHORITY, 62.

MONEY.
1. **Borrowing.** *See* BORROWING MONEY; LENDING MONEY.
2. **Deposits.** *See* DEPOSITS.
3. **Disposition**—Of money of deceased officers. *See* DISPOSITION OF EFFECTS.
4. **Naval Academy**—Payment of money to secure appointment to. *See* NAVAL ACADEMY, 12, 17.
5. **Payment of**—To secure deserter's release. *See* DESERTION, 88.
6. **Transactions**—Between enlisted men—charging of under "Conduct to prejudice of good order and discipline." *See* CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE, 15.
7. **Transportation in naval vessels.** *See* GOLD, 1.

MORAL OBLIQUITY. *See* C. M. O. 230, 1902. *See also* INSANITY, 37.

MORAL QUALIFICATIONS FOR PROMOTION. *See* MARINE EXAMINING BOARDS, 14; NAVAL EXAMINING BOARDS, 11–15; PROMOTION, 88–99.

MORAL TURPITUDE. *See* C. M. O. 16, 1916.

MORALE OF THE SERVICE. C. M. O. 23, 1910.

"MORE THAN 26 YEARS OF AGE."
1. **Construed**—With reference to appointment of assistant paymasters—Means having passed 26th birthday. *See* ASSISTANT PAYMASTERS, 3.

MORPHINE. C. M. O. 35, 1915, 4.

MORRIS TUBE. *See* C. M. O. 28, 1907.

"MOST FULLY AND HONORABLY." *See* ACQUITTAL, 19, 20.

MOTHER.
1. **Death gratuity**—Mother not designated—May appeal to Congress. *See* APPEALS, 2; DEATH GRATUITY, 5.
2. **Same**—Mother may be designated as a beneficiary. *See* DEATH GRATUITY, 13.

MOTION TO STRIKE OUT EVIDENCE.
1. **Court**—Should rule on. C. M. O. 49, 1915, 12–14. *See also* COURT, 116.
2. **Demurrer**—Is virtually a motion to strike out. *See* DEMURRER, 4. *See also* G. C. M. Rec. 21478a, p. 4.

MOURNING BADGES. *See* BADGES OF MOURNING.

MULTIPLICATION OR PLURITY. *See* CHARGES AND SPECIFICATIONS, 61–68.

Digitized by Google

MURDER.

1. **China.** *See* MURDER, 9.
2. **Concurrent jurisdiction**—The United States courts have concurrent jurisdiction with naval courts-martial in cases of murder committed outside the territorial jurisdiction of the United States, but at places within the territorial jurisdiction thereof over which there is exclusive Federal jurisdiction the United States courts can alone take cognizance of the crime of murder. 14 J. A. G., 191, Aug. 4, 1909. *See also* MURDER, 20.
3. **Courts-martial**—Jurisdiction in cases of murder is not conferred upon naval courts-martial, and article 6 A. G. N. reads as follows: "If any person belonging to any public vessel of the United States commits the crime of murder without the territorial jurisdiction thereof, he may be tried by a court-martial and punished with death." File 2195-45, Sec. Navy, Dec. 12, 1906; 14 J. A. G., 188, Aug. 4, 1909. *See also* MURDER, 14-16.
4. **Cuba.** *See* MURDER, 11.
5. **Definition**—"Felonious homicide is the killing of a human being without legal justification or excuse, and is either murder or manslaughter; murder being an unlawful killing with malice aforethought, and manslaughter being an unlawful killing without malice aforethought." (21 Cyc., 661.) Index-Digest, 1914, 28.
6. **Drunkenness**—The condition of the accused as to sobriety at the time an offense was committed may in practice be shown by evidence. A person charged with "Murder," where a state of intoxication existed, which precludes the possibility of the accused having formed the necessary specific intent, may show this by evidence. File 4578-04. *See also* DRUNKENNESS, 22; INTENT, 2, 5.
7. **Enlisted men**—Tried by naval general courts-martial on the charge of "Murder." C. M. O. 12, 1911, 5; 5, 1914, 7; G. C. M. Rec. 23037; 23654; 27960; 32478 (GUAM).
8. **Foreign country**—A fireman, second class, attached to a United States naval vessel, at anchor off Cherbourg, France, did on November 18, 1910, while on liberty on shore in the city of Cherbourg, France, willfully, maliciously, and with malice aforethought, and without justifiable cause, attack with a deadly weapon another enlisted man attached to the same naval vessel, and did thereby kill and murder said man. G. C. M. Rec. 23037.
9. **Same**—Outside of Peking, China—A corporal, U. S. Marine Corps, was tried and found guilty by a general court-martial (station case), for "Murder," the specification alleging that he "knowingly, willfully, maliciously, and without justifiable cause, shot with a rifle and wounded one Wang Yung Ch'uan, a Chinese civilian, from the results of which wound the said Wang Yung Ch'uan died," and that he "did kill and murder the said Wang Yung Ch'uan." C. M. O. 5, 1914, 7; G. C. M. Rec. 27960.
10. **Same**—Cuba. *See* MURDER, 11.
11. **Guantanamo, Cuba, U. S. Naval Station**—An enlisted man deliberately shot and murdered deceased in the U. S. naval station, Guantanamo, Cuba, on November 13, 1906. The department had no doubt respecting its power to convene a general court-martial for the trial of the accused under A. G. N. 6 and A. G. N. 22, upon a charge of "Manslaughter," should such charge be preferred. "Naval courts-martial have not, however, at least in recent years, undertaken to deal with the offense of murder committed at any place within the jurisdiction of the United States. This Government holds the naval station at Guantanamo under a perpetual lease, made in pursuance of agreement with the Government of Cuba, ratified October 6, 1903. The terms of this agreement appear to extend the territorial jurisdiction of the United States to the naval station, Guantanamo, and that station is in fact under the American flag and is occupied by United States naval forces." The department thereupon suggested to the Department of Justice that the accused be returned to the United States and tried by the Federal civil courts. The Department of Justice (Dept. Justice file 95328, Dec. 18, 1906) stated "If the Navy Department is willing to waive its custody and jurisdiction of the man * * * and bring him to this country with the witnesses and turn him over to the civil authority for trial, this would be the proper and preferable course to pursue." This was accordingly done. File 6836 and 2195-45, Sec. Navy, Dec. 21, 1906.
12. **Guilty in a less degree than charged**—Accused charged with "Murder" and found guilty of "Manslaughter."

    Apparently the only explanation of the finding is that the court gave unusual weight to the testimony of the accused himself on the stand in his own behalf or was under some misapprehension as to the distinction between murder and manslaughter. C. M. O. 12, 1911, 5.

Digitized by Google

13. **Intent**—The authorities uniformly agree that in the crime of murder "a deliberate purpose need not be long entertained; it is sufficient if it exist at the moment." (Winthrop's Military Law, p. 964.) [*See* MURDER, 19.] Clark's Criminal Law, second edition, pages 188 and 189, states:

"The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. In short, the words 'malice aforethought' are technical and must be interpreted in the light of a long series of decided cases, which have given them an artificial meaning." C. M. O. 12, 1911, 7. *See also* DRUNKENNESS, 22; MURDER, 6.

14. **Jurisdiction**—Naval general courts-martial have no jurisdiction over the crime of murder when committed in time of peace within the territorial jurisdiction of the United States. C. M. O. 7, 1914, 12.

15. **Same**—The Department of Justice in a letter to the Navy Department, December 18, 1906 (Dept. Justice file 95328) stated that the reason naval courts-martial have not undertaken to deal with the offense of "Murder" committed at any place within the jurisdiction of the United States, is "due, in part, at least, to the fact that the trial and punishment of such grave offenses by courts which proceed according to the course of the common law, and with its humane safeguard of the rights of the accused, including that of a trial by jury, are more consonant with the feelings of our people, and with the spirit of our institutions, than can be such trial and punishment by any military or naval tribunal." File 6336 and 2195-45, Sec. Navy, December, 1906.

16. **Same**—The punishment of "Murder" on board naval vessels is not vested in naval courts martial unless the crime was committed without the territorial jurisdiction of the United States, though if the crime be "Manslaughter" it may be taken cognizance of by a naval court-martial. 14 J. A. G., 189-190, Aug. 4, 1909.

17. **Same**—Concurrent jurisdiction. *See* MURDER, 2, 20.

18. **Limitation of punishment**—"While the 'Limitation of Punishment' prescribed by the President for military courts does not distinguish between murder in the first and the second degrees, the Federal Statutes do so distinguish the different degrees of murder. The minimum punishment prescribed by the Federal Statutes for murder in the second degree is ten years' imprisonment." C. M. O. 5, 1914, 7-8.

19. **Malice**—Where the accused, armed with a knife, renewed a quarrel and was in fact the aggressor, he can not be considered as being "without malice" and is guilty of "Murder" in such killing. A deliberate purpose to kill need not be long entertained; it is sufficient if it exist at the moment of killing in order to constitute "malice." C. M. O. 12, 1911, 6-8. *See also* MURDER, 13.

20. **Massachusetts, county of Barnstable**—If an enlisted man attached to a naval vessel commits a homicide within the limits of the county of Barnstable, in the State of Massachusetts, the State courts would have jurisdiction in a case of murder to the exclusion of the United States courts as well as naval courts-martial. If, however, the offense be charged as "Manslaughter," then the jurisdiction of the State courts and of naval courts-martial would be concurrent, and he might be tried by either. 14 J. A. G., 191, Aug. 4, 1909.

21. **Naval vessel at sea**—A mess attendant, third class, United States Navy, was tried by general court-martial on the charge of "Murder" committed on a naval vessel *at sea* off Santo Domingo, Dominican Republic. The court found him guilty in a less degree than charged, guilty of "Manslaughter," and sentenced him to confinement for five years with corresponding hard labor, forfeiture of pay, and dishonorable discharge.

The department criticized the court for not finding the accused guilty of the offense as charged and for adjudging an inadequate sentence.

Owing to the impracticability of reconvening the court and in order that the accused might not wholly escape merited punishment, the department, subject to the foregoing remarks, approved the proceedings, findings, and sentence in this case. C. M. O. 12, 1911, 5; G. C. M. Rec. 23654.

22. **Naval vessel at navy yard, Philadelphia, Pa.**—Accused killed another enlisted man on board a naval vessel at the navy yard, Philadelphia, Pa. Accused was first turned over to the civil authorities for trial, but later when it was found that the trial would develop certain scandalous evidence the Attorney General advised that the accused be tried by a naval court-martial for "Manslaughter," and he was delivered to the naval authorities and so tried. 14 J. A. G., 188-189, Aug. 4, 1909; File 6674:49, J. A. G., May 27, 1912.

Digitized by Google

23. **Same**—The above man could not be tried by naval court-martial for "Murder" as a general court-martial would not have had jurisdiction of that offense. File 6674:49, J. A. G., May 27, 1912.
24. **Same**—Murder committed by an enlisted man on board a naval vessel at the navy yard, Philadelphia, Pa., may be dealt with by naval court-martial as "Manslaughter." G. C. M. Rec. 16098; File 6674–10, Mar. 8, 1910.
25. **Naval vessel at San Juan, Porto Rico**—Accused stabbed a shipmate from which wound the latter died, the occurrence happening on board a naval vessel at San Juan, Porto Rico. The department directed that the accused be brought to trial by a general court-martial unless the insular authorities desired to take up the case. As there was no demand for the surrender of the accused, he was brought to trial for "Manslaughter" before a general court-martial. 14 J. A. G., 189, Aug. 4, 1909.
26. **Naval vessel at New York Navy Yard**—Murder committed on board a naval vessel which was lying at the Cob Dock at the navy yard, New York, in the waters of Wallabout Bay, on June 30, 1897. 14 J. A. G., 191, Aug. 4, 1909. *See also* U. S. *v.* Carter (84 Fed. Rep., 622); JURISDICTION, 92.
27. **Naval vessel at Norfolk, Va., Navy Yard**—Accused was charged with shooting and killing another man on January 1, 1877, on board a naval vessel lying at the wharf in what is now known as the Norfolk navy yard. The Commonwealth of Virginia had ceded to the United States the territory and all the jurisdiction which the Commonwealth possessed, over the public lands known by the name of Gosport and certain lands immediately opposite, for the purpose of a navy yard. The accused was arraigned before a United States commissioner and admitted to bail; while at liberty he was arrested under a warrant of the mayor of Portsmouth and committed to jail. The prisoner asked for a writ of habeas corpus. It was held that the Federal court and not the State court had jurisdiction. (Ex parte Tatem, 1 Hughes, 588. *See also* U. S. *v.* Cornell, 2 Mason, 60; U. S. *v.* Ames, 1 Woodbury and Mason, 76.) 14 J. A. G., 190–191, Aug. 4, 1909; JURISDICTION, 93.
28. **Naval vessel off a foreign country.** *See* MURDER, 8.
29. **Officers**—Charged with. G. C. M. Rec. 10195; 10196.
30. **Porto Rico.** *See* MURDER, 25.
31. **San Juan, Porto Rico.** *See* MURDER, 25.
32. **Self-defense**—"It is well established that one who is the aggressor or provokes the difficulty in which he kills his assailant can not invoke the right of self-defense to justify or excuse the homicide unless he in good faith withdraws from the combat in such a manner as to show his adversary his intention in good faith to desist. It is not enough to justify or excuse the homicide that in the course of the difficulty it became necessary for defendant to kill the deceased in order to save his own life or prevent great bodily harm, but he must also have been free from fault in provoking or continuing the difficulty which resulted in the killing." (21 Cyc. 805.) C. M. O. 12, 1911, 7. *See also* MANSLAUGHTER, 13 (pp. 355–358).
33. **Specific intent.** *See* MURDER, 6, 13.

MUTE. *See* ARRAIGNMENT, 9, 18–24; JEOPARDY, FORMER, 38.

"MUTINOUS CONDUCT."

1. **Acting master's mate**—Found guilty of, by general court-martial. G. O. 44, Dec. 7, 1864.
2. **Enlisted men**—Charged with. C. M. O. 40, 1880; 37, 1882; 46, 1882; 9, 1883; 91, 1897; 84, 1889.

MUTINY.

1. **"Knowing of an intended mutiny, not communicating his knowledge to his superior or commanding officer"**—General court-martial prisoner (enlisted man) tried by general court-martial. G. C. M. Rec. 23522.
2. **Sedition**—Mutiny discussed in connection with sedition. *See* SEDITION, 1.

NAMES.

1. **Arraignment**—Name of accused. *See* ARRAIGNMENT, 25–27.
2. **Change of.** *See* NAME, CHANGE OF.
3. **Charges and specifications**—Middle names may be abbreviated. *See* CHARGES AND SPECIFICATIONS, 60.
4. **Judge advocate's name**—Published in a Court-Martial Order. *See* COURT-MARTIAL ORDERS, 19; CRITICISM OF COURTS-MARTIAL, 41.
5. **Members of courts-martial**—Names published in Court-Martial Order. *See* COURT-MARTIAL ORDERS, 19; CRITICISM OF COURTS-MARTIAL, 41.

Digitized by Google

6. **Sentences**—Should include name and rank of accused—A general court-martial sentence should contain the name and rank of the accused in order to show specifically who was sentenced. (Navy Regulations, 1913, R-816 (4); Forms of Procedure, 1910, p. 42; C. M. O. 37, 1909, 3; 42, 1909, 6; 55, 1910, 8; 30, 1910, 7; 1, 1913, 5; 20, 1913, 3; 42, 1914, 5. *See also* C. M. O. 53, 1910; 54, 1910; 7, 1912; 8, 1912; G. C. M. Rec. 21478; in which the sentences were of irregular form in that they did not include the name and designation of accused.) C. M. O. 14, 1915, 2.
7. **Same**—Name of accused should be spelled correctly in sentence. C. M. O. 16, 1912, 3.
8. **Specifications**—Middle name of accused may be abbreviated. *See* ABBREVIATION, 1.

NAME, CHANGE OF.

1. **Assumed name**—Recruiting officer properly refused to enlist an applicant under an assumed name. *See* NAME, CHANGE OF, 5.
2. **Fraudulent enlistment cases**—Where a man's name is incorrectly recorded, the department has authorized him to use his true name without prior legal sanction being exacted. This is the practice in the cases of men who fraudulently enlist under assumed names after having previously enlisted under their true name. In such cases, when as a result of court-martial proceedings or otherwise the true name of the man is ascertained, the department changes the record of his fraudulent enlistment so as to show his true name by which he is thereafter known while serving sentence, and during the remainder of his enlistment if restored to duty. *See* File 24368–2, Sec. Navy, Sept. 28, 1910.) File 24368–13, J. A. G., March 29, 1915.
3. **"Jr."**—Permission granted to drop—An officer having the same name as his father, a retired naval officer, requested permission to drop the "jr." from his name owing to the death of his father, which request was granted in accordance with the department's precedents. File 24368–15, Sec. Navy, May 6, 1915; C. M. O. 20, 1915, 7. *See also* C. M. O. 12, 1915, pp. 10–11; C. M. O. 16, 1915, p. 6; File 24368–4, Sec. Navy, July 11, 1911; 24368–13, J. A. G., March 29, 1915; 24368–20, Sec. Navy, Sept. 5, 1916.
4. **Proof that name desired was true name.** *See* NAME, CHANGE OF, 14.
5. **Recruit enlisted under true name**—An applicant applied for enlistment under an assumed name, stating that he had been known by the name under which he applied for some years. Upon advice of recruiting officer applicant enlisted under his original name.

   The action of the recruiting officer in enlisting this man under his original name was proper. The records of the Navy are an important part of the historical records of the country, and should as far as possible be correct. To this end the department customarily approves of changes in the cases of persons who, while still in the Navy, satisfactorily establish that their true names are different from those shown in the records or who comply with statutory provisions by obtaining judicial sanction of changes in their original names; and in cases of persons not in the Navy general laws have been passed authorizing such changes where the applicants served under assumed names during the Civil and Spanish Wars; and special acts have been passed in individual cases not covered by the general law. For the department knowingly to enlist persons under assumed names would be to sanction and to encourage such practice, and to invite confusion in its records and considerable additional work which is involved in all such cases when applications are received from persons who have entered the Navy under assumed names and desire to have the records changed. File 24368–13, Sec. Navy, March 29, 1915; C. M. O. 12, 1915, 10–11.
6. **Right to change names**—"It is the custom for persons to bear the surname of their parents, but it is not obligatory. A man may lawfully change his name without resort to legal proceedings, and for all purposes the name thus assumed will constitute his legal name just as much as if he had borne it from birth." (29 Cyc., 271. *See also* Christianson *v.* King County, 196 Fed. Rep., 791, 792; Loser *v.* Plainfield Sav. Bk., 128 N. W., 1101.)

   In some States statutes have been enacted which provide for legal proceedings on the application of persons desiring to change their names, but it has been held that such proceedings are not exclusive and do not affect the common law right of individuals to change their names at will. (In re McUeta, 189 Fed. Rep., 250. *See also* 131 N. Y. S., 890; 124 N. Y. S., 989.)

   A full discussion of the law and decisions on this subject will be found in Smith *v.* U. S. Casualty Co. (197 N. Y., 420), and in the note to said case published in 18 Ann. Cas., 701. The subject is also quite fully considered in the note to Ladin etc. Co. *v.* Steytler (14 L. R. A., 690). File 24368–13, J. A. G., March 29, 1915. *But see* NAME, CHANGE OF, 7–14, which state the rule of the department. *See also* File 8267–03, J. A. G., Sept. 29, 1903; 4754–03; 23 J. A. G., 308.

Digitized by Google

7. **Rule of the department**—The department's rule does not go so far as to render it impossible for persons in the naval service to change their names on the records, but provides in general that legal sanction must first be obtained. It is contrary to the department's policy to allow persons in the naval service to make even slight changes in their names, so far as concerns the naval records, unless they deem the matter of sufficient consequence first to obtain legal sanction for such change. In the case of Smith *v.* U. S. Casualty Co. (197 N. Y. 420) reference was made to the case of General Grant whose baptismal name was Hiram Ulysses "and he bore that appellation until he was appointed a cadet at West Point. General Hamer, who nominated him for a cadetship, by some means got his name mixed up with that of his brother. He was, therefore, appointed as 'Ulysses Sidney Grant' *and that name once recorded on the books of the military academy could not be changed.* He was baptized into the military schools as U. S. Grant, and he has ever since been thus designated." File 24368–13, J. A. G., March 29, 1915.
8. **Same**—The department declined to authorize an officer named "Wells" to change the spelling of his name to "Welles" in the absence of legal action, the department stating that it "deems it inadvisable to make changes of this character except in cases where the legal steps to effect the change of name have been taken by the officer interested in pursuance of the requirements of local law." File 4982–96, Sec. Navy, May 27, 1896, quoted approvingly in File 24368–13, J. A. G., March 29, 1915. *See also* File 7219–3, March 12, 1908.
9. **Same**—An officer was informed that his application would be granted to change his middle name "Smith" to "Burbridge" only after he had obtained legal sanction therefor, the department stating in part: "In view of the inconvenience and possible confusion resulting from changes of this nature in an organization such as that of the Navy, the department considers they should not be made except in cases where the parties themselves have deemed the matter to be of sufficient importance to effect the change in accordance with the provisions of law." Subsequently, this officer having complied with the statutory provisions on the subject, the department authorized the change in question. File 7219, J. A. G., May 18, 1907; 7219:2, Sec. Navy, Feb. 15, 1908, quoted with approval in File 24368–13, J. A. G., March 29, 1915.
10. **Same**—The department affirmed its decision of March 29, 1907, that a retired naval officer was not authorized to drop his middle name and initial without court proceedings. This retired officer forwarded a statement to him from an attorney that court proceedings were not necessary for such change. The department in its letter of May 18, 1907, stated that it was familiar with the authorities on the question; "that these cases relate, however, to the transaction of private life wherein the presence or omission of the middle name has, in some cases, been held not to be significant. An organization such as that of the Navy presents, however, different conditions. Inconvenience and possible confusion result from changes in the permanent records of the naval service and such changes should never be made except for good and sufficient reasons. The department considers that it is inadvisable to make changes of this character except in cases where the parties concerned have themselves deemed the changes to be of sufficient importance to effect them in pursuance of the requirements of law." File 7219–1, Sec. Navy, May 18, 1907, quoted with approval in File 24368–13, J. A. G., March 29, 1915.
11. **Same**—The mother of a former enlisted man having married a second time he requested that the department's records be changed so that he will be known under the name of his stepfather, and that a new discharge be issued him under the latter name. *Held*, that the department has consistently declined to approve of even slight changes in the names of its personnel, where is is admitted that the recorded name is correct, except where legal sanction for such change is first obtained; that the marriage of the mother does not of itself convey the name of the stepfather to the child; that even though this man's name were changed by legal proceedings, the department would not be authorized to issue him a certificate of discharge from the naval service in his new name in lieu of discharge in his true name previously issued to him; that even in cases where persons enlist in and are discharged from the naval service under assumed names, certificates of discharge can not *thereafter* be issued to them in true name except in those cases which are specifically covered by statute. (*See* C. M. O. 12, 1915, 11; File 24368–13, J. A. G., Mar. 29, 1915; 7219–2.) File 24368–14, J. A. G., Apr. 24, 1915; C. M. O. 16, 1915, 6. *See also* NAME, CHANGE OF, 15, 16.
12. **Same**—Department will not make changes in the names of naval officers unless they deem the matter of sufficient importance to make application to the civil courts to

Digitized by Google

have such changes made in pursuance of law. File 4982–1896; 7219 and 7219–1, 1907; *See also* File 5460–25; 24368–4; 7219–2; 7219–3; 77 Navy and M. C. Let. Book, 422; 55 Navy and M. C. Let. Book, 465 and 469.

13. **Same**—A man named "Schall" was tried by general court-martial and three summary courts-martial previous convictions introduced. It appeared from an examination of the department's records that no man named "Schall" had in fact been tried by summary court-martial, and it was only after making inquiries at Marine Corps headquarters that it was learned that during the period covered by the extracts of previous convictions the accused was serving under the name of "Ellsworth," and that he was subsequently authorized to assume the name of "Schall." C. M. O. 59, 1903, 2.
14. **Slight changes**—Cases have arisen in which slight changes have been authorized by the department in the names of persons in the naval service where such changes were for the purpose of making the naval records show the man's true name. Thus, for example, a paymaster's clerk was granted permission to make a slight change in his name, satisfactory evidence being furnished the department that the name desired was the true name of this officer. File 5460–25, Sec. Navy, Dec. 10, 1908.
15. **Stepson**—Does not necessarily take his stepfather's name. *See* NAME, CHANGE OF, 11.
16. **Statutes**—"During many years subsequent to the War of the Rebellion large numbers of bills were introduced in Congress asking relief in cases where men had enlisted in the Army or Navy under assumed names. In most cases this had been done innocently by the person enlisting, without realization of the difficulties in correcting the record thereafter. In such cases these bills had the favorable consideration of Congress, and relief was granted by special legislation. In 1890 a general act was passed giving relief to all soldiers and sailors who had enlisted or served under assumed names, while minors or otherwise, in the Army or Navy, during the War of the Rebellion, except in cases where names had been assumed to cover crimes or avoid their consequences." Senate Report No. 882, 61st Congress, 2d session.

By act approved June 25, 1910 (36 Stat. 824), the previous law of April 14, 1890 (26 Stat. 55), was extended to include the soldiers and sailors who enlisted under assumed names during the War with Spain or the Philippine insurrection. The law as thus amended reads as follows:

"That the Secretary of War and the Secretary of the Navy be, and they are hereby, authorized and required to issue certificates of discharge or orders of acceptance of resignation, upon application and proof of identity, in the true name of such persons as enlisted or served under assumed names, while minors or otherwise, in the Army and Navy during the War of the Rebellion, the War with Spain, or the Philippine insurrection, and were honorably discharged therefrom. Applications for said certificates of discharge or amended orders of acceptance of resignation may be made by or on behalf of persons entitled to them; but no such certificate or order shall be issued where a name was assumed to cover a crime or to avoid its consequences."

It will be seen from the foregoing that Congress has provided for the issuance of certificates of discharge in true name, first, by special legislation applicable to individual cases; second, by a general act applicable to persons who served during the Civil War; and, third, by another general enactment amending the previous law so as to include persons who served during the War with Spain and the Philippine insurrection. Congress having assumed jurisdiction of this subject and legislated in connection therewith, designating the specific classes of cases in which the Secretary of the Navy was "authorized and required" to issue certificates of discharge in true name, it is not believed that the department should assume the authority to issue such certificates in cases which Congress has not seen fit to include in its legislation. The action of Congress in this matter has settled the policy of the Government to be, that the cases in which certificates of discharge in true name should be issued to persons no longer in the service are to be determined by the legislative and not the executive branch of the Government. While it is undoubtedly within the general powers of the department to correct its records to accord with the facts, yet when a man has served through an enlistment and received a discharge under an assumed name he has no further connection with the service and this department is not officially concerned in his subsequent movements or the motives which may in later years influence him to seek a certificate of discharge in a name other than that under which he served. Should the department undertake to investigate and determine the facts in all cases of men who may, for various reasons, have served in the Navy or Marine Corps under assumed names, and issue to them certificates of discharge in true

Digitized by Google

name, the burden would be much greater than that which Congress has seen fit to place upon the department, and in view of the legislation already referred to, such a course could not appropriately be pursued without a further expression by Congress of its wishes in the premises. File 24368-13, J. A. G., March 29, 1915. *See also* NAME, CHANGE OF, 11.

NARCOSIS. *See* G. C. M. Rec. 30485, p. 117.

NATURAL CONSEQUENCES. *See* ACTS, 3.

NATURAL DEATH. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 68.

NATURALIZATION. *See* CITIZENSHIP.

NATURALIZATION CERTIFICATE. *See* CITIZENSHIP, 26.

NAUTICAL ALMANAC. *See* File 17626; 9449-04, Mar. 18, 1904; 18168-25; 9449-04, Dec. 2, 1904; 17279-3, May 11, 1905; 9449-04; 17626, Jan. 19, 1905; 1112-04, Feb. 12, 1904; 17279-02, Feb. 13, 1904.

NAVAL ACADEMY. *See also* "BOARD OF INQUIRY;" HAZING; MIDSHIPMEN.

1. **Academic Board of.** *See* ACADEMIC BOARD OF THE NAVAL ACADEMY.
2. **Aliens**—Appointment of as midshipmen. *See* MIDSHIPMEN, 8; RES JUDICATA, 8.
3. **Appointments to.** *See* MIDSHIPMEN, 5-9, 11-16, 43, 52, 53, 55, 70-73, 75.
4. **Civil War service**—Service during Civil War at Naval Academy. *See* CIVIL WAR SERVICE, 3.
5. **Civilian dentist at.** *See* APPOINTING POWER, 2; DENTAL SURGEONS, 7.
6. **Dentist at the Naval Academy.** *See* APPOINTING POWER, 2; DENTAL SURGEONS, 7.
7. **Enlisted men of Navy**—Appointment of as midshipmen. *See* MIDSHIPMEN, 13, 14.
8. **Enlisted men of the Marine Corps**—Appointment of as midshipmen. *See* MIDSHIPMEN, 52.
9. **Filipinos**—Appointment as midshipmen. *See* Act, August 29, 1916 (39 Stat. 576).
10. **Foreigners**—As students at Naval Academy. *See* MIDSHIPMEN, 8.
11. **Hazing.** *See* HAZING.
12. **Influence to secure appointments**—"It is of the utmost importance to the character and efficiency of any military service that its tone should be maintained at the highest standard of personal and professional honor, and particularly, that it should be invariably regarded and treated by all connected with it, as entirely above and disconnected from mercenary influences of any kind. The use of such influences, under any circumstances of inducement by a naval officer, to procure an appointment to the Naval Academy, is calculated to lower the tone of the service where it should be the highest and purest; and countenance or excuse of such action, by his brother officers or by the department would bring the Navy into deserved discredit." The accused in this case was tried by general court-martial for paying money intended as the consideration for services rendered in procuring the appointment of his son to the Naval Academy. G. O. 156, May 24, 1870. *See also* CONGRESS, 11.
13. **Longevity pay**—Service at the Naval Academy as a midshipman counts for longevity. *See* LONGEVITY.
14. **Marines**—Appointment of enlisted Marines as midshipmen. *See* MIDSHIPMEN, 52.
15. **Marine Corps**—The act of July 9, 1913 (38 Stat. 103), "makes the Naval Academy in effect a training school for the Marine Corps as fully as for the Navy proper." File 5252-66, J. A. G., May 12, 1915.
16. **Misconduct**—Of officer on duty at Naval Academy. C. M. O. 14, 1915.
17. **Money**—Appointments to the service may not properly be obtained by the payment of money, and the Navy, at least, must neither be, nor seem to be, in any way connected with such a practice. *See* NAVAL ACADEMY, 12; CONGRESS, 11.
18. **Offense**—Aggravated by the fact that the officer was on duty at the Naval Academy. C. M. O. 14, 1915.
19. **Reappointment of midshipmen.** *See* MIDSHIPMEN, 70.
20. **Reinstatement of midshipmen.** *See* MIDSHIPMEN, 75.
21. **Regulations of the U. S. Naval Academy, 1911, p. 116**—Issued under the authority of R. S. 161 and have same force as Naval Instructions. J. A. G., June 7, 1915. "Under the present practice, plenary authority, the Secretary makes the regulations and can modify or change them at will, provided, of course, no statute is thereby trenched upon. The regulations of the Naval Academy do not, strictly speaking, form a part of the regulations for the government of the Navy. They are

Digitized by Google

not embodied therein, and do not come under section 1547, R. S., giving the Navy Regulations the force of law. The regulations of the Academy are not directly approved by the President as are the Navy Regulations. The Secretary makes and can therefore change the regulations of the Naval Academy.

"The Academy regulations are not issued under any explicit statute. The Academy being under naval control is administered by the Secretary of the Navy, and it is assumed that he makes the regulations of the Academy under his general powers as Secretary, but there are certain clauses in the statutes touching more or less directly upon the matter," as for instance, R. S. 1515; R. S. 1520; R. S. 1526; Act, Aug. 5, 1882 (22 Stat. 285); Act, March 3, 1903 (32 Stat. 1197); R. S. 1519; R. S. 1521 as amended by Act, Aug. 5, 1882 (22 Stat. 283), June 26, 1884 (23 Stat. 60), March 2, 1889 (25 Stat. 878), March 3, 1899 (30 Stat. 1004), March 3, 1903 (32 Stat. 1197).

"Duly formulated regulations being essential to the proper administration of such an establishment as the Naval Academy" the "effect of the statutes on the subject is to place the power of making such regulations in the hands of the Secretary of the Navy, subject to the general direction of the President." 36 J. A. G., 195, March 19, 1907.

22. **Sea duty**—There is no legal obstacle to providing that the course at the Naval Academy shall be so arranged as to include one year at sea. File 5252-76:2, J. A. G., May 3, 1916.
23. **Service at**—Longevity pay. *See* LONGEVITY.
24. **Six year course**—Meaning of. *See* File 313-42, J. A. G., March 3, 1908, p. 4. *See also* Harmon *v.* U. S. (23 Ct. Cls. 412); Potter *v.* U. S. (34 Ct. Cls. 14, 16); Crenshaw *v.* U. S. (134 U. S. 109).
25. **Statutory history**—Of the Naval Academy. *See* Weller *v.* U. S. (41 Ct. Cls. 324-343).
26. **"Year"**—Definition of "year" as applied to the academic course at the Naval Academy. File 313-42, J. A. G., March 3, 1908.

NAVAL ATTACHÉS.

1. **Brazil, Republic of**—In accordance with a joint resolution of Congress, approved October 13, 1914, a naval officer was granted leave of absence by the President, to assist the Republic of Brazil as an instructor in the Naval War College of that country, provided that while so absent in the service of Brazil he shall receive no pay or allowances from the United States Government. The resolution further provided: "That the permission so given shall be held to terminate at such date as the President may determine. To insure the continuance of this work during such time as may be desirable, the President may have the power of substitution in case of the termination of the detail of an officer for any cause." *Held:* that if it is desired that this officer perform, in addition, the duties of naval attaché, special legislation is necessary, and this fact should appear in the contract with the Brazilian Government. File 28508-9, J. A. G., Jan. 18, 1915.
2. **Foreign languages**—Student officers. *See* NAVAL ATTACHÉS, 6.
3. **Leave of absence**—Officer granted leave of absence to assist the Republic of Brazil as an instructor in the Naval War College, should not be detailed to active duty as naval attaché without special legislation, etc. *See* NAVAL ATTACHÉS, 1.
4. **Newspapers**—The department desires that all newspapers and periodicals, both American and foreign, for the Naval Establishment, for use on shore, both in and outside the continental limits of the United States, except such as may be purchased by naval attachés, shall be purchased after advertisement in the public press. Circular, Oct. 6, 1914, File 12809-83.
5. **Official correspondence**—Owing to confusion resulting in some instances from members and *attachés* of the embassies and legations in Washington communicating directly with the heads or individual officers of the executive departments, the Department of State circulated a letter, dated November 18, 1915, reading in part as follows: "Correspondence with a foreign Government or its diplomatic representatives in Washington should be carried on entirely through the Department of State, which is intrusted with the conduct of the foreign affairs of the Government." This practice has long obtained in this country and is in consonance with diplomatic practice abroad.
6. **Status of**—An officer of the naval service having been detailed as an attaché to study foreign languages and having received orders to report to the American Minister and the senior naval attaché, obtained leave of absence by authority of the American Minister and the commander in chief but without the knowledge or consent of the senior naval attaché. The orders of this attaché specifically placed him under the orders of the naval attaché, so far as his duties as a student officer were concerned. The department censured this officer, stating, "In future you will regard the naval

Digitized by Google

attaché to the legation at * * * as your superior officer and will not leave your station for any purpose without his specific consent." Department's letter, March 2, 1911.

NAVAL AUXILIARY SERVICE.

1. **Hospital Fund.** *See* HOSPITAL FUND, 6.
2. **Line of duty and misconduct.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 26.
3. **Naval hospital**—Treatment in. File 152-97, Sec. Navy, May 11, 1908.

NAVAL CADET.

1. **General court-martial**—Tried by. C. M. O. 98, 1894, 2; 36, 1898, 2; 89, 1899.

NAVAL CONTRACTOR.

1. **Tried by naval general court-martial**—Found guilty and sentenced. G. O. 56, May 30, 1865.

NAVAL EXAMINING BOARDS. *See also* MARINE EXAMINING BOARDS; PROMOTION.

1. **Action upon record.** *See* PROMOTION, 5.
2. **Appointment of members**—According to naval custom, the Secretary of the Navy acts for the President in appointing examining boards. Such boards have been convened by the commander in chief, the record being acted upon by the President. File 8291-98, Nov. 29, 1898. *See also* NAVAL EXAMINING BOARDS, 4.
3. **Candidate as a witness.** *See* NAVAL EXAMINING BOARDS, 26.
4. **Commander in chief**—May not make changes in the constitution of a naval examining board—Section 1496 of the Revised Statutes provides that "no line officer below the grade of commodore, and no officer not of the line, shall be promoted to a higher grade on the active list of the Navy until his mental, moral, and professional fitness to perform all his duties at sea have been established to the satisfaction of a board of examining officers appointed by the President." The civil courts having held in various decisions that the act of the Secretary of the Navy in a matter under his jurisdiction is in legal contemplation the act of the President (*see* Weller *v.* U. S., 41 Ct. Cls. 324, and cases there cited) it is the prerogative of the Secretary of the Navy to sign precepts convening examining boards. In view of the above the department held that the commander in chief of a fleet has no authority, nor can he legally be granted authority by the department, to make changes in the constitution of naval examining boards and boards of medical examiners. File 28026-1086:2, Sec. Navy, Aug. 4, 1915; C. M. O. 29, 1915, 6-7. *See also* File 28027-154:3, Sec. Navy, Dec. 26, 1916, where such a change was ratified.
5. **Constitution of**—Boards for the professional examination of officers of the Navy for promotion shall consist of "not less than three officers, senior in rank to the officer to be examined," and they shall, when practicable, be selected from the same corps to which the candidate belongs. (R. S. 1498.) File 26260-1244, J. A. G., April 14, 1911; 15 J. A. G., 287, May 31, 1911, p. 2.
6. **Constitutionality of.** *See* CONSTITUTIONAL LAW, 4.
7. **Courts-martial**—Considered by. *See* NAVAL EXAMINING BOARDS, 15; PROMOTION, 38-48.
8. **Same**—An examining board is in no sense a court before which the candidate is on trial for his misdeeds. The *punishment* for such misdeeds is provided for by other statutes and is not a question to be considered by an examining board; but the bearing, if any, which such misconduct may have upon the officer's fitness for promotion *is* a question before the board and must be determined by it wholly independent of any disciplinary proceedings to which the officer has rendered himself liable. File 26260-1392, J. A. G., June 29, 1911, pp. 23, 30. *See also* PROMOTION, 38-48.
9. **Disagreement as to findings**—Case of disagreement in findings of examining board adjusted by the Judge Advocate General. Memo. J. A. G., No. 1, p. 7.
10. **"Due process of law"**—Application of the constitutional provision relating to "due process of law" to naval promotion. File 26260-1392, June 29, 1911, p. 31. *See also* PROMOTION, 64.
11. **Duty of with reference to officers' service records**—It is the department's desire that examining boards examine the records of officers quite as critically as it does their examination papers, bearing in mind the fact that it is the candidate's duty to establish his professional fitness rather than the duty of the board to establish his unfitness. The department desires the boards to adopt a high standard not only in regard to the written examination, but particularly in regard to recommending for

Digitized by Google

promotion officers whose service records indicate that they are in any respect lacking in officer-like qualities. When an officer's record shows that he is addicted to loose and careless methods, that he is inattentive to duty, or that his general performance of duty is merely passable, he should not be recommended for promotion. The department feels that the examining boards will appreciate the merit of the policy expressed herein and realize the importance of maintaining a high standard of efficiency by assigning great weight to the service records of candidates for promotion and will in no instance whatever recommend for promotion any officer whose zeal and efficiency are in any degree doubtful. File 26260-3525:1, Sec. Navy, July 15, 1916.

12. **Evidence**—Record of a naval examining board as evidence in a general court-martial trial. *See* G. C. M. Rec. 28681, p. 52.

13. **Finding of**—The law prescribes the phraseology to be used when an examining board finds the officer in all respects qualified for promotion. But there is no set language to be used when the officer is not in all respects qualified for promotion.

A recommendation by the board, expressed in its finding, that the candidate be given a reexamination at such and such a time has no bearing upon the case if it is not the department's policy to grant a reexamination when an officer fails to qualify on the first examination. File 26260-396e, J. A. G., Feb. 24, 1910, p. 14.

14. **Same**—Disagreement as to. *See* NAVAL EXAMINING BOARDS, 9.

15. **Function and authority of**—A naval examining board has authority and exercises functions as extensive in their nature as those exercised by naval courts-martial themselves, and in its consideration of an officer's qualifications for promotion it determines for itself all questions arising, independently of any disciplinary action that may or could have been taken in the premises. File 26260-697, 1392, J. A. G., June 29, 1911, p. 15. *See also* File 5878-97; Davis *v.* U. S., 24 Ct. Cls. 442.

A naval examining board in a recent case found, in effect, that, "no matter what its [the board's] personal feelings may be," a certain candidate was morally qualified for promotion because the members of a court-martial had acquitted him of serious offenses with which he had been charged, and the board "has not the power to question the findings of said court."

The finding of the naval examining board in this case was not satisfactory and was not accepted by the department for the reason that it withheld the very opinion which the board was ordered to express—that of the board itself—and relied instead upon the finding of a general court-martial, which finding in point of fact was disapproved by the convening authority. It is well settled that the fact that a case has been acted upon, or that no action has been taken in certain premises, does not close that portion of an officer's record to which it relates in such a manner as to relieve an examining board from the responsibility of scrutinizing it; and, even in the event of an acquittal by a court-martial, an examining board still has the duty cast upon it by express provisions of law to examine into the facts and outcome of such trial in order to determine for itself the effect, if any, that should be given thereto with reference to the officers' qualifications for promotion. File 5878-97; 26260-697; 26260-1392.

Moreover the finding of a court-martial, even if approved, would not be conclusive upon an examining board for the reason that a court-martial can not properly arrive at a finding of "guilty" unless the evidence establishes the guilt of the accused beyond a reasonable doubt; while, on the other hand, members of an examining board are not required to be satisfied beyond a reasonable doubt that a candidate is not qualified for promotion, but instead are forbidden to recommend any officer for promotion "as to whose fitness a doubt exists." In other words, before a court-martial every doubt must be resolved in favor of an accused, while before an examining board any doubts must be resolved against the candidate, and the existence of even a doubt as to his fitness requires that he be not recommended for promotion. File 26260-3342:1, Sec. Navy, Apr. 7, 1916; C. M. O. 13, 1916, 6-7.

16. **Questions and answers**—The record of a naval examining board must show the questions propounded to the candidate, and his answers thereto. Department's letter of March 6, 1883.

17. **Rank of members of board**—The law is mandatory in its terms, requiring that all the members of a naval examining board must be senior to the officer under examination before them. File 26260-1244, J. A. G., April 14, 1911, p. 4.

The record of proceedings of a naval examining board were disapproved as fatally defective in that one of the members was junior to the candidate. File 26260-1244, J. A. G., April 14, 1911.

18. **Reconvening on own initiative**—In a case where an examining board found a candidate for appointment as assistant surgeon in the Navy mentally, morally, and

Digitized by Google

professionally qualified, recommended him for appointment, the finding being signed by all the members and the recorder, but reconvened two days later on its own initiative, and decided to change its findings and recommendations, the Judge Advocate General was of the opinion that the subsequent proceedings of the Naval Examining Board not having been authorized or directed by proper authority, was without legal effect, and it was *advised*, in view of all the circumstances of the case, that the record of proceedings of the board in the case be disapproved, and that the candidate be permitted to appear before another naval examining board. File 26258-302, J. A. G., May 29, 1912.

19. **Record.** *See* NAVAL EXAMINING BOARDS, 13, 25.
20. **Scope of**—The act of June 18, 1878 (20 Stat. 165), in explicit language prohibits inquiry into any fact which occurred prior to the last examination whereby the candidate was promoted, which has already been inquired into and decided upon, and specifically provides that "such previous examination, if approved, shall be conclusive." Only one exception to this mandatory rule is contained in the statute, and that is, "where the fact continuing shows the unfitness of the officer to perform all his duties at sea." File 26260-874, J. A. G., June 3, 1910, p. 4; 26521-173:1, J. A. G., Jan., 1917.
21. **Secretary of the Navy**—Signs precepts of Naval Examining Boards. *See* NAVAL EXAMINING BOARDS, 4.
22. **Selection**—First precept convening a "Board to Recommend Officers for Selection." File 28026-1484, Sec. Navy, Nov. 13, 1916. *See also* PROMOTION BY SELECTION.
23. **Statement by candidate**—May be under oath—Section 1500, R. S., gives the candidate the right to be present when his case is considered and to submit a statement of his case under oath, but *Held*, right to have a statement sworn to might be waived. The right being statutory, knowledge of it must be presumed on the part of the candidate and he can not claim ignorance of the statutory right as an excuse for not exercising it. File 26260-1360, Feb. 12, 1912. *See also* File 26260-1678, Feb. 28, 1912.
24. **Surgeon General**—Composition of—It was held that the examination of a surgeon general of the Navy, whose actual rank was that of surgeon, should, under sections 1496 and 1498, R. S., be conducted by a Naval Examining Board composed of officers, if practicable, of the Medical Corps of the Navy who were senior to the candidate in the actual rank held by him in said corps. 15 J. A. G., 286, May 31, 1911.
25. **Witness**—The unrecorded presence of a witness before an examining board would constitute a serious irregularity. File 26260-1360, Feb. 12, 1912.
26. **Same**—Candidate as—When a candidate before examining or retiring boards submits a sworn statement he does not thereby become a witness and subject to examination as a witness. This, however, does not preclude the candidate from being called as a witness by the boards, and should he be so called it is proper that he be interrogated fully as to all matters pertaining to the subject matter of the examination. File 26521-123, Sec. Navy, Aug. 13, 1915; C. M. O. 29, 1915, 6.

NAVAL HOME.

1. **Admission to**—Forfeiture of retired pay—The Secretary of the Navy may not require that, upon being admitted to the benefits of the Naval Home at Philadelphia, Pa., a retired sailmaker must forfeit his retired pay. Suitable mode of procedure suggested. The Naval Home is supported from the naval pension fund. File 5362-35, J. A. G., June 29, 1911.
2. **Bureau of Navigation**—Under supervision and direction of. *See* NAVAL HOME, 4.
3. **Inmates**—Cost of maintenance per annum—The gross cost of maintenance of each beneficiary in the Naval Home is stated to be about $656, and the net cost, that is, with pensions deducted, as $495. File 5362-35, J. A. G., June 29, 1911, p. 5.
4. **Naval Station, is a**—The United States Naval Home, and the naval hospital within its grounds, for all purposes, administrative, legal and disciplinary, is a naval station, of which the governor is commandant.

   The object of the Naval Home is to provide an honorable and comfortable home, during their life, for old, disabled, and decrepit officers and enlisted men of the Navy and Marine Corps, who may be entitled under the law to the benefits of the institution, and who shall be known as beneficiaries.

   It is under the supervision and direction of the Bureau of Navigation, subject to the control of the Secretary of the Navy and the laws of Congress which may be passed from time to time. (Regulations, Origin, History and Laws of the United States Naval Home, Philadelphia, Pa., 1916, p. 5.)
5. **Status of.** *See* File 26250-776:1.

Digitized by Google

NAVAL HOSPITALS. *See* HOSPITALS.

NAVAL HOSPITAL FUND. *See* HOSPITAL FUND.

NAVAL INSTRUCTIONS, 1913, I–4893. *See* GENERAL ORDER No. 110, July 27, 1914; C. M. O. 36, 1914, 5; 42, 1914, 5; 53, 1914, 6–7; 6, 1915, 15; 12, 1915, 6, 12; 20, 1915, 5; 22, 1915, 5; 31, 1915, 13, 14; 35, 1915, 10; 49, 1915, 25; File 26287–251:69; 26806–131:29; 26254–1834:1; 26254–2029; 26806–131:28; 27210–302; 26806–131:44; 26806–131:42; 165 S. and A. Memo. 3424; 172 S. and A. Memo. 3687; 177 S. and A. Memo. 3833; Comp. Dec., June 13, 1916, App. No. 25964, File 26254–2039; Naval Instructions, 1913, I–4893 (*revised*).

NAVAL INTELLIGENCE, OFFICE OF. *See* OFFICE OF NAVAL INTELLIGENCE.

NAVAL MILITIA.

1. **Aviation branch**—*Held*, that a proposed general order limiting membership in the aviation branch of the Naval Militia only to "citizens of the United States" would not be legal in view of the law (act Jan. 21, 1903, 32 Stat. 775; act May 27, 1908, 35 Stat. 399; act Feb. 16, 1914, 38 Stat. 283; G. O. No. 77) which provides that the militia shall consist of "every able-bodied male of foreign birth and who has declared his intention to become a citizen, who is more than 18 and less than 45 years of age" in addition to citizens of the various States, Territories, etc., and that the Naval Militia shall consist of such part of the Organized Militia as may be duly prescribed in each State, Territory and the District of Columbia. File 3973–129, J. A. G., Dec. 18, 1915; C. M. O. 49, 1915, 26.
2. **Citizenship.** *See* NAVAL MILITIA, 1.
3. **Collision**—Occurring with vessel which has been turned over to Ohio Naval Militia. *See* COLLISION, 14.
4. **Constitution of**—The duty of duly prescribing who shall constitute the Naval Militia of any State devolves upon the State and not upon the Secretary of the Navy. File 3793–139, J. A. G., March 15, 1916.
5. **Construction of act, February 16, 1914 (38 Stat. 283, 284, 286–287, 289).** File 26256–35:17. *See also* NAVAL MILITIA, 1, 34.
6. **Death**—Of member of Naval Militia while on a naval vessel. *See* NAVAL MILITIA, 27.
7. **Deck courts**—Officers of the Regular Navy who are detailed for duty with the Naval Militia as inspector-instructors may not act as deck court officers for the trial of enlisted men of Regular Navy on duty with the Naval Militia. File 3973–107: 2, J. A. G., Aug. 21, 1915.
8. **District of Columbia**—Promotion of officer—Where the recommended promotion of a lieuteneant (junior grade) in the Naval Battalion, National Guard of the District of Columbia, was protested by a former lieutenant (junior grade) in said battalion, on the ground that the latter had been illegally discharged and was entitled to the promotion as being the senior lieutenant (junior grade) in said battalion: *Held*, that the discharge in this case was legal; and it appearing that the officer nominated for promotion was therefore the senior lieutenant (junior grade) actually in service there exists no legal objection to his promotion to fill a vacancy in the grade of lieutenant (junior grade) in said battalion, provided he had duly qualified therefor. In this aspect of the matter, it was not necessary to decide whether promotions in said Naval Battalion were required to be made by seniority. File 7984–30, Sec. Navy, Feb. 20, 1915; C. M. O. 10, 1915, 10. *See* C. M. O. 10, 1915, 10 for consolidation of divisions.
9. **Same**—Legality of orders—An order of the commanding officer of the Naval Battalion, District of Columbia National Guard, relieving an ensign from duty with the Fourth Division and ordering him to duty with the Second Division, is sufficient authority for the transfer and the said ensign became a member of the Second Division, even though such orders did not on their face show that they were approved by the Commanding General, National Guard, District of Columbia, as required by the Regulations for the National Guard of the District of Columbia. The order in question was in legal contemplation approved by the Commanding General, for, in absence of evidence to the contrary, such approval is presumed. Copy of said order was filed at headquarters. The Commanding General thereafter recognized said order as valid by directing the discharge of this officer as supernumerary thus treating him as belonging to the Second Division. The Commanding General never objected to said order and its validity was never questioned until more than a year after its issue, and then only because of the discharge of the aforesaid officer as supernumerary. File 7984–30, Sec. Navy, Feb. 20, 1915; C. M. O. 10, 1915, 10–11.

Digitized by Google

10. **Same**—Discharge of supernumerary officers—The approval of the President is not not necessary for the honorable discharge of officers of the Naval Battalion, District of Columbia National Guard, who are rendered supernumerary in consequence of the consolidation of divisions. File 7984–30, Sec. Navy, Feb. 20, 1915; C. M. O. 10, 1915, 10.
11. **Enlistment in Naval Militia**—Effect of enlisting in the Naval Militia of a person who is in receipt of a pension. File 3973–144, J. A. G., March 29, 1916.
12. **Examination**—Scope of examination for officers and enlisted men of the Naval Militia for aeronautic duty. File 3973–129, J. A. G., Dec. 18, 1915.

Recommended that records of examinations for promotions, etc., pass through Office of Judge Advocate General. File 28026–1399: 1, J. A. G., July 17, 1916.
13. **General Order No. 77, February 25, 1914 (38 Stat. 283)**—This general order is merely a publication of the act of February 16, 1914, "to promote the efficiency of the Naval Militia, and for other purposes." C. M. O. 49, 1915, 16.
14. **General Order No. 150, June 14, 1915.** *See* NAVAL MILITIA, 21, 29.
15. **Jurisdiction**—Subject to jurisdiction of naval courts-martial when employed in the service of the United States in time of war or public danger (file 3973–107, Feb. 16, 1915), or for refusing to obey the President's order calling them into the service of the United States. (Martin *v.* Mott, 12 Wheat. 19; Houston *v.* Moore, 5 Wheat. 1; Act Feb. 16, 1914, sec. 5 (38 Stat. 285).)
16. **Same**—General court-martial of the Regular Navy has jurisdiction to try an enlisted man of the Regular Navy serving on board a naval vessel loaned to the Naval Militia. *See* NAVAL MILITIA, 39.
17. **Same**—Naval Militia serving on board a vessel of Navy. *See* NAVAL MILITIA, 36, 27.
18. **Loan of vessels**—By Regular Navy to Naval Militia. *See* COLLISION, 14; NAVAL MILITIA, 39–41.
19. **Marine divisions**—The Naval Militia act of February 16, 1914 (38 Stat. 283), applies to marine divisions that existed as a part of the Organized Militia of certain States at the time of the passage of the act, which divisions still exist.

The Naval Militia act of February 16, 1914 (38 Stat. 283), applies also to marine divisions of the Naval Militia of certain States, Territories, and the District of Columbia, that may hereafter be organized as parts of the Naval Militia in such States, Territories. and the District of Columbia. File 3973–98, Sec. Navy, Jan. 12, 1915; C. M. O. 6, 1915, 14.
20. **Marine league**—Use of the Naval Militia outside of the three-mile limit. File 3973–136: 2, J. A. G., Feb., 1916.
21. **Oaths**—The Naval Militia should adhere strictly to the form of oath provided in General Order No. 150, June 14, 1915. If each State were permitted to change the oath prescribed, in various ways which it might think still met the requirements, uniformity would at once be gone and there would be irreconcilable chaos. File 3973–109: 4, Sec. Navy, Aug. 31, 1915; C. M. O. 29, 1915, 8.
22. **Officer**—Summoned as a witness before a general court-martial of the Regular Navy, *See* NAVAL MILITIA, 45, 46.
23. **Ohio**—Naval vessel loaned to. *See* COLLISION, 14; NAVAL MILITIA, 3.
24. **Pay**—Of retired naval officer while holding a commission in the Naval Militia. *See* PAY, 94.
25. **Same**—For joint service or maneuvers with the Regular Navy. (Compt. Dec., June 20, 1914.) File 3973–64: 2.
26. **Penalty envelopes**—Use of by Naval Militia. *See* File 3973–127: 2, Sec. Navy, Feb. 11, 1916; 3973–127: 3, J. A. G., Feb. 19, 1916.
27. **Pensions**—The question as to whether the dependents of a member of the Naval Militia, who dies while participating in a cruise on board a United States war vessel, is entitled to a pension should be answered by the Commissioner of Pensions, under whose jurisdiction lies the authority for granting pensions to claimants, and not by the Secretary of the Navy. File 26250–709: 1, J. A. G.; C. M. O. 49, 1915, 26.
28. **Same**—Effect of enlisting in the Naval Militia of a person who is in receipt of a pension. *See* NAVAL MILITIA, 11; PENSIONS, 2.
29. **Physical examination**—General Order No. 150, June 14, 1915, paragraph 2 (b), provides: "Every officer now in the Naval Militia, and every condidate for appointment as a commissioned or warrant officer in the Naval Militia, must pass the physical examination prescribed for officers in this order," notwithstanding the fact that such officers or candidates have been previously examined by a board of officers of the Regular Navy, including naval medical officers. File 27405–8, J. A. G., Oct. 4, 1915; C. M. O. 35, 1915, 10.

Digitized by Google

30. **Private business**—Naval Militia officer made use of the services of a yeoman, 2d class, of the Regular Navy for certain duties in connection with private business, instead of requiring him to attend strictly to his duties in connection with the Naval Militia. File 26251–11340:6, Sec. Navy, Jan. 13, 1916.
31. **Repairs to vessels**—Procedure of requests for and executing repairs to Naval Militia vessels. File 3973–126, J. A. G., Mar. 31, 1916.
32. **Retired officers of the Regular Navy**—Employment of, in Naval Militia. *See* RETIRED OFFICERS, 54–58.
33. **Secretary of the Navy**—Has not the duty of prescribing who shall constitute the Naval Militia of any State. *See* NAVAL MILITIA, 4.
34. **Shipkeepers**—The number of enlisted men detailed for duty as shipkeepers on vessels loaned to the Naval Militia under the provisions of section 2 of the Naval Militia act of Febrary 16, 1914 (38 Stat. 283; G. O. No. 77), are in addition to the number allowed by law for the Regular Naval Establishment. The enlistment of such additional number of men, even if an excess of appropriations, is not prohibited by section 3679 and 3732 of the Revised Statutes, as amended. Men detailed for duty with Naval Militia under section 17 of the Naval Militia act are included in the number allowed by law for the Regular Naval Establishment. File 3973–106, J. A. G., Feb. 8, 1915. *See also* File 26255–358.14; C. M. O. 10, 1915, 11; NAVAL MILITIA, 39–41; File 3973–20, J. A. G., Oct. 23, 1909, for discussion of "shipkeepers" in 1909; File 26835–542, J. A. G., Mar. 15, 1915, 6th ind., for proper scope of their employment.
35. **Status of Naval Militia while cruising on board a vessel of the Regular Navy**—Naval Militia officers can not impose punishments on men belonging to their organizations while cruising on board a vessel of the Regular Navy, nor can Naval Militia officers convene State courts-martial on such vessels. File 3973–107, J. A. G., Feb. 16, 1915; C. M. O. 10, 1915, 11–12.
36. **Status of Naval Militia cruising with Regular Navy for training and instruction**—Naval Militia officers cruising with the Regular Navy for training and instruction are authorized by law to perform duty and to exercise authority over the naval personnel of inferior rank, but can not impose punishments upon persons in the naval service. File 3973–107, J. A. G., Feb. 16, 1915; C. M. O. 10, 1915, 11–12.
37. **Same**—Members of the Naval Militia, participating with the Regular Navy in cruises for the purpose of training and instruction, are not employed in the service of the United States, but remain civilians and consequently are not subject to punishment under the Articles for the Government of the Navy. The naval officer of the Regular Navy in command has, however, full authority to enforce any orders which affect the discipline, safety, and well-being of the vessel or any part of the armament, equipment, or crew, and to this end may, if necessary, place members of the Naval Militia in confinement or remove them from the vessel under lawful regulations issued by the Navy Department, *not as punishment, but merely to maintain discipline*. File 3973–107, J. A. G., Feb. 16, 1915; C. M. O. 10, 1915, 11–12.
38. **Status in relation to the Regular Navy while on board naval vessels for training or on vessels loaned to States**—A naval commanding officer has supreme authority over all persons on board his ship, including members of militia organizations. While he can not try the latter by court-martial or impose punishments upon them under article 24, A. G. N., he may, if necessary, place them in confinement, or remove them from the vessel, when circumstances demand, under lawful regulations to be adopted by the department. It should, however, be distinctly understood that such action is not authorized as punishment, but only in so far as is necessary to maintain the discipline of the ship and the supreme authority of the commanding officer.

Militia officers assigned to duty by the commanding officer of a naval vessel, or detailed to duty on a vessel loaned to the Naval Mulitia, have all the authority over persons of inferior rank, whether in the Regular Navy or in the Naval Militia, which may be necessary for the purpose of carrying out the duty upon which they have been detailed; but this does not include the power of punishment.

Persons in the Regular Navy thus subjected to the authority of the militia officers may, for insubordination, be punished by the department in accordance with the Articles for the Government of the Navy for conduct to the prejudice of good order and discipline.

Persons in the Naval Militia guilty of insubordination and other military offenses while cruising on board a vessel of the Regular Navy may and should be, punished by the State authorities under State laws; but such punishments can not be imposed on board, but must be deferred until the offenders have been disembarked. Until disembarked, the commanding officer of the naval vessel would be authorized in

Digitized by Google

taking such steps as might be necessary to effect restraint of the offender and to prevent the occurrence of another similar outbreak, which is, of course, injurious to discipline. By "naval vessel" in this connection is intended a vessel controlled for the time being by the United States. In such condition the State can not exercise jurisdiction.

There would seem to be no objection to the holding of a State court-martial on board a naval vessel loaned to the Naval Militia, and for the time being under the control of the State, whether in reserve or as an outright loan. Also, punishments may be imposed upon militia men serving on such vessels by the commanding officer of the Naval Militia, when he is on board, in accordance with State laws. In these latter cases the State can exercise jurisdiction, as the United States has relinquished it for the time being. File 3973-107, J. A. G., Feb. 16, 1915; C. M. O. 10, 1915, 11-12.

39. **Status of an enlisted man of the Regular Navy serving on board a vessel under jurisdiction of Naval Militia.**—A fireman first class, U. S. Navy, was tried by general court-martial at the navy yard, New York, by order of the Secretary of the Navy, on the following charges:

CHARGE I: Absence from station and duty without leave.

Specification.—In that * * * a fireman first class in the United States Navy, did, at or about seven hours postmeridian, on or about the twenty-third day of July, nineteen hundred and fifteen, without leave from proper authority, absent himself from his station and duty on board the United States ship *Dorothea*, at Put-in-Bay, Ohio, to which ship he had been regularly assigned, and did remain so absent until he surrendered himself on board the aforesaid ship at the aforesaid place, at about twelve hours and thirty minutes antemeridian, on or about the twenty-fourth day of July, nineteen hundred and fifteen.

CHARGE II: Leaving station before being regularly relieved.

Specification.—In that * * * a fireman first class in the United States Navy, attached to and serving on board the United States ship *Dorothea*, at Put-in-Bay, Ohio, did, at or about seven hours postmeridian, on or about the twenty-third day of July, nineteen hundred and fifteen, while on watch in charge of the fireroom of said ship, absent himself from his station before being regularly relieved, and did remain so absent for a period of about five hours.

The court having accepted the plea of the accused to dismiss the charges, and forwarded the record to the department, the Secretary of the Navy returned the record with the following letter:

1. The trial in this case was ordered upon the charges of "Absence from station and duty without leave," and "Leaving station before being regularly relieved." Page 2 of the record shows that at the outset of the proceedings "the court was cleared. When opened, all parties to the trial entered, and the president announced that the court found the charges and specifications in due form and technically correct." No preliminary plea or motion was made by counsel for the accused based upon the insufficiency of the specifications to support the charges, or the lack of jurisdiction of the court. Nevertheless, after the prosecution had rested, and without hearing any evidence for the defense, the court has decided upon motion of counsel for the accused "that it has no jurisdiction to proceed with the case"; and, as stated in your letter of transmittal, "that in accordance with the provisions of General Order 77, the accused is only triable on the charge of 'Conduct to the prejudice of good order and discipline.'"

2. The department considers the court's ruling last above mentioned to be erroneous. General Order 77 is merely a publication of the act of Congress approved February 16, 1914 [38 Stat. 283], "to promote the efficiency of the Naval Militia, and for other purposes." Section 12 [38 Stat. 286-287] of this act was quoted by counsel for the accused, omitting the material and pertinent portion thereof. This section provides, *inter alia*, "that any officer or petty officer or enlisted man of the Naval Militia placed on duty as aforesaid *or detailed to duty on a vessel assigned to the Naval Militia* shall have, during the time that he is on duty, all authority over all persons inferior to himself in rank or equivalent rank necessary for the purpose of carrying out the duty upon which he has been so detailed." It is not therefore correct, as contended by counsel for the accused, that the court of which you are president "has no jurisdiction over his [the accused's] person," because "the Ohio Naval Militia was at the time of the alleged offenses of which the accused is charged were committed" not "taking part in any maneuvers, field instruction, or encampment of the Regular Navy, which was a prerequisite to the exercise of any authority of the Naval Militia over any members of the naval service." On the contrary, under the express language of

Digitized by Google

the law, as above quoted from General Order 77, militia officers detailed on a vessel assigned to the Naval Militia have the same authority over enlisted men of the Regular Navy on board that they have when participating in cruises, etc., with the Regular Navy—that is to say, in either case the militia officer has "*all authority* over all persons inferior to himself in rank or equivalent rank necessary for the purpose of carrying out the duty upon which he has been so detailed." Similar provisions are contained in Court-Martial Order No. 10, 1915, pp. 11 and 12. [*See* NAVAL MILITIA, 38.]

3. The Articles for the Government of the Navy provide that "all offenses committed by persons belonging to the Navy *which are not specified in the foregoing articles* shall be punished as a court-martial may direct." (A. G. N. 22.)

4. The Navy Regulations adopted pursuant to this article provide that "when the offense is a neglect or disorder *not specially provided for*, it shall be charged as 'Scandalous conduct tending to the destruction of good morals,' or 'Conduct to the prejudice of good order and discipline.'" (Navy Regulations, 1913, R-712 (4).)

5. *When the offense is a neglect or disorder specifically provided for, it is properly chargeable under the specific charge, and not under the general or catch-all clause* (Article 22) of the Articles for the Government of the Navy. The court's attention may be invited to Court-Martial Order No. 4, 1913, pp. 45, 46, quoting an opinion of the Attorney General [29 Op. Atty. Gen., 563] holding that embezzlement of public funds by a pay officer of the Navy, being specifically provided for by the Articles for the Government of the Navy, is properly alleged under the specific charge of "Embezzlement, in violation of article fourteen of the Articles for the Government of the Navy"; and that "it could with much reason be urged" that the offense being thus specifically provided for, "is excluded by express language from article 22." The Attorney General, however, stated in this connection that he knew of "no rule of *practice* which *prohibits* the formulation of the same charge under more than one article, and as a matter of precaution it might be advisable to formulate the charges against the accused under both paragraph 9, article 14, and article 22."

6. Thus, according to the Attorney General, where the offense is specifically provided for, it is properly alleged under the specific charge, but may in addition be also charged under the catch-all clause, article 22 of the Articles for the Government of the Navy, that is, "Conduct to the prejudice of good order and discipline," or "Scandalous conduct tending to the destruction of good morals," as may be appropriate. [*See* CHARGES AND SPECIFICATIONS, 61-68 for rule of department regarding multiplicity or plurality of charges.]

7. In the present case, therefore, the offenses alleged to have been committed by the accused were properly chargeable first, under the specific charges, if any, applicable thereto, and second, under the general or catch-all clause (Article 22, A. G. N., and R-712 (4)) if not specially provided for, or if there were aggravating circumstances distinguishing them from the ordinary case.

8. It is scarcely necessary to state that the offenses of "Absence from station and duty without leave," and "Leaving station before being regularly relieved," are specifically provided for by the Articles for the Government of the Navy. (*See* A. G. N. 4, 8.) They were therefore, in accordance with the department's policy and practice, the opinion of the Attorney General and other established authorities, properly charged under the specific headings of "Absence from station and duty without leave," and "Leaving station before being regularly relieved." Whether they might also have been charged as "Conduct to the prejudice of good order and discipline" in accordance with the rule of practice referred to by the Attorney General and the department's policy, is not necessary to decide, the fact being that they were not so charged, and that there is no rule of practice, regulation or statute requiring a multiplicity of charges in any case.

9. In view of the arguments of counsel for the accused in this case, and the court's decision, as stated in your letter transmitting the copy of proceedings, it may be remarked that the principles hereinbefore stated in no manner conflict with Court Martial Order No. 10, 1915, p. 12, which provides that persons in the Regular Navy subjected to the authority of militia officers "may," for "insubordination" be punished by the department "in accordance with the Articles for the Government of the Navy" for "Conduct to the prejudice of good order and discipline."

10. The Articles for the Government of the Navy and the Navy Regulations provide for charging "Conduct to the prejudice of good order and discipline" when the offense is one not specifically provided for. While a large number of offenses which are specifically provided for might be included under the general characterization of "insubordination," this expression, as used in the department's court-martial order,

Digitized by Google

related to such acts of insubordination as were not specifically provided for, and which would therefore, under the Articles for the Government of the Navy, be properly chargeable as "Conduct to the prejudice of good order and discipline." Thus, the refusal of an enlisted man in the accused's status to obey the order of a militia officer, or his disobedience of such order, or his disrespectful conduct and deportment toward such officer, would be acts of insubordination properly chargeable under "Conduct to the prejudice of good order and discipline" for the reason that, while such officer is by law vested with authority over enlisted men detailed to duty on board a naval vessel loaned to the Naval Militia, nevertheless such officer is not, strictly speaking, the "superior officer" of an enlisted man in the Regular Navy. This expression in its commonly accepted meaning refers to a man's superior in the same service. Thus, article R–64 provides that "within the meaning of the foregoing articles, unless there be something in the context or subject matter repugnant to or inconsistent with such construction, officers shall mean commissioned and warrant officers, and paymasters' clerks; superior officers shall be held to include mates and petty officers of the Navy and noncommissioned officers of the Marine Corps, in addition to the officers enumerated." Accordingly, "Disobeying lawful order of superior officer," "Striking, assaulting, or attempting or threatening to strike or assault his superior officer while in the execution of duties of office," "Refusing to obey the lawful order of superior officer," "Treating his superior officer with contempt or being disrespectful to him in language or deportment while in the execution of his office," are offenses specifically provided for; nevertheless, in view of the relations existing between an enlisted man of the Regular Navy and a Naval Militia officer under whom he is serving, and in view of the commonly accepted interpretation of the words "superior officer," and the definition thereof contained in R–64, such offenses would under the circumstances stated be chargeable as "Conduct to the prejudice of good order and discipline," and this is the meaning of the paragraph quoted from Court-Martial Order No. 10, 1915, p. 12, and this meaning is expressed in said paragraph by the statement that insubordination under the circumstances suggested would be punishable as "Conduct to the prejudice of good order and discipline" "in accordance with the Articles for the Government of the Navy," that is, where such insubordination is not specifically provided for.

11. In conclusion, you are informed that the department's decision is as follows:

(a) That the charges and specifications preferred against the accused are in due form and technically correct, as decided by the court at the outset of its proceedings;

(b) That while these offenses might perhaps have been charged as "Conduct to the prejudice of good order and discipline," they are specifically provided for by the Articles for the Government of the Navy, and were therefore properly charged under the specific headings; and

(c) That the court-martial of which you are president has jurisdiction of the charges in question as preferred.

12. It is accordingly directed that the court in this case proceed with the trial.

Upon reconvening the court proceeded with the trial and acquitted the accused of both charges. File 26251–10968:6, Sec. Navy, November 16, 1915; G. C. M. Rec. No. 31331; C. M. O. 49, 1915, 16–20.

40. **Same**—The accused (a coal passer) was directed to report to the commanding officer of the U. S. S. *Oneida* for duty as shipkeeper on board that vessel. The U. S. S. *Oneida* was, under the provisions of the act of August 3, 1894 (28 Stat. 219), as amended by the act of May 11, 1898 (30 Stat. 404), transferred to the Naval Militia of the District of Columbia. An officer of the Naval Militia was, by Special Order No. 9 of the Brigadier General of the District of Columbia Militia, dated February 26, 1900, given command of the *Oneida*, with directions to superintend the general repairs to that vessel. The accused, having been instructed by this Naval Militia officer in command of the *Oneida* to perform certain work on the pilot house of the *Oneida*, refused so to do, thus refusing duty to which he had been regularly assigned when detailed as shipkeeper on board that vessel. The accused was tried by a general court-martial of the Regular Navy and found guilty of "Conduct to the prejudice of good order and discipline." C. M. O. 132, 1901.

41. **Same**—A machinist's mate was detailed to duty on board the U. S. S. *Yantic* which had been loaned to the Naval Militia of the State of Michigan. He was tried by general court-martial convened by the Secretary of the Navy for "Conduct to the prejudice of good order and discipline," the specifications alleging that he used abusive, profane, and threatening language toward the Naval Militia officer who was the executive officer of the *Yantic*, and found guilty. G. C. M. Rec. 30823.

42. **"System of discipline"**—As provided in the act of August 29, 1916, defined and discussed. File 8124–55, J. A. G., Oct. 17, 1916. *See also* SYSTEM OF DISCIPLINE.

Digitized by Google

43. **Vessels loaned to Naval Militia by Regular Navy**—In accordance with the provisions of the Constitution and of the laws enacted in pursuance thereof, the President, in cases not affecting the execution of the laws or the protection of the property of the United States, may use the military or naval forces of the United States within the boundaries of the several States only on application of the legislature of the State, or, in case the legislature cannot be convened, on application of the governor. In other words, it is considered that the President, except as indicated, is not legally authorized to use, or permit to be used, the naval forces under his command to assist any particular State in the maintenance of law and order within its boundaries. As a naval vessel is one of the integral and most important units going to make up the naval forces of the United States, it would seem that this prohibition to the use of the naval forces would extend to such an important part thereof as a naval vessel that is armed and equipped for war.

Should occasion ever arise in the future making desirable the use of the *Montgomery* to quell "riots, insurrection, or defiance of civil law within the State limits," it is considered that the only lawful manner in which the vessel could be so used would be in accordance with the provisions of the Constitution, upon application of the legislature or of the executive (when the legislature cannot be convened), made to the President. File 4570-194, Mar. 15, 1915.

44. **Same**—Naval vessels loaned to State militia organizations may be used only for the training and instruction of the Naval Militia. While it may perhaps be said that in a certain sense the use by a State of a naval vessel loaned to the Naval Militia for the purpose of quelling riots, insurrection, or defiance of civil law within the State limits is such a use as may tend to promote the efficiency of the Naval Militia that may be on board, it is nevertheless considered that such a use of a naval vessel, her armament and equipment, for what is in reality a purely local police work is a use entirely foreign to the promotion of the efficiency of the Naval Militia as contemplated by the act of February 16, 1914 (38 Stat. 283). File 4570-194, Mar. 15, 1915.

The Naval Militia act, approved February 16, 1914 (G. O. No. 77), section 2, is to be construed in connection with the act of August 3, 1894 (28 Stat. 219), and accordingly, the vessels so loaned to the States are to be used "only by the regularly organized Naval Militia of the State for the purposes of drill and instruction." File 4570-194, J. A. G., Dec. 19, 1914.

The Solicitor *held*: That it would be unlawful for the State of Maryland "to utilize the *Montgomery* for patrol duty within the State and if necessary in silencing and dispersing riots and insurrections on the shores bordering her waters." The *Montgomery* was loaned to Maryland under agreement dated March 10, 1915, covering the loan of a vessel in "reserve commission." File 4570-194, Op. Solicitor, Mar. 15, 1915.

45. **Witnesses before naval courts-martial**—A Naval Militia member subpœnaed as a witness before a naval court-martial is not thereby called into the service of the United States under the provisions of Article I, sec. 8, clause 15 of the Constitution, and the act of February 16, 1914, sec. 3 (38 Stat. 284). He is not, therefore, by virtue of such subpœna entitled to the pay and allowances provided for the Naval Militia when called into the service of the United States. File 26276-119:3, J. A. G., Jan. 26, 1916. *See also* NAVAL MILITIA, 46.

46. **Same**—A member of the Naval Militia subpœnaed as a witness before a naval court-martial when his organization is not in the service of the United States, is in the status of a civilian witness, not in Government employ, and he is entitled to fees and mileage accordingly. File 26251-10968:9, Sec. Navy, Dec. 1, 1915; 26276-119:2, J. A. G., Dec. 21, 1915; Dec. 1, 1915; 26276-119, Sec. Navy, Dec. 22, 1915; C. M. O. 49, 1915, 26. *See also* NAVAL MILITIA, 5.

NAVAL OBSERVATORY.

1. **Naval station**—The Naval Observatory is a naval station, and the Superintendent of the Naval Observatory is the commandant of a naval station within the meaning of the act of January 25, 1895 (28 Stat. 639), "authorizing certain officers of the Navy and Marine Corps to administer oaths" as amended by the act of March 3, 1909 (35 Stat. 1036). File 19037-45, May 26, 1914. *See also* File 15924, Apr. 3, 1903; 26509-97, Feb. 4, 1913.

NAVAL OFFICERS. *See* OFFICERS.

NAVAL OPERATIONS, CHIEF OF.

1. **Commission for.** *See* File 22724-33, J. A. G., Aug. 22, 1916.

Digitized by Google

NAVAL PRISONS. *See also* PRISONS.
1. **Printing press for**—Requested. *See* PRINTING PRESS.

NAVAL PROVING GROUND, INDIANHEAD, MD. *See* JURISDICTION, 83-84.

NAVAL RECORDS.
1. **Names, change of.** *See* NAME, CHANGE OF.
2. **Nation's history**—Important part of. *See* NAME, CHANGE OF, 5.
3. **Records of the department.** *See* RECORDS OF THE DEPARTMENT.

NAVAL RESERVE.
1. **Marine Corps**—The Comptroller of the Treasury Department in a decision dated April 2, 1915, stated, in part, "I therefore advise you that service in the Marine Corps may be included in computing the service of members of the Naval Reserve." (*See* act of Mar. 3, 1915, 38 Stat.; 22 Stat., 472, 473, c. 97; U. S. *v.* Dunn, 120 U. S., 249; Wilkes *v.* Dinsman, 7 How., 89.) File 28550-1 and 28550-1:2, J. A. G., Apr. 5, 1915; C. M. O. 16, 1915, 6.
2. **Same**—The act of March 3, 1915 (38 Stat. 940), establishing a Naval Reserve did not authorize the establishment of a Marine Corps Reserve, since the language of this law is used in the restricted sense, applicable only to the Navy proper. File 5460-81, J. A. G., May 12, 1916. *But see* MARINE CORPS RESERVE, 2.
3. **Messmen, signalmen, etc.**—Detail of Naval Reserve members as messmen, signalmen, etc.—Extra compensation for. File 28550-10, J. A. G., June 15, 1916.
4. **Service "in the Navy"**—Service in the Naval Reserve is not service "in the Navy" within the meaning of the Executive order, November 27, 1906 (published in G. O. 34, Nov. 28, 1906), and therefore a citizen of the United States whose last discharge from the Regular Navy was by reason of expiration of enlistment, and who thereafter enlists in the Naval Reserve and is discharged therefrom within a year, is entitled on reenlistment in the Regular Navy to the benefits of said Executive order. This decision is an original construction of the act of March 3, 1915 (38 Stat. 941). Comp. Dec., Aug. 2, 1916; File 26254-2081.
5. **Time of peace, service in**—In construing that part of the Naval appropriation act approved March 3, 1915 (38 Stat. 941), reading as follows—"Members of the Naval Reserve may, in time of peace, be required to perform not less than one month's active service on board a vessel of the Navy, during each year of service in the Naval Reserve, and such active service shall not exceed two months in any one year"—it was *held:*
   "1st. That a member of the Naval Reserve may be required to serve less than one month's active service on board a vessel of the Navy in time of peace, but that, as a general rule, the legislative expression on this point should be observed. It follows that a member of the Naval Reserve may be ordered to active service on board a vessel of the Navy for one month and be discharged from such active service at the end of a shorter period of time at the discretion of the bureau in case it is either necessary or desirable; furthermore, in case it is necessary or desirable to the efficiency of the Naval Reserve, a member of the Naval Reserve may be called into active service for less time than one month, there being no provision requiring or suggesting that the one month's service be rendered at any one time; and
   "2d. That a member of the Naval Reserve can not be allowed to render voluntary active service exceeding two months in any one year, but if the legislative requirement is substantially observed, the fact that under stress of conditions a man might necessarily be detained slightly in excess of two months in any one year would not be in violation of the statute." File 28550-3, J. A. G., May 12, 1915; C. M. O. 49, 1915, 27.
6. **Transportation of applicants for enlistment**—The transportation of applicants for enlistment in the Naval Reserve from the substations to the main recruiting stations and return may be paid from the appropriation for the Naval Reserve made by the act of March 3, 1915 (38 Stat. 941), which reads in part as follows: "The sum of $130,000 is hereby appropriated to carry into effect the foregoing provisions relative to a naval reserve." (*See* Comp. Dec., Dec. 31, 1915.) File 28550-11, Sec. Navy, Dec. 13, 1915; C. M. O. 49, 1915, 26-27.
7. **Went out of existence**—"By operation of law on August 28, 1916." File 28550-20, J. A. G., Oct. 4, 1916. *See also* Comp. Dec., Sept. 22, 1916, No. 692.

NAVAL RESERVE FORCE.
1. **Fleet Naval Reserve**—Retainer pay. File 28550-20, Sec. Navy, Nov. 1, 1916. *See also* File 28550-20:1, J. A. G., Nov. 10, 1916.

Digitized by Google

NAVAL RETIRING BOARDS.

1. **Constitution of**—Whenever any officer on being ordered to perform the duties appropriate to his commission reports himself unable to comply with such order, or whenever, in the judgment of the President, an officer is incapacitated to perform the duties of his office, the President, at his discretion, may direct the Secretary of the Navy to refer the case of such officer to a board of not more than nine nor less than five commissioned officers, two-fifths of whom shall be members of the Medical Corps of the Navy. Said board, except the officers taken from the Medical Corps, shall be composed, as far as may be, of seniors in rank to the officer whose disability is inquired of. (Sec. 1448, R. S.)
2. **Rank of members**—The proceedings of a retiring board were held to be fatally irregular and erroneous, and the proceedings were set aside. One of the nonmedical members was junior in rank to the candidate, who appeared before the board pursuant to an order issued by the *Chief of the Bureau of Navigation*, whereas the department's precept convening the board was for the examination of "such officers as may be ordered by the *Secretary of the Navy* to appear before it." Recommended that the following paragraph be added to the department's precepts convening retiring boards: "The board will not examine officers who are senior to any nonmedical member of the board without specific instructions from the Secretary of the Navy in each case." File 26253-257, J. A. G., Jan. 10, 1913, approved by Sec. Navy, Jan. 10, 1913.
3. **Section 1452, Revised Statutes**—Relating to retiring boards in the Navy, provides that, "A record of the proceedings and decisions of the board in each case shall be transmitted to the Secretary of the Navy, and shall be laid by him before the President for his approval or disapproval, *or orders in the case.*" For a case where the President neither approved nor disapproved, *see* File 26253-275, Sec. Navy, Apr. 4, 1913.

NAVAL WAR COLLEGE. *See also* ALIENS, 12.

1. **Brazil.** *See* NAVAL ATTACHÉS, 1.
2. **Established**—Naval War College established. *See* G. O. 325, Oct. 6, 1884.

NAVIGATION. *See also* COLLISION; COMMANDING OFFICERS; OFFICER-OF-THE-DECK; WATCH OFFICERS.

1. **"Aids to navigation."** C. M. O. 27, 1916. *See also* NAVIGATION, 17.
2. **Asiatic station**—Gunboats on. *See* GUNBOATS, 1.
3. **Beacons.** *See* NAVIGATION, 17.
4. **Bearings on lights.** *See* NAVIGATION, 10.
5. **British Navy**—Loss of the *Victoria*. G. C. M. Rec. 32389, pp. 87-88.
6. **Buoys.** *See* NAVIGATION, 7, 17, 19, 31, 32, 42, 94.
7. **Channel buoys.** C. M. O. 27, 1916.
8. **Charts**—Failing to make use of (C. M. O. 24, 1911; 17, 1913); Navigation without use of (C. M. O. 24, 1916, 2); Commanding officer failed to supply the officer of the deck with proper chart (C. M. O. 29, 1909); Navigating chart (*see* NAVIGATION, 71); Coast Survey and Hydrographic Office Charts (*see* CHARTS); Current charts (C. M. O. 24, 1912, 2); Unreliable charts (*see* NAVIGATION, 17).
9. **Chart board.** C. M. O. 27, 1916, 2.
10. **"Checking the position"**—Navigator tried by general court-martial for failing to use the ordinary and simple methods of navigation by checking the position by means of bearings on a light. C. M. O. 24, 1911, 2. *See also* G. C. M. Rec. 32389.
11. **Coast pilot information.** G. C. M. Rec. 32389.
12. **Collision.** *See* COLLISION.
13. **Commander in chief**—Responsibility of commander in chief as to navigation. *See* NAVIGATION, 31.
14. **Commanding officer**—Responsibility of with reference to navigation of the vessel he commands. *See* COLLISION, 19; COMMANDING OFFICERS, 38; NAVIGATION, 15-19, 31, 53, 57, 71, 72, 82, 86, 88.
15. **Same**—The commanding officer of a vessel can not relieve himself from the responsibility for the safe conduct of the vessel under his command without a definite protest when he realizes that the vessel, in obedience to an order, is being steered from an uncertain position into known danger. G. C. M. Rec. 32389; File 26251-12077, J. A. G., Aug. 2, 1915, approved by Sec. Navy Aug. 16, 1916. *See also* NAVIGATION, 31.
16. **Same**—The department considers that the good of the naval service requires the commanding officer of every naval vessel to be held to very strict responsibility for the safety of the ship and its officers and men.

Digitized by Google

The commanding officer's obligation of vigilance was, in the department's judgment, not lessened, but rendered more imperative by the facts that the vessel was on a "shake-down" cruise and that he had no previous personal acquaintance with the navigator.

How far the navigator may have been in fault need not be considered in this case, his negligence or errors can not excuse or palliate those of the commanding officer. C. M. O. 53, 1906.

17. **Same**—Was charged with running his ship upon a rock, etc., and sentenced to be dismissed, which was confirmed by the President. The vessel was at the time of the accident cruising on special service in proximity to dangerous coasts which were unprovided with lighthouses, beacons, buoys, or other ordinary aids to navigation, demanded special vigilance on the part of the accused. The accused was aware that the charts of the locality were unreliable and the currents uncertain, but instead of exercising constant and unremitting care in navigating his vessel, he failed, while approaching Tugidak Island, Alaska, to lay a course which would bring his vessel clear of that island or to cause soundings to be taken as required in such cases by the Navy Regulations. About half past three of the morning of the accident, more than an hour before the vessel struck, land on an unexpected bearing was reported to the accused, and the officer of the deck subsequently reported to him that "the engines had been slowed to ease the strain on the topsails," which reports, under the conditions then existing, should have made him aware that his presence on deck was imperatively required. In consequence of the absence from his post of duty of her commander, the orders for the management of the vessel were not promptly or clearly given, the sails were not properly handled, the engines were stopped, and after nearly three-quarters of an hour had been consumed in the attempt to change the course of the vessel, she drifted upon the rocks. During all this time the accused remained in his cabin, and did not appear on deck until the vessel struck. C. M. O. 7, 1893, 3–4.

18. **Same**—Was charged with "Through negligence suffering a vessel of the Navy to be run upon a shoal." The court found him guilty of "Suffering a vessel of the Navy to be run upon a shoal." The findings as recorded amount to a declaration on the part of the court that an officer who disregards substantially all the precautions prescribed by the regulations relating to the handling of a naval vessel is not guilty of negligence. The department can not concede the principle that an officer may wholly disregard requirements of the regulations and ordinary precautions intended to protect the safety of the vessel under his command and yet avoid responsibility, and deems it necessary to emphasize the vital importance of the unfailing observance of one of the greatest safeguards known to seamen, namely, taking soundings. In this case an officer, clearly guilty of very serious negligence, by the strained and illogical conclusion reached by the court, escaped adequate punishment for his offenses. C. M. O. 43, 1906. *See also* NAVIGATION, 17, 82.

19. **Same**—Is guilty of gross negligence—Where a commanding officer was in plain sight of range lights which indicated a safe course through the channel, but ignored them and attempted to pilot his vessel at night by buoys, which are frequently out of place, he is guilty of gross negligence. C. M. O. 15, 1905.

20. **Concurrent responsibility.** C. M. O. 24, 1916, 4; NAVIGATION, 57.

21. **Current**—Failing to allow for. C. M. O. 2, 1915; 3, 1915.

22. **Same**—Navigator failed to make use of the information furnished by official publications in regard to the currents, in consequence the vessel was stranded upon a shoal. C. M. O. 24, 1916, 1. *See also* NAVIGATION, 28.

23. **Same**—Variable currents (C. M. O. 27, 1916, 1); Tidal currents (G. C. M. Rec. 32389); Uncertain currents (*see* NAVIGATION, 17).

24. **Current charts**—The navigator navigated the vessel without the use of the very important current charts supplied for the waters in question. C. M. O. 24, 1916, 2.

25. **Danger**—There are times when danger need not be considered. *See* COLLISION, 6.

26. **Same**—Duty of commanding officer when a source of possible danger is reported to him. *See* COLLISION, 19.

27. **Dead reckoning**—Errors in. C. M. O. 2, 1915; 3, 1915; G. C. M. Rec. 32389; NAVIGATION, 28, 31.

28. **Same**—A navigator in plotting his course by dead reckoning failed to make use of the information furnished by official publications in regard to the currents, in consequence of which the vessel was stranded upon a shoal. C. M. O. 24, 1916, 1. *See also* NAVIGATION, 22.

29. **Derelicts.** *See* DERELICTS.

30. **Destroyers**—Navigation of torpedo-boat destroyers. *See* NAVIGATION, 88.

Digitized by Google

31. **Division Commander**—A division commander was tried by general court-martial and found guilty of the charges of "Improperly hazarding a vessel of the Navy, in consequence of which she was run upon a shoal and seriously injured," and "Violation of a lawful regulation issued by the Secretary of the Navy."

The evidence adduced in this case shows that the commanding officer of the *San Francisco* had been directed to proceed with the vessel under his command to the entrance of Great Round Shoal Channel. At 12.07 a. m. the ship arrived at the point which by reckonings should have been close to the entrance buoy. Upon arriving at this point the division commander was to decide whether to proceed through the channel or to go outside around Nantucket Shoal, the decision being dependent upon weather conditions. The facts may be stated as follows:

The division commander is weighing the alternatives of the situation in his mind and is about to decide as to the course of action when, at 12.14 a. m. the officer of the deck reports sighting a flashing light bearing 225°; the captain doesn't see it; the navigator doesn't see it; no lookouts report it. The division commander, feeling that this light is the one for which all have been searching, gives the order, at 12.15, "head for the light, captain."

The commanding officer enters no protest to the order of the division commander but gives the necessary orders; the ship turns slowly to starboard; by order of the commanding officer speed is increased to two-thirds in order to expedite her swinging, and finally is steadied on 231°. Meanwhile the commanding officer reiterates his inability to see the light but steadies the ship one-half point away from the bearing given by the division commander in order to avoid certain foul ground near buoy No. 4, which he at that time thought the light marked. From the evidence recorded it appears that no doubt arose in the mind of any person on the bridge as to *whether* or *not* the light *was on one or the other of the two channel buoys:* the only question which seems to have arisen in the mind of the commanding officer was as to *whether or not the light actually existed.*

Though the navigator plotted the new course (231°) on the chart from the dead reckoning position at 12.15, and though he found it passed over a shoal about 2 miles distant and varied about 25° from the course of the channel, and though this discrepancy was observed by both the commanding officer and the division commander, no action was taken by any person, and the course was followed until the *San Francisco* took ground at 12.41 a. m.

No issue of fact was involved in this case. The Navy Regulations bearing upon the issue are as follows:

R-1606. "The commander in chief shall direct the course to be steered by the fleet when at sea, and is responsible for its safe conduct."

R-2081 (5). "Unless in company with a senior, he [the commanding officer] is responsible for the course steered, and he is always responsible for the safe conduct of the ship."

The Judge Advocate General placed upon the record the following indorsement:

"The proceedings and sentence in this case are legal; the findings on the second charge are recommended for approval; the specification of the first charge was proved.

"The question of whether or not Commander * * *, [the accused] in giving an order to head for a certain light and in permitting a course to be steered for that light under existing conditions, was guilty of 'Improperly hazarding a vessel of the Navy,' is so intimately connected with the policy of the Navy Department in the fixing of responsibility and the division of responsibility as between flag officers and commanding officers, that the case is referred to the Bureau of Navigation through the Chief of Naval Operations."

The Chief of Naval Operations in his indorsement upon this case set forth his views in effect, viz:

That Navy Regulations, 1913, R-1606—

"The commander in chief shall direct the course to be steered by the fleet when at sea, and is responsible for its safe conduct," does not apply in the case of a single ship, and was not intended to make a flag officer responsible for the detailed handling of a ship on which he is a passenger; that under such circumstances a flag officer is not charged with responsibility unless in his opinion the commanding officer of the ship is incompetent to properly discharge his duties; however, that a flag officer who, as in his case, interferes with the navigation of a ship on which he is a passenger, thereby voluntarily assumes joint responsibility for the safe conduct of the ship and under such circumstances should be held responsible for the consequences.

Digitized by Google

That at the same time the last clause of Navy Regulations, 1913, R-2081 (5)—"Unless in company with a senior, he is responsible for the course steered, and he is always responsible for the safe conduct of the ship," places the responsibility for the safe conduct of a vessel clearly and definitely upon the commanding officer under all circumstances; that the latter, with the assistance of his navigator, the officer of the deck, the quartermaster, the leadsmen, lookouts, and other means at his disposal, should have given the benefit of such assistance and information to the division commander and made it clear to him that he was taking risks in directing the ship to be steered as stated; that it was quite as clearly the duty of the commanding officer of the *San Francisco* to inform the division commander of the risk he was running by steering the course given, as it was the duty of the navigator to so inform the commanding officer, and the responsibility can not be avoided in either case.

The situation involved in this case is not covered by the Navy Regulations, but this fact in no wise relieves an officer of culpability for the neglect of duty which his seniority may impose upon him. Not only is it impracticable to anticipate in the Navy Regulations every contingency which may possibly arise, but an attempt to do so would not be conducive to the proper development of character and officer-like qualities. Neither is it considered in the interests of efficiency to restrict too closely the performance of duty by officers, especially those of the higher ranks. Officers have duties and obligations, imposed upon them by the commissions which they hold and the positions which they occupy, which are as binding as express provision of the Navy Regulations could be. The language used in an officer's commission imposes upon him the responsibility for the efficient performance of duties of his grade and no court would be justified in relieving of culpability an officer who failed to perform such duties as were imposed by the broad terms of his commission and by the customs of the service, merely because such duties were not definitely enumerated in the Navy Regulations.

The Chief of the Bureau of Navigation placed upon the record an indorsement: "Recommending approval of the findings and sentence of the general court-martial."

The Secretary of the Navy approved the proceedings, findings, and sentence. C. M. O. 27, 1916.

32. **Entrance buoys.** C. M. O. 24, 1916, 3. *See also* NAVIGATION, 31.
33. **"Estimating distances."** G. C. M. Rec. 32390.
34. **"Fixes."** G. C. M. Rec. 32390; File 26251-12138, J. A. G., Aug. 8, 1916. *See also* NAVIGATION, 57.
35. **Fixing position of ship**—A navigator failed to utilize well known and generally accepted methods of fixing the position of a ship. C. M. O. 24, 1916, 1. *See also* C. M. O. 18, 1913.
36. **Flag officers**—With reference to navigation. *See* NAVIGATION, 31 (p. 413).
37. **Flagships**—Navigation of. *See* NAVIGATION, 31.
38. **Flashing lights.** C. M. O. 27, 1916, 3. *See also* NAVIGATION, 31 (p. 412).
39. **Foggy and misty weather.** C. M. O. 27, 1916; G. C. M. Rec. 32389.
40. **"Foul ground."** C. M. O. 27, 1916. *See also* NAVIGATION, 31 (p. 412).
41. **"Foul water."** C. M. O. 27, 1916; G. C. M. Rec. 32389.
42. **Gas buoys.** *See* GAS BUOY.
43. **Grounding ship.** C. M. O. 15, 1905, 1. *See also* GROUNDING SHIP.
44. **Same**—Failing to enter on ship's logbook that ship went aground. C. M. O. 12, 1912.
45. **Gunboats**—Navigation of gunboats on Asiatic station. *See* GUNBOATS.
46. **Handlead.** C. M. O. 24, 1916, 3; NAVIGATION, 57.
47. **"Haphasard navigation."** *See* NAVIGATION, 88.
48. **"Inevitable accident."** *See* COLLISION, 12.
49. **Lead**—Use of the lead as a means of checking the position of the vessel. C. M. O. 24, 1911, 2. *See also* NAVIGATION, 82.
50. **Leadsman.** C. M. O. 27, 1916, 5.
51. **Light draft**—Navigation of vessels of light draft. *See* NAVIGATION, 82.
52. **Lookouts.** *See* NAVIGATION, 31.
53. **"Mere guesses"**—Commanding officer permitted courses to be steered which were "little better than mere guesses." C. M. O. 9, 1911, 2.
54. **Misty and foggy weather.** C. M. O. 27, 1916; G. C. M. Rec. 32389.
55. **Navigator**—Tried by general court-martial. C. M. O. 24, 1911; 18, 1913; 33, 1913; 3, 1915; 24, 1916.
56. **Same**—Errors or negligence of navigator can not excuse commanding officer. C. M. O. 53, 1906. *See also* NAVIGATION, 16.

Digitized by Google

57. **Same**—Responsibility of—The accused (lieutenant, junior grade) was tried and acquitted by general court-martial on the following charges:

CHARGE I.—Culpable inefficiency in the performance of duty (one specification alleging that the accused, as navigator of the *San Francisco*, in plotting his course by dead reckoning from 9 p. m. to 12 p. m. on May 16, 1916, failed to make use of the information furnished by official publications in regard to the currents, in consequence of which the *San Francisco* was stranded upon a shoal at about 12.41 a. m. May 17, 1916, in about latitude 41° 21′ 30″ N., longitude 69° 48′ 40″ W.)

CHARGE II.—Culpable negligence and inefficiency in the performance of duty (four specifications alleging a failure to utilize in navigating the *San Francisco* certain well known and generally accepted methods of fixing the position of a ship, and that he failed to notify and warn the commanding officer when, in his opinion, the ship was standing into danger, as the result of which the *San Francisco* ran upon a shoal at the time and place set forth under Charge I.)

In reviewing this case several questions arise, and it is uncertain upon what ground the court arrived at an acquittal. These questions may be considered as follows:

(1) The responsibilty of the navigator under the circumstances.

(2) Whether or not he was negligent and inefficient in the actual navigation of the ship. This in turn divides itself into (a) Navigation of the ship before 12.07 a. m., and (b) that subsequent to 12.07 a. m.

(3) Whether or not, as a consequence of such neglect and failure, the *San Francisco* stranded.

Responsibility of the navigator.—The Navy Regulations, 1913, R-2401, state that "the navigating officer is the officer detailed by the department to perform the navigation duties and is the head of the navigation department of the ship." It also states that "the navigating officer shall be senior to all watch and division officers." It was shown by the evidence that the accused was not detailed by the department but was detailed, at his own request, by the captain of the ship as navigator, and that he was not the officer upon whom by rank the navigation duties would have automatically devolved. Certain evidence was also introduced showing that upon graduation he stood low in his class and low in the subject of navigation, and that he had not received instruction in navigation since his graduation.

The question of his standing in the subject of navigation and the absence of instruction since he became a commissioned officer is believed to be irrelevant. An officer bearing a commission must be accepted as a responsible person and must be held accountable for the proper and efficient performance of duties commensurate with his grade as recognized by Navy Regulations. The only question remaining under this heading is whether or not the court considered that he was legally assigned to the duties of navigator in the sense of being responsible for the efficient performance of those duties. The duties of navigator of a vessel such as the *San Francisco* are commensurate with the grade of junior lieutenant, and, despite the provision of the Navy Regulations above quoted, the accused was responsible for the proper performance of these duties after they were assigned him by the commanding officer; it is not believed that the court acquitted him on this ground.

Methods of navigation of the ship—(a) *Before 12.07.*—Without reviewing in detail all of the evidence concerning the navigation of the ship, the evidence shows that the *San Francisco* was navigated from the last fix to 12.07 without the use of the very important current charts supplied for the waters in question, and as a consequence arrived at the entrance to Great Round Shoal Channel at approximately 11.54 instead of 12.07. The evidence shows that working forward from the last fix and applying the current, the track of the *San Francisco* was almost identical with the track obtained by working back from the position of grounding; and working forward it was shown that she would have arrived off the entrance to the channel at 11.53, while working back from the position of grounding showed that she must have arrived off the entrance at 11.54; in other words, the evidence shows that had the current chart which was supplied to the ship for that purpose been utilized in the run subsequent to the last fix, her position would at all times have been accurately known, and at 11.53 or 11.54 either the entrance buoys would have been sighted or else a course to the eastward would have been laid at that time.

(b) *After 12.07.*—The evidence shows that at 12.14, on sighting a light to the southward and westward, toward which, under orders of the division commander, the ship was steered, with the exception of soundings by the hand lead, ordinary methods of navigating and safeguarding the ship were neglected, and though the navigator realized the uncertainty of his position, he failed to advise and warn the captain as to his opinion concerning the danger of the course then being pursued, as is required by

Digitized by Google

Navy Regulations. Navy Regulations, 1913, R-2404 (3), requires that "If the commanding officer is conning and the navigator thinks the ship is running into danger, he shall so inform the commanding officer and advise him as to a safe course to be steered." It is believed that the full purport and value of this regulation is frequently overlooked. This warning which is required by regulations is as important a portion of the duties of navigator as are the ordinary methods of piloting; this regulation is not intended to be permissive, it is mandatory. The keeping afloat of a vessel of war is a duty so important that the Government, in order to safeguard itself and insure a check against those unaccountable lapses which sometimes occur in any individual, however proficient he may be, has prescribed a concurrent responsibility in regard to the navigation thereof.

The department considers that in cases of danger, or in cases where the navigator feels uncertain of his position, the requirement above quoted of article 2404 is an additional safeguard intended to bring forcibly to the attention of the commanding officer the fact that the position of the ship is not known to the navigator. Though the evidence shows that both the division commander and the commanding officer were cognizant of the conditions subsequent to 12.07, this knowledge is not construed as relieving the navigator of responsibility for affirmatively informing the commanding officer of his opinion concerning the course then being steered; and aside from all other navigational features subsequent to 12.07, the department considers that the failure of the navigator to make this protest was in itself negligence and inefficiency in the performance of his duties.

Effect of navigational methods upon stranding of the ship.—If it is considered that the accused was inefficient in the navigation of the ship; that the methods used by him were not such that the Government has a right to demand of officers charged with this duty, then it may be stated, as a matter of law, that the final clause in each specification to the effect that "in consequence of which neglect and failure the *San Francisco* was stranded," is surplusage and is not an essential part of the specification. It is a portion of the specification which might have been omitted in framing the charges, or it might have been affirmatively omitted in the findings of the court; the question of whether or not the methods of navigation directly resulted in the stranding of the vessel is important only in so far as the quantum of punishment is involved. If it is considered that the accused was negligent and inefficient in his performance of duty as navigator, the culpability, in so far as the specification is concerned, is fully established entirely without the concluding clause. A navigator may be culpable and negligent and inefficient without involving the ship even in danger of grounding. The fact of grounding therefore merely affects the gravity of the offenses.

As stated above, it is not known upon which of the above grounds the court arrived at its acquittal. It is not believed that it was on account of lack of responsibility of the accused as navigator. It is not believed that the court considered that the navigational methods employed were such as the Government has a right to require of officers charged with that responsible duty. A careful review of the case leads to the conviction that the court acquitted him because of his comparative youth, and because he was associated on the bridge with the commanding officer and division commander, whom it appears were practically as familiar with the situation as was the navigator. If this is correct, in the opinion of the department such a verdict is not justified, does not protect the Government in the navigation of its vessels, would establish an undesirable precedent, and would not carry out the spirit of the Navy Regulations, which impose concurrent responsibility upon the navigator for the safety of the ship. Where concurrent responsibility is imposed by the regulations upon several individuals and an accident occurs, it is illogical to hold that a junior is guiltless because a senior was present. The concurrent responsibility which has been established by the Navy Regulations is an additional safeguard of the Government in keeping its ships afloat; not to recognize this in effect nullifies this feature of the regulations. In such cases an endeavor to place the burden of entire responsibility upon some one individual results in confusion and a miscarriage of justice. The only logical method is to hold each individual concerned responsible, not for the accident itself, but for neglect of such of his individual duties as may have contributed to the accident.

For the above reasons the department considers that—

(1) The accused was responsible for the efficient performance of duties of navigator which had been assigned to him by the commanding officer;

Digitized by Google

(2) The methods of navigation employed by him, although they were perfectly known to the commanding officer and the division commander, were nevertheless not such as the Government can approve as being efficient;

(3) If the above be correct, he is culpable, whether or not they contributed directly to the grounding of the ship.

In view of the above the department would, under ordinary circumstances, return the record, together with a statement of the law governing the case, to the court for a revision of its findings and acquittal. The court in this case, however, is composed of officers of high rank who have been absent from their regular stations, where urgently needed, for an appreciable length of time, and the convening of this court in revision would detain them further. The department, therefore, having in mind the best interests of the service at large, approves the proceedings, but disapproves the findings and acquittal. C. M. O. 24, 1916.

58. **Same**—"From a review of this case, the commander in chief observes that stress was laid on the inexperience of the accused and the fact that, as the commanding officer was on the bridge, he (the accused) had a very small part to perform in navigating the vessel. No matter who is conning a vessel, it is the plain duty of the officer acting as navigator to keep track of the courses steered and the run of the vessel; and if he fails to use the methods and instruments for fixing the position which are at his command, and further fails to notify the captain when practicable that he believes the ship to be running into danger, he fails in his whole duty." C. M. O. 33, 1913, 1-2, quoted with approval by the Secretary of the Navy in C. M. O. 24, 1916.
59. **Navigating chart.** *See* NAVIGATION, 71.
60. **Navigational aids.** *See* NAVIGATION, 88.
61. **Navigational lights.** C. M. O. 24, 1911.
62. **Navigational methods.** C. M. O. 24, 1916, 4; NAVIGATION, 57.
63. **"Nerve"**—On part of commanders of torpedo boats. *See* COLLISION, 6.
64. **Officer of the deck.** *See* OFFICER-OF-THE-DECK; ORDERS, 48, 49.
65. **Orders**—With reference to navigation by division commanders and commanders in chief. *See* NAVIGATION, 15, 31; G. C. M. Rec. 32389, pp. 87-88.
66. **Outlying aids to navigation.** C. M. O. 3, 1915.
67. **Overtaking another vessel**—The officer of the deck was tried by general court-martial. He carelessly disregarded one of the simplest rules of the road. He overtook and ran into a much slower vessel in the open sea in broad daylight. C. M. O. 29, 1910.
68. **Patent log.** *See* PATENT LOG.
69. **Pelorus.** C. M. O. 27, 1916, 2; G. C. M. Rec. 32389, p. 6.
70. **Piloting at night.** *See* NAVIGATION, 19.
71. **Position of ship**—Commanding officer failed to require the position of the ship to be accurately plotted on navigating chart, in consequence of which neglect the ship ran on a reef. C. M. O. 9, 1911. *See also* C. M. O. 24, 1911; NAVIGATION, 10, 31, 72.
72. **Same**—Commanding officer "failing to plot the position of the said ship on the chart, etc. G. C. M. Rec. 32389.
73. **Precautions to avoid collision.** *See* COLLISION, 17.
74. **Precautionary orders**—By commanding officers. *See* COLLISION, 19.
75. **Range lights.** *See* NAVIGATION, 19.
76. **Rescue**—If a naval vessel collides with another vessel the commanding officer must do all practicable to rescue persons from the other vessel. *See* COLLISION, 22; COMMANDING OFFICERS, 34.
77. **Responsibility, concurrent.** C. M. O. 24, 1916, 4. *See also* NAVIGATION, 57.
78. **Responsibility of commanding officers.** *See* COLLISION, 6, 19; COMMANDING OFFICERS, 38; NAVIGATION, 15-19, 31, 53, 57, 71, 72, 82, 86, 88.
79. **Rules of the road.** C. M. O. 38, 1905; 29, 1910, 2. *See also* NAVIGATION, 67.
80. **"Shake-down" cruise.** *See* NAVIGATION, 16.
81. **Shifting berth.** C. M. O. 9, 1913.
82. **Soundings**—Inasmuch as unqualified approval of the court's action in this case might tend to establish the principle that an officer may wholly disregard requirements of the regulations and ordinary precautions intended to promote the safety of the vessel under his command and yet avoid responsibility, the department deems it necessary to emphasize the vital importance of the unfailing observance of one of the greatest safeguards known to seamen, namely, taking soundings.

Article 472, paragraph 1, Navy Regulations, 1900, prescribes as one of the commanding officer's duties: "When under way on soundings, he shall have casts of the lead taken frequently if necessary to verify the position."

Under this regulation it is true that the commanding officer must assume the responsibility of determining whether frequent soundings are necessary to verify

Digitized by Google

the position of his vessel, but if he fails to adopt this precaution when necessary he assumes the risk of disaster. The safety of his vessel being at stake, all doubt as to whether any precaution prescribed by the regulations ought or ought not to be taken should be resolved in favor of the precautionary measure. The vessel should be given the benefit of the doubt.

It was contended by the defense that casts of the lead do not, in the case of small vessels of light draft, give warning of danger in sufficient time to be of value. The purpose of the clause of the regulations referred to, however, is not so much to provide a means of disclosing imminent danger as to fix the position of the vessel with a view to avoiding such dangers.

It is noted that the discretion vested in the commanding officer by this regulation is limited to the question of the necessity of soundings in order to verify position. If the position of the vessel is known beyond question, frequent soundings are unnecessary and are not required to be taken. The qualifying words of the regulation, however, do not go beyond this. The requirement is not that frequent soundings shall be taken if practicable. There is no exception based on the difficulty of taking soundings in the case of a small vessel laboring in a heavy sea. While the testimony introduced in this case tends to show that soundings made under the existing conditions would have been difficult and their results of questionable value, it is manifestly the duty of the officer responsible for the safety of a vessel to make at least the attempt in such cases to avail himself of all safeguards prescribed by the regulations.

With due regard for the difficulties existing in this case—a small vessel laboring in a heavy sea—the department is advised and the evidence before the court indicates that soundings could have been taken, and the department has concluded, after careful consideration, that it was clearly the duty of the accused to bring the vessel head to sea and obtain the best soundings practicable in the circumstances. Whether or not this would have prevented the loss of the vessel, the soundings obtained would have had some value, and the action would, at all events, have shown that the vessel was lost in spite of all seamanlike precautions.

There being extenuating circumstances in this case, however, and not wishing to act in the direction of severity, against the opinion of a court composed of seagoing officers of experience, the proceedings and, subject to the foregoing remarks, the findings and acquittal in the case are approved. C. M. O. 50, 1903, 3-4. *See also* C. M. O. 30, 1909; 24, 1911; 2, 1915; 24, 1916; G. C. M. Rec. 32389; NAVIGATION, 17, 18.

83. **"Submerged and unmarked wreck."** G. C. M. Rec. 32390; File 26251-12138, J. A. G., Aug. 8, 1916.

84. **Tidal currents.** G. C. M. Rec. 32389.

85. **"Timing the flashes of a light."** C. M. O. 27, 1916, 2.

86. **Torpedo boats**—Torpedo boat, standing for an anchorage in the vicinity of four other vessels of the flotilla, was not informed by signal or otherwise, by the flotilla commander, as to where it should anchor, or that there had been any change in the disposition of the vessels of the flotilla since the early morning when it departed. *Held*: This omission of duty on the part of another does not relieve the commanding officer of the torpedo boat of the responsibility of handling his vessel, on such occasion, with great precaution and care. C. M. O. 5, 1906.

87. **Same**—"Nerve" in moneuvering. *See* COLLISION, 6.

88. **Torpedo-boat destroyers**—"The commander in chief observes that the accused in this case plead guilty to both charges, and that considerable evidence in extenuation was introduced, mainly to the effect that the ordinary methods of navigation are employed with difficulty on destroyers making high speeds.

"The present case presents to the commander in chief an example of extremely careless and haphazard navigation. Modern destroyers are large and costly torpedo vessels carrying comparatively large crews; and their value, and the number of lives on board, are certainly sufficient reasons for demanding careful navigation.

"The * * * left a known anchorage, had several navigational aids in plain sight, and yet, after running only 7 or 8 miles in smooth waters, not only failed to pass safely through a wide and deep passage, but missed it by over a mile. If this is an example of the methods used in other vessels of her class the commander in chief can not but fear the consequences. To him the grounding is an evidence of gross carelessness—an utter disregard of the most ordinary precautions used by seafaring men—which, had loss of life occurred or the vessel been seriously injured, would have been absolutely without extenuation. Those officers who occupy similar positions of responsibility should not fail to heed the warning against carelessness and overconfidence." C. M. O. 32, 1913, 1-2.

89. **Typhoon signals.** C. M. O. 7, 1915.

Digitized by Google

90. **Warning**—Of bad weather. *See* NAVIGATION, 91.
91. **Watch**—"Failing to keep a regular and proper watch either for signals or for radio messages," warning of bad weather. G. C. M. Rec. 32390.
92. **Watch officers.** *See* DRUNKENNESS, 99; WATCH OFFICERS.
93. **Weather**—Foggy and misty weather. C. M. O. 27, 1916; G. C. M. Rec. 32389.
94. **Whistling buoy.** G. C. M. Rec. 32389, p. 6.
95. **Wrecks**—"Submerged and unmarked wreck." G. C. M. Rec. 32390; File 26251-12138; J. A. G., Aug. 8, 1916. *See also* WRECKS.

NAVIGATOR. *See* NAVIGATION, 55-58.

NAVY NURSE CORPS. *See* BUREAU OF MEDICINE AND SURGERY, 6; MEDICAL OFFICERS OF THE NAVY, 11.

NAVY PAY OFFICE.
1. **Washington, D. C., at**—Is not one of the "bureaus and offices" of the Navy Department within the meaning of a contract to deliver ice to the Navy Department and its various bureaus and offices. File 6482, July 26, 1904.

NAVY PAY TABLES.
1. **Deck Courts**—Navy pay tables should be disregarded in adjudging loss of pay by deck court. C. M. O. 34, 1913, 6.

NAVY REGISTER.
1. **Printing of**—Section 73 of the public printing act of 1895 (28 Stat. 616) provides for the printing of 1,000 copies of the Navy Register for the use of the House of Representatives, and 500 for the Senate. The Secretary of the Navy is not required, by law, to publish a Navy Register. 15 J. A. G., 96.
2. **Status of officer**—The position of an officer's name in the official register of the Navy does not affect such officer's status nor confer upon him or any other officer any right of promotion or advancement of rank. File 5038-18, 19, J. A. G., Feb. 29, 1912. *See also* File 27231-8, Feb. 7, 1911.

NAVY REGULATIONS. *See* REGULATIONS, NAVY.

NAVY YARD.
1. **Command**—Succession to. *See* COMMAND, 14, 15.

NEGLECT OF DUTY.
1. **Enlisted men**—Charged with. C. M. O. 5, 1911, 7; G. C. M. Rec. 31705; 31714; 31857; 31930.
2. **Officers**—Charged with. C. M. O. 21, 1908; 26, 1908; 35, 1908; 30, 1909; 19, 1910; 6, 1911; 11, 1911; 15, 1911; 24, 1911; 32, 1911; 7, 1913; 9, 1913; 18, 1913; 33, 1913; 39, 1913; 3, 1914; 13, 1914; 19, 1914; 28, 1914; 35, 1915; 45, 1914; 46, 1914; 7, 1915; 19, 1915; 32, 1915; 41, 1915; 45, 1915; 25, 1916.
3. **Same**—Charged with "Culpable negligence and inefficiency in the performance of duty" and found guilty in a less degree than charged, of "Neglect of duty." C. M. O. 8, 1915, 2.
4. **Paymaster's clerk**—Charged with. C. M. O. 26, 1912, 3.
5. **Warrant officers**—Charged with. C. M. O. 32, 1910; 12, 1912; 15, 1912; 18, 1917.
6. **Warrant officers (commissioned)**—Charged with. C. M. O. 27, 1908; 12, 1914.

NEGLIGENCE.
1. **Counsel**—Effect of negligence of counsel for accused. *See* COUNSEL, 40.
2. **Disbursing officers**—Negligence with reference to embezzlement. *See* EMBEZZLEMENT, 18.

NEGLIGENCE IN OBEYING ORDERS.
1. **Officers**—Charged with. C. M. O. 203, 1902; 15, 1914. *See also* C. M. O. 55, 1894; 117, 1907.

NEGLIGENCE IN THE PERFORMANCE OF DUTY.
1. **"Culpable inefficiency in the performance of duty"**—"Negligence in the performance of duty" is a lesser degree than. *See* CHARGES AND SPECIFICATIONS, 71; GUILTY IN A LESS DEGREE THAN CHARGED, 12, 38.

NEGLIGENCE OR CARELESSNESS IN OBEYING ORDERS, ETC.
1. **Specific intent**—Not required. *See* INTENT, 2.

"NERVE" ON PART OF TORPEDO BOAT COMMANDERS. *See* COLLISION, 6,

Digitized by Google

NEURASTHENIA.
1. **Nervous disorder**—Not a mental disease. C. M. O. 24, 1914, 6.

NEUTRAL. *See also* PUBLICATION.
1. **Engaged in business**—In an enemy's country during war is regarded as a citizen or subject of that country. C. M. O. 29, 1915, 11. *See also* CITIZENSHIP, 18; EXPATRIATION, 2; RETIRED OFFICERS, 31, 32.
2. **Internment**—Of vessels in neutral ports. *See* INTERNMENT.
3. **Violation of**—Newspaper clippings. *See* File 28573-46:1, June 6, 1916.
4. **War in Europe**—Officers commenting publicly on military or political situation in Europe—Could be tried by general court-martial under "Conduct to the prejudice of good order and discipline." File 28517-24, J. A. G., Mar. 5, 1915.

NEW TRIAL. *See* File 6674-38, April 26, 1907; 1 Op. Atty. Gen., 233.

NEW YORK STATE CAMPAIGN BADGE. *See* CAMPAIGN BADGES, 2.

NEWFOUNDLAND.
1. **Letters**—Newfoundland is not a part of Canada, but a separate Province of the British Empire; and official letters to Newfoundland are required to be prepaid. File 7538-176, Aug. 2, 1915.

NEWSPAPERS. *See also* PUBLICATION.
1. **"Conduct unbecoming an officer and a gentleman"**—Officer tried by general court-martial for writing an abusive letter to. *See* CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN, 4.
2. **Correspondents**—Officers as. *See* NEWSPAPERS, 5.
3. **Evidence**—An accused officer was charged with "Scandalous conduct tending to the destruction of good morals." The judge advocate offered in evidence a copy of a newspaper which contained accounts of the scandalous conduct of the accused. Counsel objected on the ground of hearsay. Judge advocate replied that the newspaper would "show how how the alleged scandal was desseminated over the country," etc. The objection was sustained by the court. The department *held:* That "the court clearly erred in this ruling. The best evidence that the conduct of the accused *did* bring scandal and disgrace upon the naval service was the copy of a newspaper showing, as contended by the judge advocate, 'how the alleged scandal was disseminated over the country.' A newspaper, in such a case, is offered to the court not as evidence of the facts stated therein which must be otherwise established, but as evidence of the publicity which was given the scandal." C. M. O. 4, 1913, 55.
4. **Information**—Furnishing of information pertaining to the Navy or naval service, to newspapers, for publication, by persons belonging to the Navy or under the Navy Department. File 4496-57, June 4, 1907.
5. **Officers**—Acting as correspondent for—An officer of the Marine Corps was authorized to act as correspondent for certain papers during the trip of the battleship fleet from the Atlantic to the Pacific coast. File 2310-144, Oct. 30, 1907.
6. **Purchase of**—Only after advertisement. *See* NAVAL ATTACHÉS, 4.

NEXT OF KIN.
1. **Medical records**—Deceased enlisted men—Delivered to. *See* MEDICAL RECORDS.

NOLLE PROSEQUI.
1. **Court**—Can not enter. *See* NOLLE PROSEQUI, 9.
2. **Defense may not enter**—It is not competent for the defense to enter *nolle prosequi* to any charge or specification. C. M. O. 42, 1914, 6.
3. **Definition**—A *nolle prosequi* (or *nol. pros.*, or *withdrawal*, or *discontinuance*) is "an entry made on the record by which the *prosecutor* or plaintiff declares that he will proceed no further." (2 Bouv. 503. *See also*, C. M. O. 14, 1910, p. 10. File 26251-8038 and 26251-9538.) C. M. O. 42, 1914, 6.
4. **"Desertion"**—Charge and specification of "Desertion" withdrawn and "Absence from station and duty without leave" substituted. G. C. M. Rec. 30832. *See also* File 26251-12396:1.
5. **Desertion of accused**—In view of the desertion of the accused the case was withdrawn. File 26251-11493.
6. **Erroneously used**—The expression "*nolle prosequi*" was evidently used erroneously in a case from misapprehension as to the the meaning of the term. The fact was, however, that the defense entered an objection to the third and fourth charges on the ground that the specifications thereunder were identical, citing specifically the court-martial

Digitized by Google

order in which the department's policy was announced as being opposed to duplicating charges based on the identical facts, where there are no aggravating circumstances set forth under the one charge which distinguishes it from the other. C. M. O. 42, 1914, 6–7.

7. **Escape**—In view of the escape of a naval prisoner while awaiting trial by general court-martial the charge and specification thereunder were withdrawn. File 26251-12240, Sec. Navy, Aug. 24, 1916.
8. **Government may withdraw**—"In the absence of express limitation the Government may always withdraw charges which it has made." (Street *v.* U. S., 133 U. S. 305.) *See* File 26251-11493.

   After the accused was brought to trial it was held his fraudulent enlistment had been constructively ratified by restoring him to duty. While it was held that the fact of restoration to duty could not bar disciplinary proceedings for the offense of fraudulent enlistment if the department desired to bring him to trial therefor as a matter of policy the charge and specification were withdrawn. File 26251-8539:1, Sec. Navy, Jan. 24, 1914.

   In one case a charge and specification alleging desertion were withdrawn by telegraph and accused restored to duty. File 26251-12396:1, Sec. Navy, Sept. 27, 1916.

   Where charges and specifications are withdrawn the accused should not be furnished with a copy of the record of proceedings. *See* RECORD OF PROCEEDINGS, 36.
9. **Judge advocate**—In a prosecution before a naval court-martial even the judge advocate or the court can not withdraw a charge or specification without authority from the Secretary of the Navy or other convening authority. (C. M. O. 16, 1911, pp. 3–4.) C. M. O. 42, 1914, 6.
10. **Jurisdiction of civil authorities**—Charge of "Desertion" preferred September 7, 1911, was temporarily withdrawn while accused was under jurisdiction of civil authorities (indicted for murder). Accused was tried on original charges and specifications on February 24, 1916, at Norfolk, Va. Pleaded "Guilty" and sentenced. G. C. M. Rec. 31774.
11. **Physical condition of the accused**—Charges and specifications were withdrawn in view of the physical condition of the accused.
12. **Quorum**—In view of the fact that the department's order to enter a nolle prosequi in the case of the above-named man amounts in effect to a withdrawal of the charges from prosecution; is an order which binds the judge advocate, the accused, and the court alike; does not prejudice the rights of the accused; and requires no action by the court, the department does not consider that the absence of a legal quorum in the court will prevent the entering of a nolle prosequi in such case. File 26251-8038:7, Sec. of Navy, Feb. 14, 1914.
13. **Revised charges and specifications**—Charges and specifications of "Fraudulent enlistment" were withdrawn and new ones substituted. G. C. M. Rec. 31500.
14. **Substitution.** *See* NOLLE PROSEQUI, 4, 13.
15. **Summary court-martial**—The general court-martial charge and specification were withdrawn by order of the Secretary of the Navy and the accused was tried by summary court-martial. File 26251-11538.
16. **Temporarily withdrawn.** *See* NOLLE PROSEQUI, 10.

NOLO CONTENDERE.

1. **Definition**—The plea of nolo contendere is not a plea of "guilty, but without criminality." It is a confession of guilt of the offense alleged, but forbids the Government from using the plea of "guilty" as evidence of guilt should a civil suit be entered subsequently against the accused to recover pay and allowances given accused (in his fraudulent enlistment). The court erred in not accepting the plea and in directing the judge advocate to enter a plea of "not guilty" in lieu thereof, and proceeding with the trial.

   There is no difference in legal effect between this plea and that of guilty, at least with regard to all the proceedings in an indictment. (United States *v.* Hartwell (U. S.) 26 Fed. Cas., 196, 199.)

   Under the heading of *Nolo contendere*, on page 4815, vol. 5, of Words and Phrases Judicially Defined, the following appears:

   "A plea of nolo contendere is an implied confession of guilt, and has the same effect as a plea of guilty, so far as the proceedings on an indictment are concerned, and hence, a defendant who has been sentenced on such a plea is to be deemed convicted of the offense for which he was indicted. (Commonwealth *v.* Horton, 9 Pick., 206; Commonwealth *v.* Ingersoll, 145 Mass., 381, 14 N. E., 449.) In the latter case it is said: 'A plea

Digitized by Google

of nolo contendere, when accepted by the court, is, in effect upon the case, equivalent to a plea of guilty. It is an implied confession of guilt, only, and can not be used against the defendant as an admission in any civil suit for the same act. The judgment of conviction follows upon such a plea as well as upon a plea of guilty, and such a plea, if accepted, can not be withdrawn and a plea of not guilty entered, except by leave of the court. If such plea is tendered, the court may accept or decline it, in its discretion. If the plea is accepted, it is not necessary or proper that the court should adjudge the party guilty, for that follows as a legal inference from the implied confession, but the court proceeds thereon to pass the sentence of the law.' (Barker *v.* Almy, 39 Atl., 185, 186, 20 R. I., 367, citing State *v.* Conway, 38 Atl., 656, 20 R. I., 270.) C. M. O. 26, 1910, 5-6.

NOMINAL PUNISHMENT.

Public reprimand is. C. M. O. 8, 1915, 3. *See also* PUBLIC REPRIMAND, 11.

NONPAYMENT OF DEBTS. *See* DEBTS.

NOSTALGIA.

1. **Midshipman**—Committed suicide while suffering from acute nostalgia. *Held:* Not line of duty and misconduct. File 26250-812.

NOTARY PUBLIC.

1. **Recruiting**—Irregularities of a notary public in connection with enlistment of an applicant. File 7657-299, J. A. G., Aug. 11, 1915.

NULL AND VOID.

1. **Commissions.** *See* COMMISSIONS, 20.
2. **General court-martial proceeding**—Held null and void. C. M. O. 4, 1914, 11. *See also* C. M. O. 33, 1914, 5.

NUMBERS IN SENTENCES.

1. **Words and figures**—The sentence must be recorded by the judge-advocate's own hand and must be free from erasures and interlineations. Numbers in the sentence should be expressed both by words and figures. C. M. O. 1, 1911, 5; 19, 1911, 5; 1, 1913, 5.

NUMBERS, ADDITIONAL. *See* ADDITIONAL NUMBERS.

NUMBERS, LOSS OF. *See also* CONVENING AUTHORITY, 50.

1. **Foot of list**—Sentences which reduced an officer to the foot of the list. C. M. O. 47, 1906, 2; 43, 1904, 2; 38, 1908; 2, 1907, 1; 3, 1911; 48, 1910; 20, 1910; 25, 1910; 3, 1911; 4, 1911; 27, 1911; 6, 1912; 40, 1913.
2. **Foot of list and there remain until a certain loss of numbers sustained.** C. M. O. 17, 1904, 2; 2, 1907; 20, 1910; 4, 1911; 17, 1915, 1; 14, 1915.
3. **Same**—Where an officer's position on the Navy Register will not permit of his being reduced the numbers determined upon, the court should place him at the foot of the list with the proviso that he is to remain in that position until he has lost the required numbers. C. M. O. 14, 1910, 16; 23, 1910, 7; 1914, 2.
4. **Same**—Reviewing and convening authority's action, where a sentence of dismissal is mitigated. *See* NUMBERS, LOSS OF, 10.
5. **Form of sentence**—A sentence involving loss of numbers as "to lose ten (10) numbers in his grade, to take rank next after," etc., is objectionable, in view of the fact that it is practically impossible, because of changes being often made in the roster of officers, during the interim between the publication of the registers, for a court to be cognizant of the exact status of an officer and other officers junior to him when sentence is adjudged. Consequently, it sometimes happens that the terms of such a sentence, which are made to include both a loss of numbers and also that the officer sentenced will be placed in a certain position with reference to a specially named officer, are conflicting, in that loss of the specified numbers may not accord with reduction to the position next after the designated officer. An unqualified phraseology, such as, "The court, therefore, sentences him, ————, ————, to lose ——— (—) numbers in his grade," is preferable in such sentences. C. M. O. 14, 1910, 16; 23, 1910, 7; 19, 1914, 2. *See also* C. M. O. 18, 1917.
6. **Same**—While the Secretary of the Navy, in mitigating certain sentences involving loss of numbers, has designated the position that an officer will take in the roster, it is manifestly improper for courts to do so, as it is impossible for a court to know

Digitized by Google

the date that the sentence will be approved or the changes that may be made in the roster by the time of such approval. C. M. O. 17, 1913; 18, 1913; 19, 1914, 2.

7. **Same**—The following court-martial orders contain incorrect phraseology for a sentence involving loss of numbers. C. M. O. 67, 1902; 43, 1904, 2; 22, 1909; 43, 1909; 45, 1909; 56, 1910; 18, 1910; 15, 1913; 17, 1913; 18, 1913; 2, 1914; 3, 1914; 8, 1914; 19, 1914.
8. **Mitigation of dismissal to loss of numbers.** The reviewing authority may mitigate a sentence of dismissal to loss of numbers. *See* DISMISSAL, 19.
9. **Promotion**—Loss of numbers caused by suspension from promotion. *See* PROMOTION, 102.
10. **Reviewing and convening authority's action**—Proper form where it is desired to place officer at foot of list and wait there until he suffers the required loss—"The proceedings, findings, and sentence of the general court-martial in the foregoing case were ..... approved by the Secretary of the Navy, but the sentence was mitigated so that ..... will be placed at the foot of the list of ..... of the ..... with the rank of ....., there to remain until he shall have lost a total of..... numbers in said grade." C. M. O. 31, 1914; G. C. M. Rec. 21628; 22910; 24405.
11. **Sentence executed can not be revoked**—Where an officer while in the grade of second lieutenant was sentenced to loss of numbers, was not pardoned, but subsequently promoted to the grade of first lieutenant, the department held that the sentence was completely executed, and that there was no way, under existing law, in which he could be restored to the rank he held before he was sentenced. File 26261–246, Sec. Navy, March 18, 1914. *See also* File 26262–1794, Jan., 1917.
12. **Same**—An officer of the Navy requested the reconsideration of the department's action in approving the sentence of general court-martial in his case and mitigating the sentence to loss of five numbers. In reply to the department stated that "the record was very carefully reviewed before final action was taken, and in view of the fact that there is no new evidence submitted in your letter, the department denies your request for a reconsideration of its former action." File 26251–8101; 2, Sec. Navy, April 30, 1915.
13. **Sentence of an officer**—Loss of numbers is more appropriate than ss of pay for a commissioned officer. *See* PAY, 100.
14. **Suspension from promotion.** *See* PROMOTION, 194–207.
15. **Warrant officer (commissioned)**—The law governing the promotion of a commissioned warrant officer does not give him the right of promotion by reason of seniority (C. M. O. 21, 1910, p. 17:1, 1911, p. 3; 37, 1914, p. 1), and the department has on numerous occasions expressed its disapproval of this form of punishment in the case of a commissioned warrant officer, as practically it is without any effect. (C. M. O. 37, 1914, p. 1.)

    In order that there may be uniformity in the sentences adjudged, it is desirable that courts-martial use the following form and make it a basis for adjudging sentences in the cases of commissioned warrant officers:

    "The court, therefore, sentences him ——, ——, to be restricted to his ship or station for a period of —— (——) months, and to lose —— dollars ($——) per month of his pay for a period of —— (——) months." (C. M. O. 37, 1914, 1.) C. M. O. 52, 1914. *See also* C. M. O. 48, 1915, 5; 18, 1917.
16. **Same**—Department favors loss of pay rather than loss of numbers for commissioned warrant officers. C. M. O. 48, 1915, 5.

NURSE CORPS. *See* BUREAU OF MEDICINE AND SURGERY, 6. MEDICAL OFFICERS OF THE NAVY, 11.

OATHS.

1. **Additional charges and specifications**—Where additional charges and specifications are preferred after arraignment no legal objection could exist to swearing members again as to the additional charges and specifications. *See* ADDITIONAL CHARGES AND SPECIFICATIONS, 2.
2. **Adjutant and Inspector, U. S. M. C.** *See* OATHS, 48.
3. **Affidavits**—Oaths by recruiting officers to persons who desire to make affidavits as to dates and places of birth of applicants for enlistment. *See* OATHS, 30, 39.
4. **Administration of.** *See* OATHS, 48.
5. **Army**—Difference between oath administered to members of an Army and a Navy general court-martial. *See* ADDITIONAL CHARGES AND SPECIFICATIONS, 1.
6. **Boards of Inquest**—Oaths not authorized. *See* BOARDS OF INQUEST, 4.

Digitized by Google

7. **Boards of Investigation**—It has never been decided that boards of investigation in the Navy have general authority to swear witnesses in every case. Precedent supports the conclusion that such boards are authorized to administer oaths to witnesses only when the subject matter of the investigation relates to frauds on, or attempts to defraud, the Government or any irregularity or misconduct of any officer or agent of the United States." (*See* R. S. 183; Act, Mar. 2, 1909, 31 Stat. 951; Feb. 13, 1911, 36 Stat. 898.) File 3980–842, Sept. 29, 1913.

   Navy regulations, 1913, R–316 (3–4) provides that boards of investigation will not take testimony *under oath* except in important cases in which the precept expressly states that such board is authorized to administer oaths to witnesses in accordance with the above law. *See* OATHS, 25, 26.

   On May 27, 1915, the Superintendent of the Naval Academy convened a naval board of investigation authorized to take testimony under oath in accordance with R. S. 183, as amended by Act, Feb. 13, 1911. File 5252–73, Oct. 2, 1915.

8. **Clerks or reporters of general courts-martial**—Should be sworn by the judge advocate, not by the president of the court. *See* CLERKS OR REPORTERS OF GENERAL COURTS-MARTIAL, 2.
9. **Commanding officer**—Authority to administer. *See* OATHS, 48, 49.
10. **Counsel, special.** *See* COUNSEL, 50.
11. **Courts of Inquiry.** *See* COURTS OF INQUIRY, 35, 36.
12. **Courts-martial**—Until a court is duly sworn according to law it is incompetent to perform any judicial act, except to hear and determine challenges against its members. C. M. O. 29, 1914, 3.
13. **Deck courts.** *See* DECK COURTS, 32, 58; OATHS, 54.
14. **Deck court recorder.** *See* DECK COURTS, 32.
15. **Enlistment**—The applicant for enlistment is bound by the terms of his oath of enlistment which he executes before the recruiting officer. Statements not in harmony therewith made by the applicant to members of the recruiting party before executing the oath, but not made to the recruiting officer, do not relieve the applicant from his statements sworn to under oath. C. M. O. 12, 1911, 3–5.
16. **Executive officers**—Authority to administer oaths—Under act, March 3, 1901 (31 Stat., 1086); Navy Regulations, 1913, R–1536 (1); the executive officer of a naval vessel is authorized, in the absence of his commanding officer, to administer oaths for all purposes of naval administration. G. C. M. Rec. 26651; File 19037–38, J. A. G., Sept. 25, 1913. *See also* OATHS, 49.
17. **Same**—When the commanding officer is on board his vessel, the executive officer is not authorized to administer oaths. The law specifically enumerates the different classes of officers who have such authority, but does not mention therein executive officers. *Expressio unius est exclusio alterius.* (*See* WORDS AND PHRASES.) File 19037–38, J. A. G., Sept. 25, 1913.
18. **Same**—Executive officers not in command can not exercise authority "to administer oaths on papers relating to naval administration" merely because they may incidentally and occasionally "act as recruiting officer of the ship." (Naval Instructions, 1913, I–2514 (3).) As shown by the department's letters of December 1, 1900, to the Naval Committee of Congress recommending that the power to administer oaths be extended to recruiting officers "throughout the country, where there is no commanding officer of a vessel available to administer the required oath." (File 7286–00, J. A. G., Dec. 1, 1900.) File 19037–38, J. A. G., Sept. 25, 1913.
19. **Foreign country.** *See* COUNSEL, 50.
20. **General courts-martial**—Members of a general court-martial take the following oath, administered by the judge advocate, which is required by section 1624, Revised Statutes, before proceeding with a trial:

   "I, A B, do swear (or affirm) that I will truly try, without prejudice or partiality, the case now depending, according to the evidence which shall come before the court, the rules for the government of the Navy, and my own conscience; that I will not by any means divulge or disclose the sentence of the court until it shall have been approved by the proper authority; and that I will not at any time divulge or disclose the vote or opinion of any particular member of the court, unless required so to do before a court of justice in due course of law." (A. G. N. 40.)

   The president administers the following oath or affirmation to the judge advocate:

   "I, A B, do swear (or affirm) that I will keep a true record of the evidence given to and the proceedings of this court; that I will not divulge or by any means disclose the sentence of the court until it shall have been approved by the proper authority;

Digitized by Google

and that I will not at any time divulge or disclose the vote or opinion of any particular member of the court, unless required so to do before a court of justice in due course of law." (A. G. N. 40.) *See* C. M. O. 4, 1914, 11; File 26251-12159, Sec. Navy, Dec. 9, 1916, p. 2.

21. **Same**—Order of administering. *See* OATHS, 27.
22. **Same**—Divulging vote or opinion, or sentence. *See* CRITICISM OF COURTS-MARTIAL, 22, 36; OATHS, 47.
23. **Hospitals**—Where a passed assistant surgeon on duty at a hospital where an officer was a patient administered an oath to such officer on an affidavit by him, the department stated: "It is proper to remark that there is no authority of law for the administration of oaths by naval officers, except in certain specific cases, of which the one in point is not an instance." C. M. O. 99, 1893, 2.
24. **Income tax returns**—Officers empowered to administer oaths are authorized to administer the necessary oaths for the execution of income tax returns. File 28472-9; 19037-45. *See also* U. S. *v.* Bailey, 9 Pet. 238; Act, Oct. 3, 1913 (38 Stat. 166-181), with reference to income taxes.
25. **Investigating officer**—Authorized to administer. *See* File 5421-11, Sec. Navy, May 2, 1907, to Solicitor. *See also* R. S. 183, as amended by act March 2, 1909 (31 Stat. 951) and act Feb. 13, 1911 (36 Stat. 898); File 26251-8827:5; 16711, July 12, 1911; OATHS, 7.
26. **Same**—Any officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud, the Government, or any irregularity or misconduct of any officer or agent of the United States, and any officer of the Army, Navy, Marine Corps, or Revenue Cutter Service, detailed to conduct an investigation, and the recorder, and if there be none, the presiding officer of any military, naval, or Revenue Cutter Service board appointed for such purpose, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation. (Act of Feb. 13, 1911, 36 Stat., 898.) *See also* OATHS, 7, 25.
7. **Irregularly administered**—From an examination of a record of proceedings of a general court-martial the department noted that the oath was first administered by the judge advocate to the members, and then to the judge advocate by the president, whereas A. G. N. 40 provides that the president shall administer the oath to the judge advocate, and, this oath being duly administered, each member of the court shall be sworn by the judge advocate. This mode of procedure, although irregular, does not invalidate the proceedings of the court. (*See* 13 Op. Atty. Gen. 374.) C. M. O. 10, 1893, 1.
28. **Judge advocates**—Oath administered to judge advocate by president of general court-martial. *See* OATHS, 20.
29. **Same**—Where a judge advocate is relieved, the record must show that new judge advocate took oath. *See* JUDGE ADVOCATE, 92.
30. **Same**—The judge advocate of a general court-martial is authorized to administer an oath to an enlisted man when the affidavit made by such man relates to the loss of certain military stores, even though the affidavit has no relation to any court-martial matter. *See* File 26806-94; 19037-27.
31. **Marine Corps**—Authority of officers of the Marine Corps to administer oaths. *See* OATHS, 48.
32. **Midshipmen**—Agreement and oath signed by midshipmen appointed to the Naval Academy. *See* MIDSHIPMEN, 7, 57.
33. **Naval administration.** *See* OATHS, 48.
34. **Naval force of Pennsylvania**—The commanding officer of the naval force of Pennsylvania is not empowered by Navy Regulations, 1913, R-1536 (1), or by the act of March 3, 1901 (31 Stat. 1086), upon which said regulation was based, to administer oaths to witnesses in the investigation conducted by him concerning a collision. File 26835-360, J. A. G., Aug. 21, 1913.
35. **Naval Militia**—Oath prescribed in G. O. 150, June 14, 1915. *See* NAVAL MILITIA, 21.
36. **Naval Observatory**—Authority of commandant to administer oaths. *See* NAVAL OBSERVATORY, 1.
37. **Private business**—Act of March 3, 1901 (31 Stat. 1086), amending act, Jan. 25, 1895 (28 Stat. 639) [*see also* act, Feb. 13, 1911, 36 Stat. 898], does not authorize the officers mentioned therein to administer an oath for other purposes, such as in matters relating to the private business of either officers or enlisted men. File 19037-27, Sec. Navy, Mar. 30, 1912.
38. **Same**—A commanding officer has no authority to administer an oath in the case of an enlisted man desiring to prove up a homestead or making application for an annuity or any other sum due an Indian. Such does not come within the expression

Digitized by Google

(act, Mar. 3, 1901, 31 Stat. 1086) "other purposes of naval administration" referring to the authority to administer oaths, as the power to administer oaths by officers in the service was granted for the purpose of facilitating the business of the naval service and to promote economy. File 19037-27, Sec. Navy, Mar. 30, 1912.

39. **Recruiting officers**—In view of the provisions of Navy Regulations, 1913, R-1536 and the Act of March 3, 1901 (31 Stat. 1086), it is *held* that the administering of an oath by a recruiting officer of the Navy "to a person not in the naval service who desires to make an affidavit as to the date and place of birth of an applicant for enlistment in the United States Navy," is authorized under the clause "and for other purposes of naval administration." (*See* File 7751-03, J. A. G., Sept. 9, 1903; 19037-38, J. A. G., Sept. 25, 1913; 19037-45, J. A. G., May 26, 1914.) File 26806-138, J. A. G., Feb. 1, 1916; C. M. O. 5, 1916, 7.
40. **Same**—Authority to administer oaths. *See* OATHS, 48.
41. **Solicitor**—The solicitor in the Office of the Judge Advocate General was detailed by the Secretary of the Navy, May 2, 1907, to investigate reported discrimination against Marines in uniform visiting the Library of Congress, and was authorized to administer oaths to witnesses under R. S. 183. File 5421-11, Sec. Navy, May 2, 1907. *See also* File 26263.
42. **Special counsel.** *See* COUNSEL, 50.
43. **Statute**—Authority to administer an oath can be given only by statute—The person who can administer the oath being named in the statute, other persons are excluded by its terms from exercising that authority. C. M. O. 14, 1911, 5, 5, 6.
44. **Summary courts-martial.** *See* OATHS, 47, 54; SUMMARY COURTS-MARTIAL.
45. **Surgeons.** *See* OATHS, 23.
46. **Taking of oath**—It does not follow that every one who takes the oath of office is an officer. File 9736-18, J. A. G., June 25, 1910, p. 13.
47. **Vote or sentence of summary courts-martial**—The oath administered to members of summary courts-martial contains no prohibition against divulging the vote of a particular member, and his vote may be officially ascertained without judicial proceedings.

    Nevertheless the department desires it to be understood that notwithstanding the absence of any law or regulation on the subject, in the matter of secrecy, it regards members of summary courts-martial as governed by the same principle which applies to members of general courts-martial. Considered solely as a matter of propriety and official decorum, it is as pernicious for members of summary courts-martial, as it is for members of general courts-martial, to disclose the sentence of the court prior to its approval, or at any time to divulge or disclose the vote or opinion of any particular member of the court, unless officially required to do so by proper authority.

    Briefly stated, the department considers the confidential nature of the vote of opinion of each member of a summary court-martial to be sacred in all cases except where official inquiry is made by the convening or higher authority. In the case of general courts-martial the statute protects this secrecy against any other than a judicial investigation; in the case of a summary court-martial the department, in the absence of any statute or regulation on the subject, will sanction a modification of this rule only to the extent of allowing the vote or opinion of members to be disclosed, as above stated, upon official inquiry by the convening or higher authority. File 25675-9-10-11, Sec. Navy, Oct. 28, 1915; C. M. O. 42, 1915, 8-9. *See also* CRITICISM OF COURTS-MARTIAL, 36; REPORTS ON FITNESS, 3.
48. **Who may administer oaths**—The act of March 3, 1901 (31 Stat. 1086), Navy Regulations, 1913, R-1536(1), provides: "That judge advocates of naval general courts-martial and courts of inquiry, and all commanders in chief of naval squadrons, commandants of navy yards and stations, officers commanding vessels of the Navy, and recruiting officers of the Navy and the adjutant and inspector, assistant adjutant and inspectors, commanding officers, and recruiting officers of the Marine Corps, be, and the same are hereby, authorized to administer oaths for the purposes of the administration of naval justice and for other purposes of naval administration." File 26806-138, J. A. G., Feb. 1, 1916; C. M. O. 5, 1916, 7. *See also* File 19037-45, J. A. G., May 26, 1914; File 26509-1:16, J. A. G., Oct. 1, 1909, p. 13, with reference to adjutants and inspectors of the Marine Corps.
49. **Same**—There is no authority of law for the administration of an oath by any officer on board ship except the commanding officer [and executive officer], and the department held that any other officer could not administer the oath in enlisting a man on board ship. C. M. O. 135, 1897, 2. *See also* OATHS, 16-18.

Digitized by Google

50. **Witnesses**—Naval courts-martial—When a witness takes the stand after a recess, or resumes the stand for any reason, the record of proceedings should show that he was cautioned that the oath previously taken is binding. C. M. O. 47, 1910, 5. But where such witnesses were resworn instead of merely being warned, such error does not in anywise affect the validity of the proceedings. C. M. O. 54, 1898.
51. **Same**—Where a witness for the prosecution was not duly sworn, but permitted to testify and then sworn that the testimony as given was the truth, the proceedings of the summary court-martial were disapproved. Case of Wm. P. McCabe, Nov. 27, 1909.
52. **Same**—The proceedings of a deck court were set aside in a case where the deck court officer allowed himself to be sworn as a witness for the prosecution by the recorder, etc. *See* DECK COURTS, 58.
53. **Same**—Witness sworn by judge advocate instead of by president of the general court-martial. *See* DECK COURTS, 58; ESTOPPEL, 9.
54. **Same**—An oath or affirmation in the following form shall be administered to all witnesses, before any court-martial, by the president thereof: "You do solemnly swear (*or* affirm) that the evidence you shall give in the case now before this court shall be the truth, the whole truth, and nothing but the truth, and that you will state everything within your knowledge in relation to the charges. So help you God; (*or*, 'this you do under the pains and penalties of perjury')." (A. G. N. 41.) C. M. O. 48, 1915, 2.

OBEDIENCE. *See also* DISOBEDIENCE OF ORDERS; ORDERS.
1. **Importance of**—"The department desires to impress upon the service the importance of obedience to the orders of superior authority, as the first and plainest duty of all, and one from which no person in the Navy is or can be exempted." C. M. O. 67, 1892, 2; 101, 1903, 9. *See also* ORDERS, 47.
2. **Same**—The offense of refusing to obey the lawful order of a superior officer is one of the most serious known to naval laws. C. M. O. 57, 1895, 3.
3. **Military man**—The first duty of a military man is obedience. C. M. O. 37, 1915, 7.

OBESITY. *See* ACTING ASSISTANT DENTAL SURGEONS, 1.

OBJECTIONS.
1. **Charges and specifications**—Procedure when objection is made to. *See* CHARGES AND SPECIFICATIONS, 33, 34.
2. **Errors in procedure**—Where counsel claimed that the defense could not hear the statements going on in the court, and therefore the sentence was illegal, the department stated in part that "were such a claim admitted no court proceedings would ever hold, as all that would be necessary for the defense to invalidate the proceedings would be to state that certain parts of the proceedings were not heard by the defense." The defense "had the opportunity" to object to the proceedings and to disprove the facts presented, "but preferred to let it pass in the hope by so doing he could establish an error in procedure after the trial and so cause the proceedings of the court to be set aside and thereby free his client from punishment for his offense by a technicality." C. M. O. 9, 1908, 3. *See also* JUDGE ADVOCATE, 105.
3. **Evidence**—Objection to. *See* EVIDENCE, 79–84.

OBSCENE AND THREATENING LANGUAGE.
1. **Massachusetts law.** File 26251-2993:12.

OBSCENE BOOKS AND POSTAL CARDS.
1. **Mails**—Sending through. *See* File 26251-6162.
2. **Same**—Postal cards. *See* File 7538-197.

OBSTINATE COURT. *See* CRITICISM OF COURTS-MARTIAL, 43.

OBTUNDITY OF COURT. *See* CRITICISM OF COURTS-MARTIAL, 44.

OFFENSES.
1. **Accumulation of.** *See* ACCUMULATION OF OFFENSES.
2. **Aggravating circumstances.** *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 12; ACCUSED, 51, 52; AGGRAVATING CIRCUMSTANCES; NAVAL ACADEMY, 16.
3. **Commanding officer**—Had the commanding officer made the thorough investigation of the circumstances attending the offenses with which the accused was charged required by Navy Regulations, recourse to a general court-martial would hardly have been found necessary, and punishment, such as the commanding officer would

Digitized by Google

have been authorized to award, or such as could have been awarded by sentence of a summary court-martial, would seem to have been amply sufficient in this case. C. M. O. 135, 1900, 1.

4. **Common law offenses.** *See* COMMON LAW, 6.
5. **Enlisted man**—More serious when committed by an accused of long service. *See* ACCUSED, 52.
6. **Officers**—Aggravated circumstances. *See* ACCUSED, 51; NAVAL ACADEMY, 16.
7. **"Purely military offenses."** C. M. O. 49, 1915, 21, 22.
8. **Specifications**—Defective if it fails to allege an offense. *See* CHARGES AND SPECIFICATIONS, 39, 102, 103.
9. **Statement of an offense.** *See* CHARGES AND SPECIFICATIONS, 102, 103; CONCLUSIONS OF LAW, 5.
10. **Time**—As essence of offense. *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 29; CHARGES AND SPECIFICATIONS, 92. *See also* File 26287-1125, J. A. G., Mar. 19, 1912.
11. **War**—Offenses in time of war. C. M. O. 67, 1898; 91, 1898; 95, 1898; 33, 1899. *See also* DESERTION, 132-137; WAR, 6, 22, 23.

"OFFICE." *See also* GRADE AND RANK.

1. **Civil office or employment**—Of retired naval officers. *See* RETIRED OFFICERS, 18, 26, 28, 31, 34-37, 42, 50, 72.
2. **Contract**—"Whatever the form of the statute, the officer under it does not hold by contract. He enjoys a privilege revocable by the sovereign at will; and one legislature can not deprive its successor of the power of revocation." (Crenshaw *v.* U. S., 134 U. S. 99.) File 26260-1392, J. A. G., June 29, 1911, p. 17. *See also* "OFFICE," 4, 5; PAY, 76.
3. **Definition**—An "office" is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. (U. S. *v.* Hartwell, 6 Wall. 385, 393.)

   An acting paymaster appointed by the senior officer present is not an officer. A midshipman appointed acting master (1861) was held to be entitled to receive the pay of that grade. A deputy collector of internal revenue is not an officer; neither is a special deputy marshal. A circuit judge of the United States appointed a commissioner under a convention with Great Britain does not thereby hold an office. A general appraiser appointed as an expert to represent the United States in an international tariff commission is not an officer. The appointment of a special assistant attorney to aid in a certain case or set of cases is not an appointment to an office. File 9736-18, J. A. G., June 25, 1910, pp. 7, 10. *See also* File 5460-70, Mar. 1, 1915.
4. **Same**—An "office" is defined to be a "public charge or employment," and he who performs the duties of the "office" is an "officer." If employed on the part of the United States, he is an officer of the United States. Although an "office" is "an employment," it does not follow that every "employment" is an "office." A man may certainly be employed under a contract, express or implied, to do an act or perform a service without becoming an officer. But if a duty be a continuing one, it seems very difficult to distinguish such a "charge or employment" from an "office," or the person who performs the duties from an officer. (U. S. *v.* Maurice, 2 Brock., 96; 24 Op. Atty. Gen. 12.) File 9736-18, J. A. G., June 25, 1910, p. 11.
5. **Same**—A Government office is different from a Government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other. (U. S. *v.* Hartwell, 6 Wall., 385, 393; U. S. *v.* Germaine, 99 U. S. 508.) File 9736-18, J. A. G., June 25, 1910, p. 8.
6. **Duration.** *See* "OFFICE," 3.
7. **Duties.** *See* "OFFICE," 3, 4, 18.
8. **Emolument.** *See* "OFFICE," 3.
9. **Employment or charge.** *See* "OFFICE," 4.
10. **Enlisted men**—Does an enlisted man hold "office?" *See* File 9644-27, J. A. G., Jan. 24, 1913. *See also* DECORATIONS, 2; "OFFICE," 11-13.
11. **Same**—*Held:* That an enlisted man of the Army is an "officer" within the meaning of R. S. 850, allowing expenses incurred by witnesses for the Government. File 3707, June 15, 1904, citing 16 Op. Atty. Gen. 113.
12. **Same**—*Held:* That enlisted men of the Navy and Marine Corps are not officers of the United States within the constitutional prohibition and the act of June 31, 1881, sec. 3 (21 Stat. 604), with regard to the acceptance of medals, etc., from foreign Governments. *See* File 3707, June 15, 1904; 9644-27, Jan. 24, 1913; DECORATIONS, 2.

Digitized by Google

13. **Same**—The question whether Art. I, sec. 9, class 8, of the Constitution includes within its terms any person occupying a position of trust or profit under the United States, such as an enlisted man, is not free from doubt. There are decisions which have given the word "office" a very broad construction in other connections. File 9644-27, Jan. 24, 1913.
14. **Oath**—Every one who takes an oath is not an officer. *See* OATHS, 46.
15. **Pay.** *See* EMOLUMENT; "OFFICE," 3, 4, 17, 18.
16. **Property of incumbent**—An office created by statute is not the property of the incumbent. Being given by statute, it can be taken away by statute, and, therefore, the rules of law applicable to proceedings to deprive a person of property lawfully acquired are not, in general, applicable to proceedings of examining boards in cases of promotion. The rules of procedure, even in civil cases, where rights of property are involved, are not applicable here, except in so far as they are made so by statute and regulations adopted by the Navy Department in accordance with statute laws. Neither can such examinations be assimilated in any manner to criminal proceedings, which they in no sense resemble. The offices held by naval officers, Congress creates, abolishes, and limits at will. Congress has complete power, if it wishes, not only to stop promotions, but to abolish these offices. It might declare that no one should hereafter be promoted who was not over 6 feet high; or it might direct that all officers not of the required height should be discharged; and it can certainly pass an act like that of August 5, 1882 (22 Stat. 286), directing the discharge of officers whose unfitness arises from their own misconduct. File 26260-1392, June 29, 1911. *See also* PROMOTION, 142, 213.
17. **Salary**—The incumbent of an office is entitled to the salary attached thereto by law, and if he receives a less sum from disbursing officers he can claim and receive the balance. (Dyer *v.* U. S., 20 Ct. Cls. 166, 171.) File 5362-35, J. A. G., June 29, 1911, p. 6.
18. **Same**—The law creates the "office," prescribes its duties, and fixes the compensation. The appointing power has no control, beyond the limits of the statute, over the compensation, either to increase it or to diminish it. (Converse *v.* U. S., 21 How. 463; U. S. *v.* Williamson, 23 Wall. 411; U. S. *v.* Lawson, 101 U. S. 164; U. S. *v.* Ellsworth, 101 U. S. 170; Hall *v.* Wisconsin, 103 U. S. 5; Allstaedt's Case, 3 Ct. Cls. 294; Patton's Case, 7 Ct. Cls. 362; Sleigh *v.* U. S., 9 Ct. Cls. 369.) File 5362-35, J. A. G., June 29, 1911, p. 7. *See also* EMOLUMENT; PAY, 112, 115, 116; RETIRED OFFICERS, 18.
19. **Taxation**—Of an office of the United States. *See* TAXATION, 1.
20. **Tenure.** *See* "OFFICE," 3.
21. **Vested right**—An office is not a vested right. File 14818-4, J. A. G., 1909, p. 6. *See also* "OFFICE," 16.

OFFICE OF NAVAL INTELLIGENCE.

1. **Established**—"An 'Office of Intelligence' is hereby established in the Bureau of Navigation for the purpose of collecting and recording such naval information as may be useful to the department in time of war, as well as in peace.

"To facilitate this work, the Department Library will be combined with the 'Office of Intelligence,' and placed under the direction of the Chief of the Bureau of Navigation.

"Commanding and all other officers are directed to avail themselves of all opportunities, which may arise, to collect and forward to the 'Office of Intelligence' professional matter likely to serve the object in view." G. O. 292, May 23, 1882. *See also* act of February 24, 1899 (30 Stat. 874).

OFFICERS.

1. **Acting officers.** *See* ACTING BOATSWAINS; ACTING GUNNERS; ACTING MACHINISTS; ACTING PAY CLERKS; ACTING WARRANT OFFICERS, etc.
2. **Additional numbers.** *See* ADDITIONAL NUMBERS.
3. **Agreement as to quarters.** File 26254-2052.
4. **Appeals.** *See* APPEALS, 10-13.
5. **Apology.** *See* APOLOGY, 1; OFFICERS, 101.
6. **Arrest of, for trial by general court-martial**—Surrender of sword. *See* ARREST, 26, 39.
7. **Arrested by civil authorities.** *See* ARREST, 7, 28; CIVIL AUTHORITIES, 10, 33, 34.
8. **Assault**—Officer assaulting a civilian. *See* ASSAULT, 20.
9. **Same**—Ruffianly assault by accused officer upon a brother officer. *See* ASSAULT, 21.
10. **Blackmail.** *See* OFFICERS, 3, 118.
11. **Breach of trust**—A breach of financial trust or misuse of public funds is never trivial. C. M. O. 107, 1901, 2.

Digitized by Google

12. **Brief service**—Offense due to the "comparative brevity" of accused's period of service. C. M. O. 31, 1887, 2. *See also* CLEMENCY, 10.
13. **Cheating**—An officer convicted of an offense such as cheating at examination is not desirable for the naval service. C. M. O. 20, 1916. *See also* BLOTTER, 1; GOUGING; MIDSHIPMEN, 22.
14. **Citizen**—An officer must be a citizen of the United States. *See* CITIZENSHIP, 28.
15. **Civil authorities**—Officers arrested by. *See* ARREST, 7, 28; CIVIL AUTHORITIES, 33, 34; CONTEMPT OF COURT, 4.
16. **Civil obligations**—"It has always been the policy of this department to require that members of the naval service fulfill their civil obligations, and disciplinary proceedings have been initiated where failure to do so has brought scandal and disgrace upon the naval service." File 7657-408, Sec. Navy, Oct. 28, 1916. *See also* DEBTS, 1-5, 9-25.
17. **Civil office or employment.** *See* RETIRED OFFICERS.
18. **Club, Army and Navy Club, Manila, P. I.**—Officer expelled from. C. M. O. 5, 1909, 1.
19. **Commanding officers.** *See* COMMANDING OFFICERS.
20. **Commissions**—In general. *See* COMMISSIONS.
    Duties, obligations, and responsibilities imposed upon an officer by the language of his commission. *See* NAVIGATION, 31 (p. 413); OFFICERS, 97.
21. **Complaints and explanations**—Officers making either complaints or explanations are to confine themselves simply and exclusively to the facts of the case, and are neither to express an opinion nor to impugn the motives of the opposite party. C. M. O. 3, 1887, 2. *See also* C. M. O. 28, 1894, 2; CORRESPONDENCE; OFFICERS, 63.
22. **Confined at hard labor.** *See* CONFINEMENT, 18; HARD LABOR, 5, 6.
23. **Constructive service.** *See* CONSTRUCTIVE SERVICE.
24. **Consular officers**—Have no power to issue orders to naval officers, etc. *See* DIPLOMATIC OFFICERS, 2; OFFICERS, 37.
25. **Contempt of civil court**—Tried by general court-martial. *See* CONTEMPT OF COURT, 4.
26. **Control of temper and speech.** *See* OFFICERS, 117.
27. **Counsel for accused**—In court-martial cases. *See* COUNSEL.
28. **Countersign**—Officers should observe. *See* COUNTERSIGN; ORDERS, 34; SENTINELS, 18.
29. **Court-Martial Orders**—Officers responsible for ignorance of. *See* COURT-MARTIAL ORDERS, 22, 39-42.
30. **Criticizing commanding officer**—Tried by general court-martial for publicly criticizing his commanding officer. C. M. O. 40, 1909.
31. **Debts.** *See* DEBTS.
32. **Deck**—Officers of the Deck. *See* OFFICER-OF-THE-DECK; WATCH OFFICERS.
33. **Definition**—"Officer," as defined in R-64, provides that "within the meaning of the foregoing articles, unless there be something in the context or subject matter repugnant to or inconsistent with such construction, officers shall mean commissioned and warrant officers, and paymasters' clerks; superior officers shall be held to include mates and petty officers of the Navy and noncommissioned officers of the Marine Corps, in addition to the officers enumerated." C. M. O. 49, 1915, 19-20.
34. **Same**—An officer is one who performs the duty of an office. *See* "OFFICE," 4.
35. **Desertion of.** *See* DESERTION, 89-91.
36. **Dictatorial**—In handling enlisted men. *See* OFFICERS, 74.
37. **Diplomatic and consular officers**—Have no power to issue orders to commanding officers of legation guards, troops, or naval vessels. *See* DIPLOMATIC OFFICERS, 2.
38. **"Discharged" officers**—The term "discharged" as used in the act of August 5, 1882 (22 Stat. 286), providing for the discharge of officers who fail morally on examination for promotion, was intended to be synonymous with the words "wholly retired." File 26260-1392, 26260-697, Sec. Navy, June 29, 1911, p. 25. *See also* DISCHARGE, 11.
39. **Dismissed officer**—Restoration of dismissed officers. *See* DISMISSAL, 23; LEGISLATION, 5.
40. **Same**—An officer dismissed by sentence of a naval court-martial shall never again become an officer of the Navy. File 5252-79, J. A. G., June 19, 1915; DISMISSAL, 22.
41. **Disrespectful to commanding officer**—Tried by general court-martial. C. M. O. 28, 1908.
42. **Elope, attempt to**—With young girl—Tried by general court-martial. C. M. O. 55, 1894. *See also* ELOPING, 2.
43. **Emergency**—It is incumbent upon officers of the Navy to so conduct themselves that they will not only be able to assume ordinary routine duties, but to meet any emergency which might arise requiring the highest degree of energy and mental clarity, C. M. O. 5, 1915, 2. *See also* EMERGENCY.

Digitized by Google

44. **Enlisted men**—Relations with—Giving intoxicating liquor to. C. M. O. 49, 1888; 28, 1908; 16, 1917.
45. **Same**—Treatment of—Officer was tried by general court-martial for striking an enlisted man with his sword when the man was in double irons, kneeling on the deck with his hands in irons behind his back. C. M. O. 29, 1890.
46. **Same**—Manner in handling. *See* OFFICERS, 74.
47. **Same**—Officer tried by general court-martial for sleeping in an enlisted man's bunk after he had been assigned proper quarters in an officer's house. C. M. O. 16, 1910.
48. **Explanations and complaints.** *See* CORRESPONDENCE; OFFICERS, 21.
49. **Evasion of duty**—"All officers are reminded of the impropriety of seeking to evade their proper tours of professional duty, on personal considerations or through the intervention of influential friends, thus seeking to impose upon others service which it is their own duty to perform, and perhaps hardships and dangers which belong of right to themselves." G. O. 174, June 6, 1872.
50. **Example**—To midshipmen when on duty at the Naval Academy. C. M. O. 14, 1915, 2.
51. **Expatriation.** *See* CITIZENSHIP, 17–18; EXPATRIATION, 2; RETIRED OFFICERS, 31.
52. **Expelled**—Officer expelled from Army and Navy Club, Manila, P. I. C. M. O. 5, 1909.
53. **Expert witness**—In a suit between private parties—Compensation for. *See* MERCHANT VESSELS, 3, 4; EXPERT WITNESSES, 8, 11.
54. **Fees**—For service rendered in time of the United States. *See* MERCHANT VESSELS, 4.
55. **Foreign country**—The accused has been found guilty by a general court-martial of "Drunkenness," and "Conduct to the prejudice of good order and discipline." The gravity of these offenses—serious under any circumstances—is greatly augmented by the fact that they were committed by an officer of the United States Navy on duty in Mexican waters at a time when the international relations with Mexico were such as to require special care on the part of all citizens of the United States in their conduct and bearing while in that country, but even more especially was it incumbent upon commissioned officers of the United States to avoid all possibilities of friction or criticism.

    The accused was in Mexico because of the existing relations with that country and because of the commission he bore in the United States Navy. He was allowed ashore in civilian clothes on the night in question because of the presumption that a commissioned officer could be trusted to conduct himself in a gentlemanly manner and in a manner which would not reflect discredit upon the service or upon the uniform which he, as a commissioned officer, was entitled to wear. His actions proved him unworthy of the trust and confidence which is reposed in commissioned officers, and the department considers that it is only through the extreme leniency of the court that he is permitted to retain a commission in the service and mingle on a footing of equality with officers who are capable of appreciating the responsibilities of their position and the high standards which are imposed upon them and which as a body they zealously cherish. The reputation of the commissioned personnel of the service has been lowered by the irresponsible, unofficerlike conduct of the accused. C. M O. 7, 1914, 16. *See also* COMMANDING OFFICERS, 20, 44.
56. **Foreign States**—Accepting office from. *See* OFFICERS OF THE UNITED STATES.
57. **Furlough**—Secretary of the Navy may place an officer on furlough. *See* OFFICERS, 106.
58. **General court-martial**—Is only naval court-martial which has jurisdiction to try commissioned officers of the Navy. C. M. O. 7, 1914, 9.
59. **Gouging.** *See* BLOTTER, 1; GOUGING; MIDSHIPMEN, 22; OFFICERS, 13.
60. **"Habit"**—An officer can not be court-martialed for a "habit." File 26260-1392, J. A. G., June 29, 1911, p. 14. *See also* ACCUMULATION OF OFFENSES; CHARGES AND SPECIFICATIONS, 61–68, 93 (F).
61. **Hard labor**—Confinement at. *See* CONFINEMENT, 18; HARD LABOR, 5, 6.
62. **Ideals**—The department requires of and expects from officers occupying the important position of head of a department a performance of duty actuated by the highest ideals, independent of any personal inconvenience, extra hours, or diverting causes. A thorough, zealous, and efficient performance of such duties as may be assigned should be an ideal sacred to every officer. If difficulties arise the officer must surmount them and adopt or procure to be adopted such means as will produce efficient results. C. M. O. 28, 1914, 5. *See also* C. M. O. 14, 1915, 1; 17, 1915, 3.
63. **Impugning motives**—Officers should not express opinions upon or impugn the motives of other officers. (*See* Navy Regulations, 1913, R–1405.) C. M. O. 28, 1894, 2. *See also* C. M. O. 3, 1887, 2; CORRESPONDENCE; OFFICERS, 21, 64, 69.
64. **Same**—Officer tried by court-martial for expressing an opinion upon and impugning the motives of his superior officer. C. M. O. 4, 1911, 4.

Digitized by Google

65. **Influence**—Using influence to evade proper tours of professional duty. *See* OFFICERS, 49.
66. **Initiative.** *See* C. M. O. 37, 1915, 5, 6.
67. **Insubordinate.** C. M. O. 4, 1911, 2, 5, 8.
68. **Insulting officers and ladies.** *See* C. M. O. 2, 1907.
69. **Language**—A letter from a junior should be "couched in such language as should prevail in a letter from a junior to a senior." File 26806-131:24:1, Sec. Navy, July 9, 1915. *See also* CORRESPONDENCE; OFFICERS, 21, 33, 64.
70. **Law**—The service must understand and appreciate the fact that the Navy exists and is maintained by law alone; that its officers are superior in authority to the enlisted men only because the law has so elevated them; and that it is the interest of all officers, as well as their duty, to adhere with scrupulous fidelity to the laws enacted for their guidance. G. O. 168, Jan. 6, 1872.
71. **Legal matters**—The officers of the service can not be expected to become expert in the abstruse features of the law, but the department has a right to expect and does expect of courts a familiarity with those articles in the Navy Regulations in which the essential features of military trials are categorically prescribed. These essential features, though appearing as regulations, are in nearly every instance, the brief of statutes or of various decisions which have the force of law, and frequently a failure to comply with them renders the procedure wholly illegal. C. M. O. 5, 1915, 5.
72. **Leave of absence.** *See* LEAVE OF ABSENCE.
73. **Letter**—Threatening letter written by one officer to another. *See* OFFICERS, 3, 118.
74. **Manner in handling enlisted men**—The promotion of an officer was held up until certain defects in his manner of handling enlisted men, as shown by his fitness reports, were completely eradicated. In this case the department stated: "In the opinion of the department, a dictatorial and an unnecessarily severe manner in handling enlisted men is one of the most serious defects that can be possessed by an officer. An officer is necessarily charged with much authority, and the abuse thereof, more than any other one feature in an officer's character, is conclusive as to his unfitness for the trust imposed in him." File 26260-2:79:1, Sec. Navy, Nov. 3, 1915; C. M. O. 42, 1915, 11.
75. **Marine officers**—Rank and precedence. *See* PRECEDENCE, 14-19.
76. **Medical officers.** *See* MEDICAL ATTENDANCE; MEDICAL OFFICERS OF THE NAVY.
77. **Members of courts-martial.** *See* MEMBERS OF COURTS-MARTIAL.
78. **Midshipmen**—When considered an "officer" and when not. *See* MIDSHIPMEN, 58, 59; "OFFICE," 3.
79. **Naval instructions,** I-3117 (1) and I-3118 (2)—Engineer officer chargeable with knowledge of. C. M. O. 37, 1915, 4.
80. **Navy Regulations**—Officers are presumed to know. C. M. O. 5, 1914, 5; 7, 1914, 15.
81. **Same**—An officer's repeated violations of the Navy Regulations stamps him as untrustworthy and not a proper person to maintain discipline and exercise command over others. File 26260-1392, J. A. G., June 29, 1911, p. 13.
82. **"Office."** *See* "OFFICE."
83. **Officer of the United States.** *See* OFFICERS OF THE UNITED STATES; "OFFICE," 4.
84. **Pay**—Full pay is necessary for the proper maintenance of an officer on the active list. *See* PAY, 100, 109.
85. **Paymaster**—Charged with various serious offenses and tried by general court-martial—The department stated in part that: The transaction, however, it must be said in conclusion, is, in any sense in which it may be reviewed, disgraceful to the accused, and to the Navy. It would seem to have been a violation of the spirit if not of the letter of section 1781 of the Revised Statutes. C. M. O. 76, 1896, 13.
86. **Personal matters**—The Secretary of the Navy declined to give a retired officer advice concerning any action which he might take in matters of a purely personal nature in which the Navy Department is not authorized to take action of any kind. The proper course of an officer would be to consult a private attorney at his own expense. Memo. J. A. G., Aug. 5, 1916. *See also* LEGAL ASSISTANCE FOR OFFICERS AND ENLISTED MEN.
87. **Personal relations**—Of accused (officer) and other officers of his ship. C. M. O. 5, 1903. *See also* CLEMENCY, 40.
88. **Plea in bar**—Shielding himself behind—An officer being charged with "Drunkenness on duty" pleaded in bar of trial stating that he had already been punished for the offense. The court complied with the proper procedure, forwarded the record to the department, who returned the record *advising* the court to proceed with the trial. The court again respectfully adhered to its former decision in regard to the plea in bar of trial. The department after severely criticising the court stated in part: "Turning from the action of the court to that of the officer concerned, it is sufficient to say,

Digitized by Google

irrespective of the legal aspects of the matter, that by shielding himself behind a technical plea" the accused "has practically admitted his guilt. The case of an officer of the Navy who is obliged to admit, by a plea of this character, that he does not deem it prudent to submit the question of his guilt or innocence of a grave charge to the judgment of a court-martial, is most deplorable. It is wise that an officer should reflect, before declining to face charges preferred against him, that although he may, as in this instance, through the error of the court, by the interposition of a purely technical plea based upon insubstantial grounds, succeed in escaping punishment for a gross offense, he must, by such an act, necessarily imperil his standing with the service at large and the department, and leave upon his record a stain which is all the more unfortunate because the precise nature and degree of his offense is never judicially determined." C. M. O. 104, 1897, 6. *See also* OFFICERS, 116; PLEA IN BAR, 8.

89. **President**—An officer who is so grossly ignorant as not to know that the President of the United States is Commander in Chief of the Army and Navy, or who is so insubordinate in spirit that he will not hesitate to denounce and treat with disrespect the Chief Magistrate, or any superior officer, however exalted in rank, is not only wanting in the qualities of a gentleman but is wholly unfit for military service. Whatever latitude of denunciation or abuse civilians may choose to indulge in with regard to the authorities of government, officers of the Navy can claim no such privilege, even under the plea that they have a right to express their opinions on political subjects. Such license is utterly incompatible with the existence of military discipline, and at the same time is unnecessary to the most perfect freedom of opinion, either in religion or politics. A naval officer should be a gentleman in language and deportment. Good sense and good breeding will always enable any individual to express his opinions without giving just cause of offense, and the officer who can not do so is as much deficient in those qualities as he is in a sense of military duty when he treats his superior with disrespect. In this case a second assistant engineer was tried by general court-matrial for "Using language disrespectful to the President of the United States," the specification alleging that he "used language disrespectful to the President of the United States, declaring that the President had violated his pledges to the people and ought to be impeached." G. O. 85, Oct. 11, 1867. *See also* PRESIDENT OF THE UNITED STATES, 5.

90. **Private debts**—Legality of an order to pay. *See* DEBTS, 17, 18.

91. **Private litigation**—Government will not compel testimony. *See* WITNESSES, 89.

92. **Private reprimand.** *See* PRIVATE REPRIMANDS.

93. **Promotion of.** *See* MARINE EXAMINING BOARDS; NAVAL EXAMINING BOARDS; PROMOTION.

94. **Public reprimand.** *See* OFFICERS, 101; PUBLIC REPRIMAND.

95. **Qualifications of**—Officers in the naval service are selected with great care; they are trained and educated by the Nation, and required to meet a standard of mental and physical excellence which is beyond the reach of the average man. Much is expected of them, and happily the expectation is not often disappointed. They are placed in charge of complicated mechanism; they deal with the most dangerous forces known to mankind; they command men whose duty is is to obey without question. In the exercise of these high functions there is rightfully demanded of them knowledge, discretion, prudence, and a care and foresight proportioned to the consequences which may follow any default. C. M. O. 101, 1903, 9.

96. **Same**—A statute prescribing the qualifications necessary for appointment as an officer in the Navy, being in derogation of the appointing power should be strictly construed and not extended by implication to include anything which does not clearly come within the meaning of the language used. File 8822-2, Feb. 10, 1908.

97. **Same**—"The accused in this case is an officer holding a commission as commander and performing the duties of his rank. An officer assigned to duty of importance in command of a vessel of the Navy must be held to a strict responsibility for the efficient performance of that duty. C. M. O. 23, 1916, 2. *See also* NAVIGATION, 31 (p. 413).

"It is necessary that the Navy have officers who are able successfully to discharge their duties under more or less unfavorable conditions." File 6465-03, J. A. G., July 22, 1903. *See also* NAVIGATION, 31.

98. **Quarters**—Agreement as to. *See* OFFICERS, 3.

99. **Rank and title.** *See* RANK; PRECEDENCE.

100. **Reduction in rating**—To ordinary seaman. *See* REDUCTION IN RATING, 24-27.

101. **Reprimand**—"The good order and decorum of that service can be maintained only by a rigid observance of the respect due to rank and by condemning and restraining all undue exhibitions of temper by officers at the expense of the rights and feelings of others.

Digitized by Google

"When under the influence of passion, an officer oversteps the restrictions of discipline and violates the rules of propriety in the language he addresses to a brother officer, it becomes the part of those in authority to administer to him such a rebuke as may remind him of his duty and deter him from again offending in the same way.

"The indecorous, violent and profane language" of the accused, and his threatening gestures on this occasion, were unprovoked. They were applied to a brother officer whose hands were tied by the laws of the Navy, and who could neither resent the affront put upon him, nor even reply to it. It was neither just nor generous under the circumstances thus to take advantage of his own rank at the expense of an inferior.

"Some atonement was made by" the accused by an apology for his offense when his blood had time to cool. This, however, was after he was told that the matter would be reported to the department.

The accused "should bear in mind that his high standing in the service enjoins upon him the duty of restraint upon his anger, and he should see hereafter that he be not hurried into the use of language and into a course of conduct toward others calculated to wound their feelings and to expose him to the censure of authority." C. M. O. 31, 1881, 2–3. *See also* APOLOGY, 1; OFFICERS, 117.

An officer was censured for violating Navy Regulations, 1909, R–226, and a letter placed on his record. File 26836–7:12, Sec. Navy, July 15, 1915.

102. **Respect**—Every officer in the Navy should cherish a respect for authority, law, regulation, and gentlemanly decorum. G. O. 213, June 27, 1876.
103. **Resignations.** *See* RESIGNATIONS.
104. **Retired officers.** *See* RETIRED OFFICERS
105. **Ruffianly assault.** *See* ASSAULT, 21.
106. **Secretary of the Navy not required to place on duty an officer guilty of offenses such as render him unfit for association with other officers and their families—May place him on furlough**—Where an officer is found guilty of vulgar and indecent acts and associations, the Secretary of the Navy would not be required to order him to duty, but if not sentenced to dismissal might place him on furlough, as authorized by section 1442 of the Revised Statutes, which would mean that, in accordance with section 1557 of the Revised Statutes, he must receive half pay, thus imposing expenditures upon the Government from the appropriations for the Naval Service without receiving any return therefor. File 26251–11181, Sec. Navy, Dec. 17, 1915; G. C. M. Rec. No. 31436; C. M. O. 49, 1915, 27.
107. **Seniors**—Should have proper attitude toward juniors. C. M. O. 41, 1915, 9–10.
108. **Sentence disapproved**—As an approval would tend to establish a precedent that would convey a false impression of the requirements of a naval officer in the performance of his duty. C. M. O. 8, 1915, 3.
109. **Sentences.** *See* CONFINEMENT; HARD LABOR; NUMBERS, LOSS OF; PAY; REDUCTION IN RATING; SUSPENSION FROM DUTY.
110. **Sentinels**—An officer who was disrespectful, abusive, etc., to a sentinel was tried by general court-martial under "Conduct to the prejudice of good order and discipline." C. M. O. 95, 1803. *See also* COUNTERSIGN; SENTINELS, 1, 14, 18; C. M. O. 1, 1917.
111. **Status of**—Not affected by position in Navy Register. *See* NAVY REGISTER, 2.
112. **Superior officers.** *See* OFFICERS, 33; SUPERIOR OFFICERS.
113. **Suspension**—Delivery of sword. *See* ARREST, 26, 39.
114. **Suspension from duty.** *See* SUSPENSION FROM DUTY.
115. **Sword**—Surrender of, when placed under arrest. *See* ARREST, 26, 39.
116. **Technical pleas and quibbles**—In a certain case the department availed itself of the occasion to correct an erroneous impression, which, it would appear by the line of defense adopted in behalf of an officer tried by general court-martial, is entertained as to the responsibility of commanding and navigating officers. If public property to a large amount is lost, and the lives of a numerous crew are placed in imminent jeopardy while under the care of officers whose special duty it is to guard them from danger, and who are well compensated for the discharge of this duty, the department, as well as the public, will cast upon these officers the burden of proving that the loss did not occur from any negligence on their part, and they will not be permitted by a military court to profit by the technical pleas and quibbles which have been worn out in the service of petty criminals before the lowest civil courts. G. O. 80, Dec. 30, 1867. *See also* OFFICERS, 88.
117. **Temper, loss of**—In losing control of his temper, even though the provocation is exceedingly great, and in resorting to vile epithets, an officer shows a lack of judgment and a lack of observance of military propriety which reflects upon himself

Digitized by Google

rather than upon the person who offends him and he thereby causes a diminution of the respect and confidence which he has enjoyed, and which would have been increased had he kept control of his speech and taken proper measures in seeking redress for the wrongs which he felt had been done to him by his subordinate. C. M. O. 45, 1909. *See also* OFFICERS, 101.

118. **Threatening letter**—Naval officer tried by general court-martial for writing a threatening letter to his senior. G. O. 137, Sept. 7, 1869. File 26251-12159.
119. **Trial by court-martial**—The only court-martial which has jurisdiction to try commissioned officers of the naval service is the general court-martial. C. M. O. 7, 1914, 9.
120. **Unbecoming attitude**—On part of senior is subversive to good order and discipline. C. M. O. 41, 1915, 9-10.
121. **"Untruthful"**—Officer branded as untruthful. C. M. O. 24, 1910.
122. **Vile epithets**—Used by officer. *See* C. M. O. 18, 1910, 2; OFFICERS, 117.
123. **Violating civil law**—Exceeding speed limit—Tried by general court-martial. G. C. M. Rec., 31509, p. 6 of the charges and specifications.
124. **Vulgar and indecent acts.** *See* OFFICERS, 106.
125. **Warrant officers.** *See* WARRANT OFFICERS.
126. **Watch officers.** *See* OFFICER-OF-THE-DECK; WATCH OFFICERS.

OFFICER OF THE DAY. *See also* JUDGE ADVOCATE, 75.

1. **Responsibility of**—The officer of the day, under the direction of the commanding officer is responsible for the perfect execution of the post routine. The supervision of such minor details as the position of the colors on the flagstaff and the proper sounding of the bugle calls are as much a part of his military duties as the inspection of reliefs of the guard, and are no more beneath his dignity. Moreover, it is the attention to or neglect of such small details, as well as the more important ones, that marks the distinction between an efficient and an inefficient post. C. M. O. 4, 1911, 1.
2. **Tried by general court-martial.** C. M. O. 35, 1916.

OFFICER-OF-THE-DECK. *See also* NAVIGATION.

1. **Authority and responsibility of.** *See* OFFICER-OF-THE-DECK, 8-11.
2. **Bunk**—Officer-of-the-deck tried by general court-martial for being in his bunk in his stateroom, while the all-hands evolution of coaling ship was in progress. C. M. O. 15, 1909.
3. **Cigarette smoking**—There is no occasion for an officer while on duty as officer-of-the-deck for smoking a cigarette, and, if doing so brings on nausea and a state of irresponsibility, his condition should be considered as due to his own misconduct or, at least, carelessness and indifference in the performance of duty, and instead of going to mitigate the other offenses should aggravate them. C. M. O. 25, 1909, 2.
4. **Drunk.** *See* DRUNKENNESS, 99.
5. **Lying down while on duty**—A "master" who was on duty as officer-of-the-deck on board the U. S. S. *Yantic* "did spread a pea-coat on an arm-chest near the cabin companionway on the poop deck, and did lie down," when a "Norther" was anticipated—Tried by general court-martial. C. M. O. 16, 1882.
6. **Navigation**—Officer-of-the-deck tried by general court-martial for neglecting and failing to exercise proper care in navigating vessel while approaching certain reefs, in that he neglected and failed to lay a proper course in consequence of which the vessel was stranded on a reef. C. M. O. 25, 1909.

   Tried by general court-martial for changing course without notifying commanding officer. C. M. O. 30, 1909.
7. **Same**—If there is an emergency, such as imminent danger of collision, the officer-of-the-deck should change the vessel's course without orders from the commanding officer and shall report his action to the commanding officer without delay. C. M. O. 44, 1883, 2. *See also* EMERGENCY, 3; ORDERS, 26, 49.
8. **Representative of commanding officer**—The officer-of-the-deck as representative of the commanding officer of a naval vessel is entitled to obedience from all officers of whatever rank, whether of line or staff. C. M. O. 67, 1892, 2.
9. **Responsibilities of**—Few men have greater responsibility of property, life and national honor immediately resting upon them than a watch officer of a vessel of war while at sea. An officer who is guilty of drunkenness, when liable to be called upon to assume this responsibility, commits a crime of the gravest nature, for the consequences of his crime may be fatal to his ship and to all on board. C. M. O. 22, 1884, 2.

Digitized by Google

10. **Same**—The officer-of-the-deck for the time being, is vested, in case of emergency, with the entire control of the vessel's movements. While under ordinary circumstances, he should not change her course without orders from the commanding officer, yet, if there is danger of collision, he should promptly so change it, according to his judgment, as to avoid the danger. The authority thus vested in him is absolute; the only limitation being that he shall report his action to the commanding officer without delay. The power conferred carries with it a corresponding degree of responsibility, and the officer who, while entrusted with it, fails in its proper exercise, either in giving the necessary order, or in seeing it obeyed, must be held responsible for the consequence of his neglect. C. M. O. 44, 1883, 3, quoted with approval in C. M. O. 4, 1914, 9, with approval.
11. **Same**—The importance of a proper performance of duty by an officer in charge of the deck of a vessel at sea can not be overestimated. This includes not merely a vigilant lookout and prompt action on his own part; it requires that he shall also see that his orders are carried into effect. If he is negligent in this particular, he suffers the neglect of others to impair his own efficiency and to bring about disaster. C. M. O. 41, 1883, 2.
12. **"Sleeping on watch"**—In a case where an officer-of-the-deck was found guilty on his own plea of "Sleeping on watch" the department stated in part: The charge and specification to which the accused pleaded guilty, were based upon an offense, "Sleeping on watch," which, while wholly inconsistent with the general obligation of all officers to perform their duties faithfully, is especially so, considering the peculiar nature of the duty entrusted to a watch officer. As officer-of-the-deck during those hours of the night when vigilance is the most indispensable requisite, the accused was charged with a special responsibility. It was his duty not only to be vigilant himself but to see that his subordinates in the watch, for the time being, were equally so. Instead of appreciating that responsibility as he should have done he apparently relied upon the vigilance of others rather than upon his own." C. M. O. 43, 1884, 2.
13. **Same**—An officer-of-the-deck was found guilty of "Sleeping upon his watch." The Secretary of the Navy felt it incumbent upon him to express in most emphatic terms his disapproval of the conduct of the accused. Part of the defense was that the accused was ill. "Sickness has never been regarded as an excuse even in the case of an enlisted man for his abandoning his station before being regularly relieved, neither should it be so considered in the case of an officer-of-the-deck of a battleship who, because of his experience, is bound to be cognizant of means by which, if indisposed, he could be regularly relieved." The accused's conduct was reprehensible and merits and receives the censure of the department. He has shown himself unfitted for the responsible duties of an officer of the Navy. C. M. O. 25, 1910, 2.
14. **Same**—Officer-of-the-deck was found guilty of "Drunkenness on duty" and "Sleeping on watch," while ship was underway. C. M. O. 34, 1912, 2.

OFFICER OF THE UNITED STATES. *See also* DECORATIONS.

1. **Accepting office from foreign States**—Article I, section 9, clause 8, of the Constitution of the United States prohibits any person holding any office of profit or trust under the United States from holding or accepting any office, present, emolument, or title from any foreign State, unless Congress shall consent thereto. While officers of the United States on duty in Haiti could not, without the consent of Congress, hold office, receive emolument, etc., under the Haitian Government, they are not prohibited by the Constitution or any law of the United States "from rendering a friendly service" to that State, such as assisting to organize a gendarmerie (*See* Op. 13 Atty. Gen. 537, 538). However, at the present date there is no authority whereby such officers could become officers in such a force by appointment from the Government of Haiti. File 5526-33, Sec. Navy, Oct. 28, 1915; C. M. O. 35, 1915, 11.
2. **Accepting decorations, etc.** *See* DECORATIONS.
3. **Definition.** *See* "OFFICE," 4.

OFFICIAL CHANNELS.

1. **Military orders**—The right of a commanding officer of a fleet, division, squadron, or naval station, to address a proper military order of any kind to an officer under his command, through the usual official channels, can not be questioned. (*See* File 4469, Mar. 22, 1906, placing a Marine officer under arrest; and File 6489, Jan. 14, 1907, suspending an ensign.) In these cases the orders were addressed to the offenders by name, *through* the immediate commanding officer, which procedure was upheld by the department. *See* File 2649-9, Dec. 5, 1906. *See also* File 27958-4, Sec. Navy Aug. 18, 1916.

Digitized by Google

OFFICIAL COMMUNICATIONS.

1. **Titles**—"All official communications intended for officers holding positions with recognized titles shall be addressed to them by title and not by name, as 'The Secretary of the Navy,' 'Bureau of Navigation,' 'The Commandant,' 'The Commander in Chief, ——— Fleet (or Squadron),' 'The Commander, ——— Squadron (or Division),' 'The Commanding Officer.' 'The Major General Commandant, Marine Corps.'" (Naval Instructions, 1913, I–5322 (2).) File 9160–5990, Sec. Navy, Nov. 15, 1915. *See also* File 20400–68, MAT–4–ML, Sec. Navy, Sept. 6, 1916; DESIGNATIONS, 1.

OFFICIAL CORRESPONDENCE. *See* CORRESPONDENCE; OFFICIAL COMMUNICATIONS.

OFFICIAL RECORDS.

1. **Desertion**—Proof of by. C. M. O. 28, 1904, 3–4. *See also* SERVICE RECORDS.
2. **Evidence, as.** C. M. O. 28, 1904, 3–4; 31, 1915, 14–16. *See also* EVIDENCE, DOCUMENTARY.

OHIO NAVAL MILITIA. *See* COLLISION, 14; NAVAL MILITIA, 3.

OLONGAPO, P. I.

1. **Jurisdiction**—And powers of Navy over Naval Reservation, Subig Bay, P. I. *See* JURISDICTION, 94–96. *See also* 26 Op. Atty. Gen. 91; File 681–04.

"ONE OFFICER" BOARD OF INVESTIGATION. *See* BOARDS OF INVESTIGATION, 15.

"ONE OFFICER" BOARD OF MEDICAL EXAMINERS. *See* BOARDS, 1.

"ONE OFFICER" COURT OF INQUIRY. *See* COURTS OF INQUIRY, 38, 39.

"OPEN COURT." *See* COURT, 126, 127.

OPENING MAIL.

1. **Enlisted man**—Tried by general court-martial for unlawfully opening mail. C. M. O. 6, 1915, 3.

OPERATIONS. *See* SURGICAL OPERATIONS.

OPINION.

1. **Board of inquest**—Opinion to be expressed on line of duty and misconduct. *See* BOARDS OF INQUEST, 5.
2. **Challenges**—Members of courts-martial expressing opinions as to guilt or innocence of accused. *See* CHALLENGES, 16, 17.
3. **Court**—Should not allow witnesses to state directly their opinions as to guilt or innocence of accused. *See* EXPERT WITNESSES, 12, 13; OPINION, 15.
4. **Drunkenness.** *See* OPINION, 17.
5. **Evidence**—Expert witnesses. *See* EXPERT WITNESSES, 12, 13.
6. **Same**—From the examination of a general court-martial record it appeared that the following question was asked a witness for the prosecution:

   "Was the slap you received from the accused given without provocation or justifiable cause and with malicious intent?" and that questions of a similar character, in effect calling for *opinion*, and thus clearly improper, were asked of other witnesses. Inasmuch, however, as the accused was acquitted upon the charge to which the testimony relates, and was found guilty only of the charges to which he so pleaded, the putting of such questions was regarded by the department as error without injury, and the sentence was approved. C. M. O. 59, 1898. *See also* C. M. O. 41, 1909, 1.
7. **Expert witnesses**—Expression of opinions. *See* EXPERT WITNESSES, 12, 13.
8. **General courts-martial**—Member disclosing opinion of other members, etc. *See* CRITICISM OF COURTS-MARTIAL, 22, 35, 36.
9. **Judge Advocate**—Opinion allowed on record of proceedings. *See* JUDGE ADVOCATE, 59 97.
10. **Members of courts-martial**—Expressing opinion as to guilt or innocence of accused subject to challenge. *See* CHALLENGES, 16, 17.
11. **Same**—Divulging opinions of other members. *See* CRITICISM OF COURTS-MARTIAL, 22, 35, 36; OATHS, 47; REPORTS ON FITNESS, 3.
12. **Record of Proceedings**—Opinion of judge advocate allowed in record. *See* JUDGE ADVOCATE, 59, 97.
13. **Sanity.** *See* OPINION, 17.
14. **Summary courts-martial**—Members disclosing opinions. *See* CRITICISM OF COURTS-MARTIAL, 36; OATHS, 47; REPORTS ON FITNESS, 3.

Digitized by Google

15. **Witnesses**—"It was decidedly irregular and improper for the court to allow the witness to be questioned upon the legal point that the court had been assembled to decide. Witnesses are not competent to express opinions upon points of law nor to apply the standard of law involved in the case. Evidence should be confined to testimony of facts; the inferences to be drawn from the established facts must be drawn by the court alone.

The question whether or not the accused is guilty or innocent is the very question which the court must determine, and the action of the court in allowing a witness to state directly his opinion upon the specific question is irregular. (*See* Index-Digest, 1914, p. 20; G. C. M. Rec. No. 31458, action of C. A.). C. M. O. 49, 1915, 15. *See also* C. M. O. 22, 1916; 161, 1902; Ct. Inq. Rec. 4952, p. 48; COURT, 199.

16. **Same**—Expert witnesses expressing opinions. *See* EXPERT WITNESSES, 12, 13.

17. **Same**—Must state facts not opinions—Witnesses must confine themselves to statements of fact. Opinions are not admissible, except in three cases, as follows: (a) Opinions which are conclusions drawn from numerous facts within the daily observation and experience of a witness. Such relate to the demeanor or appearance of a person; his sanity, sobriety, or identity, or his resemblance to another; his physical condition, whether sick or well; his condition as regards emotion or passion, as to anger, hope or fear, joy or sorrow, excitement or coolness, and the like. These are matters of everyday occurrence with respect to which all thoughtful persons form conclusions of fact, to which they are competent to testify in a proper case; (b) opinions of experts; (c) opinions as to handwriting. (Forms of Procedure, 1910, pp. 139-140.)

OPINIONS AND DECISIONS DEFINED AND DISTINGUISHED. *See* JUDGE ADVOCATE GENERAL, 30.

"OR OTHERWISE." *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 85.

ORAL ARGUMENTS. *See* ARGUMENTS, 4; BRIEFS, 1.

ORDERS. *See also* DISOBEDIENCE OF ORDERS; EMERGENCY; OBEDIENCE.

1. **Accomplice**—Officer issuing illegal order which is obeyed is an accomplice, etc. *See* ACCOMPLICE, 1.
2. **Ambiguous orders**—Issued by a commanding officer caused the loss of certain target rafts. File 26262-1194, J. A. G.; June 16, 1911, p. 3.
3. **Annulling**—Attention is invited to article 1716, paragraph 2, United States Navy Regulations, 1909 [Navy Regulations, 1913, R-727 (2)], as follows:

"In case of an order from a superior officer the provisions of article 221, paragraph 2, shall be complied with. The report of circumstances shall be forwarded by the member receiving such order to the convening authority through the president of the court, and a copy of such report shall be attached to the record of each case to which it applies."

Also to article 221, paragraph 2, United States Navy Regulations, 1909 [Navy Regulations, 1913, R. 1513 (2)], as follows:

"If an officer receives an order from a superior annulling, suspending, or modifying one from another superior, or one contrary to instructions or orders from the Secretary of the Navy, he shall exhibit his orders, unless confidential and he has been forbidden to do so, and represent the facts in writing to the superior from whom the last order was received. If, after such representation, the latter shall insist upon the execution of his order, it shall be obeyed, and the officer receiving and executing it shall report the circumstances to the superior from whom he received the original order." C. M. O. 23, 1912, 5-6.

4. **Appeals from**—The proper course for subordinate upon receiving an order which requires the doing of an illegal act is to appeal to the officer issuing the order, or if necessary to higher authority, for revocation, modification, or correction thereof. [*See* APPEALS, 11.] But where there is an emergency which will not permit of delay, he should disregard the order without such appeal. C. M. O. 37, 1915.
5. **Same**—In time of peace at least an officer is not obliged to obey an illegal order. It becomes his duty, at once, or within a reasonable time, to appeal to the highest authority for revocation, modification, or correction of the illegal order. (Ide v. U. S., 25 Ct. Cls. 407; 150 U. S. 517.) *See* C. M. O. 37, 1915.
6. **Boilers exploding**—As a result of obedience to an illegal order. *See* C. M. O. 37, 1915.
7. **Carried out**—An officer is under a duty to see that the orders he gives are carried out. C. M. O. 41, 1883, 2; 44, 1883, 3.

Digitized by Google

8. **Chance**—Orders to take a "chance." *See* C. M. O. 37, 1915, 5.
9. **Comptroller of the Treasury**—Can not relieve officers of duty to obey orders. *See* COMPTROLLER OF THE TREASURY, 8.
10. **Confession**—Orders to make a confession. *See* CONFESSIONS, 17, 18.
11. **Confidential orders.** *See* ORDERS, 3.
12. **Conflicting orders.** *See* ORDERS, 3.
13. **Contempt of authority**—"Whoever deliberately disobeys an order given by competent authority is in legal contempt of such authority." G. O. 182, April 2, 1873.
14. **Correction of orders.** *See* ORDERS, 3.
15. **Countermanding**—An officer was tried by general court-martial for unlawfully and unjustifiably countermanding certain lawful orders issued to the coxswain of a steam launch by a patrol officer. C. M. O. 10, 1908, 1.
16. **Court-martial duty.** *See* CONVENING AUTHORITY, 32; COURT, 34-51.
17. **Danger, time of.** *See* COLLISION, 17, 19; COMMANDING OFFICERS, 38; ORDERS, 53.
18. **Debts**—Orders to pay. *See* DEBTS, 17, 18.
19. **Decisions of the department**—As an order or command. *See* JUDGE ADVOCATE GENERAL, 30.
20. **Defense**—An officer tried by general court-martial for "Culpable inefficiency in the performance of duty" and "Neglect of duty" based his defense upon the fact that he had received *orders* to expedite the loading of his vessel and to proceed to sea and to his destination with despatch, believing that an emergency existed. File 26262-1194, J. A. G., June 16, 1911. *See also* ORDERS, 52.
21. **Deviation from.** *See* ORDERS, 3, 52.
22. **Disbursing officers**—Orders by commanding officers to make payments. *See* DISBURSING OFFICERS, 10; PAY OFFICERS, 4.
23. **Disobedience of orders.** *See* DISOBEDIENCE OF ORDERS.
24. **Division commander**—A division commander gives an order "Head for the light, Captain," to the commanding officer of his flagship. The commanding officer enters no protest, but gives the necessary orders. The ship goes aground. Division commander, commanding officer, and navigator are tried by general court-martial. *See* C. M. O. 24, 1916; 26, 1916; 27, 1916; NAVIGATION, 31.
25. **Drunkenness**—No excuse for not obeying orders. *See* DRUNKENNESS, 36.
26. **Emergency**—Senior officer actually present on the spot has duty of taking necessary action upon his own initiative to prevent injury to lives and property under his charge; and where the emergency is immediate and urgent he is not justified in delaying the necessary action because of an order issued by his superior officer before the emergency occurred and under a materially different state of facts. C. M. O. 37, 1915, 1. *See also* EMERGENCY, 1; ORDERS, 49.
27. **Examination for promotion**—In Navy prior to a vacancy. *See* PROMOTION, 132.
28. **Excuse**—Only valid excuse for disobedience of orders is a physical impossibility to obey them. *See* ORDERS, 52.
29. **Failure to obey promptly**—Failure promptly to obey a military order is not to be justified by the fact that a subordinate and his commanding officer entertain different views as to the interpretation of some minor provision of law or regulation. If the superior is wrong, his is the responsibility. File 1192-1, Sec. Navy, Mar. 21, 1905.
"In assuming that he should wait for a second order when first order had not been rescinded, Ensign * * * did not show that appreciation of discipline which is expected of a commissioned officer in the Navy. His failure to carry out his orders showed a dilatoriness which the department considers reprehensible." C. M. O. 3, 1912, 3.
30. **Folly resulting from obedience.** *See* ORDERS, 47.
31. **General orders**—Legality of. *See* GENERAL ORDERS, 3.
32. **"Good of service required" deviation from orders.** *See* ORDERS, 52.
33. **Illegal orders**—An officer refused to obey an order on ground "he did not consider it a legal order." G. O. 140, Sept. 17, 1869.
Illegal action can not be justified by the order of superior authority where the circumstances are such that the subordinate should have recognized the illegality of the order as applied to the action which it commanded. C. M. O. 37, 1915, 1.
34. **Inferior, order of**—Of equal importance with prompt and unquestioning obedience to the orders of a superior, is the necessity for immediate compliance with the orders of an inferior who, while filling a position of trust, as a sentinel, without independent authority, has a most delicate duty to perform in compelling compliance with orders by a superior in rank. C. M. O. 95, 1893, 3. *See also* ORDERS, 60; SENTINELS, 14, 18.

Digitized by Google

35. **Judge advocates**—Orders to court-martial duty. *See* CONVENING AUTHORITY, 32 COURT, 34–51; JUDGE ADVOCATE, 98–102.
36. **Judgement, mistake of.** *See* ORDERS, 45.
37. **Lawful orders**—A person is bound to obey only lawful orders. C. M. O. 37, 1915, 7.
38. **Same**—A medical officer was ordered by his commanding officer to take off of the binnacle list the name of an ordinary seaman. On receiving this positive order, the medical officer retired without refusing to obey, and the commanding officer rested during the day, under the impression that it had been complied with. In the afternoon of the same day, however, finding that this was not the case, he sent for the officer to the shore, whither he had gone without obeying the order previously given him, and on his arrival the commanding officer explicitly repeated the order. The medical officer refused to obey, and persisted in his refusal; then, for the first time, alleging as a reason, that he could not conscientiously obey said order. He was therefore ordered to consider himself under arrest, and the original order was given to, and obeyed by, another officer.

In this case the officer was directed, not to declare any false opinion, nor to inflict on any individual any act of false practice in his profession, but merely to take the name off of a list made by him and under his immediate supervision, to do, by order of his commanding officer, a specific affirmative act, the only result of which was clearly within the authority of the officer giving the order. For that result the officer receiving the order had no responsibility.

The officer retained his right to remonstrate; to continue his treatment and record of the case, to enter his respectful protest on his journal; to report to the department and to prefer charges for unnecessary hardship and wrong; but it remained with the responsible commander alone to determine what duty, what exposure of life, if need be, the interests or exigency of the service required from each of the officers and crew of his ship. G. O. 140, Sept. 17, 1869.

39. **Same**—Defined—It is not questioned, and it has been repeatedly recognized by the courts, that the first duty of a military man is obedience, and that without this there can be neither discipline nor efficiency in the military forces. (*See* General Orders Nos. 140, Sept. 17, 1869, and 182, Apr. 2, 1873.) In the language of the Supreme Court, "an army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." (In re Grimley, 137 U. S. 153.) But it is equally well settled that a person in the military service is bound to obey only the lawful orders of his superiors. If he receives an order to do an unlawful act, he is bound neither by his duty nor his oath to do it. "So far from such an order being a justification, it makes the party giving the order an accomplice in the crime." (U. S. *v.* Carr, 25 Fed. Cas. No. 14732.) Quoting again from the Supreme Court, "it can never be maintained that a military officer can justify himself for doing an unlawful act by producing the order of his superior. The order may palliate, but it can not justify." (Mitchell *v.* Harmony, 13 How. 115. *See also* L. R. A., 1915 A, 1141t, note to Franks *v.* Smith, 142 Ky. 232, 134 S. W. 484.)

The courts have repeatedly recognized that a military command is not to be turned into a debating school, upon the receipt of orders from superior authority, with the result that the precious moment for action may be wasted in wordy conflicts between the advocates of various opinions as to the validity or invalidity of the orders (In re Fair, 100 Fed. Rep. 149; U. S. *v.* Lipsett, 156 Fed. Rep. 71; McCall *v.* McDowell, 15 Fed. Cas. No. 8673; U. S. *v.* Clark, 31 Fed. Rep. 710, 716); and therefore, while holding on the one hand that illegal action can not be justified by orders from superior authority, on the other hand the general duty of implicit obedience is never altogether overlooked. The result has been that some courts have endeavored to formulate a rule to the effect that the military subordinate is protected in obeying an order of his superior "which does not expressly or clearly show on its face its illegality" (In re fair, 100 Fed. Rep. 149). The most liberal statement for the protection of the subordinate who renders obedience is as follows: "Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I can not but think that the law should excuse the military subordinate when acting in obedience to the order of his commander" (McCall *v.* McDowell, 15 Fed. Cas. No. 8673). *See* G. C. M. Rec. 32389, p. 90.

The Supreme Court has not yet gone so far as to subscribe to this modification of the rule that an illegal order can not be a defense to a criminal charge but results merely in making the party giving the order an accomplice in the crime; however, the department does not hesitate in saying that, in so far as proceedings by courts-martial

Digitized by Google

are concerned, a subordinate might, under certain conditions, justify illegal action by an order from superior authority, provided the order was not such that the subordinate should have recognized its illegality as applied to the action which it commanded. C. M. O. 37, 1915, 7-8.

40. **Legality of general orders**—As to requirements in a general order. *See* GENERAL ORDERS, 3.

41. **Manual labor**—An officer attempted to justify his disobedience of orders on the ground that it was to perform manual labor. The department stated: "Manual labor is not dishonorable in itself, and whenever any species of work, manual or otherwise, becomes necessary under any exigency in which any officer is placed, or is required by the conditions of any duty to which he is ordered, or is prescribed by proper authority for his instruction or practice, or to qualify him to instruct others, then such work is not only honorable, but is most officer-like, and specially becoming to those who, intrusted, by the favor of the Government with command in the service, are intrusted also with the preservation of its efficiency." This ground is false in itself, and if allowed the natural result of it would be to strike at the foundation of all discipline and efficiency in the service. G. O. 182, Apr. 2, 1873.

42. **Members of courts-martial**—Orders to duty. *See* CONVENING AUTHORITY, 32; COURT, 34-51; MEMBERS OF COURTS-MARTIAL.

43. **Same**—Absent by reason of an order of a superior officer. *See* MEMBERS OF COURTS-MARTIAL, 2; ORDERS, 3.

44. **Same**—Orders by Secretary of Navy detaching an officer who is also a member of a general court-martial convened by secretary of Navy will operate to relieve such officer from the general court-martial. *See* MEMBERS OF COURTS-MARTIAL, 37.

45. **Mistake of Judgement**—Disobedience of orders caused by a mistake of judgement in regard to professional rights and duties, rather than a deliberate intention of wrong, rarely require a severe, and never a disgraceful, punishment. G. O. 140, Sept. 17, 1869.

46. **Modifying.** *See* ORDERS, 3, 4.

47. **Obedience**—"Obedience to the orders of superior authority is the first and plainest duty of all officers, from which no one, of any class, is, or can be, exempted.

"Authority can not, of course, control the mind, nor require a false expression of either personal or professional opinion, and disobedience may be sometimes excused by the manifest illegality, enormity, or folly which would result directly from the execution of an order; but the general rule of obedience is qualified only to this extent, and can not, with safety, be relaxed beyond it." G. O. 140, Sept. 17, 1869. *See also* OBEDIENCE, 1, 3. *But see* ORDERS, 52.

48. **Officer of the deck**—The officer of the deck, as representative of the commanding Officer of a naval vessel, is entitled to obedience from all officers of whatever rank, whether of line or staff. C. M. O. 67, 1892, 2. *See also* OFFICER-OF-THE-DECK, 8.

49. **Same**—Emergency—If there is danger of a collision the officer of the deck should change the vessel's course without orders from the commanding officer and shall report his action to the commanding officer without delay. C. M. O. 44, 1883, 3. *See also* EMERGENCY; OFFICER OF THE DECK, 7; ORDERS, 26.

50. **Pay officers**—Orders by commanding officers to make payments. *See* PAY OFFICERS, 4.

51. **Pay clerks and chief pay clerks**—Assigned to duty with pay officers who no longer have the selection of their clerks. *See* PAY CLERKS AND CHIEF PAY CLERKS, 11.

52. **Physical impossibility to obey order**—Is only excuse for disobedience of orders—Referring to a case of disobedience of orders for which the captain of a ship was tried in the English service, Harwood on Naval Courts-Martial (pp. 129, 130) states as follows:

"A captain had not fully executed the instructions he had received from the admiralty and was tried for diobedience of orders; the court declared the charge to be proved against him, but it appearing to the court that in deviating from his orders he had acted from a persuasion that, under the circumstances which then existed, the good of the service required it, they 'adjudged him to be acquitted.'"

This of course was erroneous; the legality of the acquittal was naturally questioned and an opinion of the Crown lawyers was asked upon the matter. It was decided that the motive of the officer, in acting for the good of the service might have been ground for imposing the lightest punishment, or for a pardon, but that it did not justify an acquittal. The Crown lawyers said (Harwood, p. 130):

"We are confimed in this opinion by the judgement of Lord Mansfield and Lord Loughborough in the case of Sutton *v.* Johnstone, in which they lay it down as clear and indisputable law that nothing can excuse a subordinate officer in the disobedience of orders but a physical impossibility to obey them.

Digitized by Google

Here it is plainly indicated by high legal authority that there is a defense even to disobedience of orders; and, quoting from the language of the above-mentioned case, it was said:

"If the state and condition of a ship be such that an order given can not be obeyed, the not obeying it in that case is not disobedience of orders, and requires no justification; but there ought to be an acquittal on the ground of the charge of disobedience not being made out." (Harwood, p. 130.)

Not, however, be it observed, that the proof of the disobedience would suffice to find the accused guilty, and that the exculpatory facts should then be taken into account by the reviewing authority in mitigation, but very distinctly that where there is a valid defense to the accusation there should be an acquittal. C. M. O. 5, 1912, 11-12.

53. **Precautionary orders**—When source of possible danger is reported to the commanding officer. *See* COLLISION, 12, 17, 19; COMMANDING OFFICERS, 38.
54. **Refusal to obey orders**—To take prophylactic treatment. *See* TYPHOID PROPHYLACTIC, 2, 3; VENEREAL PROPHYLAXIS, 1. *See also* File 28019-25, Mar. 29, 1912.
55. **Restraining orders.** *See* C. M. O. 37, 1915, 9.
56. **Retired officers**—To court-martial duty. *See* RETIRED OFFICERS, 23.
57. **Same**—To active duty. *See* RETIRED OFFICERS, 1, 45.
58. **Revoking**—Dissolution of court-martial—An order revoking the dissolution of a general court-martial is futile. *See* COURT, 69.
59. **Secretary of the Navy**—The orders of the Secretary of the Navy are orders of the commanding officer within the meaning of R. S. 285. File 26254-1451:11, J. A. G., April 12, 1915, p. 6.
60. **Sentinels**—Orders of, should be obeyed. C. M. O. 95, 1893, 3. *See also* COUNTERSIGN ORDERS, 34; SENTINELS, 1, 14, 18.

Orders to sentinels to fire on escaping prisoners. *See* PRISONERS, 18, 19.

61. **Serious offense**—"Disobedience of orders is, under any circumstances, a serious offense, and when committed deliberately, by an intelligent officer, under a claim of right, must tend greatly to the subversion of discipline." G. O. 140, Sept. 17, 1869.
62. **Smoker**—Orders to attend "smoker." See CLEMENCY, 37, 38; DRUNKENNESS, 41; SMOKER.
63. **Specific orders**—Required for retired officers to act as court-martial members. *See* RETIRED OFFICERS, 23.
64. **Subordinate not judge of legality of orders in first instance**—It is true that no subordinate officer can be allowed to assume to be himself the judge, in the first instance, of the propriety of the duty to which he is assigned, or of the order which is given him by superior authority. In all cases where obedience does not involve a breach of law, human or divine, the first duty of the officer is to obey, exercising his right, if he sees occasion, of protesting at the proper time and in a proper spirit, and of appealing to the common superior to right any wrong which he may think he suffers. No other course is officer-like or consistent with discipline; none other is so expressive of personal dignity, nor can any other be tolerated in the service. These principles seem so plain that it is difficult to perceive how a well-meaning officer can fail to appreciate and carry them out. G. O. 182, Apr. 2, 1873.
65. **Suspension of.** *See* ORDERS, 3.
66. **Time of danger**—No officer would be justified in refusing *in time of danger* to execute an order involving unreserved exposure of life. *See* COMMANDING OFFICERS, 38.
67. **Unlawful orders**—The rule that "a command not lawful may be disobeyed no matter from what source it proceeds" is qualified by the fact that to justify disobeying an order as illegal the case must be an extreme one and the illegality not doubtful. Of this class would be an order not relating to military duty or usages, or having for its sole object the attainment of some private end. Accordingly *held*, that where a convening authority receives an order, from the senior officer present, to modify his action on a summary court-martial case, he was "*advised* that in a case of this character involving a refined question of legal construction you should invariably give an order emanating from proper source the benefit of the doubt, and should obey it unhesitatingly, reserving to proper opportunity any question respecting its legality." File 1192-1, Sec. Navy, Mar. 21, 1905. *See also* REPORTS ON FITNESS, 2.
68. **Violation of orders by deceased.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 107-112.

Digitized by Google

ORDINARY DISCHARGES.

1. **Convenience of enlisted men**—When discharged at his own request and for his own convenience a man receives an "ordinary discharge." C. M. O. 20, 1915, 5. *See also* GENERAL ORDER No. 110, July 27, 1914, 18; ORDINARY DISCHARGES, 2.
2. **Definition**—The following persons are entitled to an ordinary discharge only:
   (*a*) All who are not recommended by the commanding officer for fidelity, obedience, and ability during their term of service.
   (*b*) All who are discharged before the expiration of their term of enlistment at their own request or for their own convenience. C. M. O. 30, 1910, 10; 20, 1915, 5.
3. **Purchase**—Discharge by—When discharged at his own request and for his own convenience a man receives an "ordinary discharge." *See* ORDINARY DISCHARGES, 2.
4. **Request of enlisted men.** *See* ORDINARY DISCHARGES, 2.

ORDINARY SEAMAN.

1. **Officers**—May be reduced to rate of. *See* REDUCTION IN RATING, 24, 27.

ORDNANCE OFFICER.

1. **General court-martial**—Tried by—Neglecting to examine and have recoil cylinders filled. C. M. O. 43, 1895.

OUTFITS, CLOTHING.

1. **Right to.** *See* CLOTHING OUTFITS

OVERSLEPT.

1. **Excuse**—When tried by general court-martial. C. M. O. 51, 1910, 2.

OVERSTAYING LEAVE.

1. **Ensign**—Charged with. C. M. O. 67, 1904.
2. **Gunner**—Charged with. G. C. M. Rec. 6362.

PANAMA.

1. **G. O. 121.** *See* GENERAL ORDER No. 121, SEPTEMBER 17, 1914, 17.
2. **Jurisdiction.** *See* JURISDICTION, 65.

PAPERS.

1. **"Aloud"**—Papers read in court-martial proceedings. *See* ALOUD.
2. **Useless papers**—In office of Judge Advocate General destroyed. File 14287-20, J. A. G., Nov. 4, 1915; 4496-77, J. A. G., Sept. 26, 1907.

PARDONS.

1. **Acceptance**—Where a pardon is legally issued by the President it is the right of the person to whom the pardon is proffered to refuse it. (Burdick *v.* U. S., 235 U. S. 267). *See* PARDONS, 16; SELF-INCRIMINATION, 13-14.
2. **Citizenship**—Effect of pardon for "desertion" upon rights of citizenship lost by conviction of "Desertion" prior to August 22, 1912. *See* DESERTERS, 17-20; DESERTION, 26, 29, 41.
3. **Commuting sentences of courts-martial**—The President in the exercise of his power to pardon may in acting upon court-martial cases commute sentences. *See* COMMUTING SENTENCES, 4; DISMISSAL, 18.
4. **Conditional pardon**—The power of the President to grant conditional pardons is unquestioned and is commonly exercised in practice.
   An enlisted man deserted from the Navy. The records did not show that he was tried by court-martial or punished in any way for his offense. A pardon was issued on the sole condition that he present himself for enlistment within 20 days from the date of the conditional pardon, and if accepted, enlist in the United States Navy. File 3000-98, Sec. Navy, May 12, 1898.
5. **Same**—An officer of the Navy, sentenced to loss of numbers, has been pardoned on condition that he take rank in a specified place in his grade, below his original position. File 26282-26, Sec. Navy, Mar. 2, 1909.
   A midshipman received a conditional pardon as follows: "I hereby pardon Midshipman * * *, upon condition that he take rank at the foot of his class, and, if commissioned, be commissioned as the last number therein." The accused "advised the department of his acceptance, under the condition stated, of the pardon of the President." C. M. O. 30, 1908, 2. *See also* C. M. O. 33, 1908, 2; File 26262-198.
6. **Constructive pardon**—Promotion of an officer. *See* PARDONS, 44.
7. **Same**—Appointment of a convicted deserter, with knowledge he was such, as an officer. *See* DESERTION, 41.

Digitized by Google

8. **Same—Restoration to duty.** *See* PARDONS, 47.
9. **Courts-martial have not power to pardon**—The law has never intended to vest in courts-martials the power to pardon offenses or to award a nominal punishment equivalent to a pardon. The power to pardon, remit or mitigate is expressly vested in the President of the United States. The exercise of this power by a court-martial is therefore illegal. C. M. O. 89, 1897; 122, 1897, 2. *See also* COURT, 132.
10. **Death**—Pardon after death. *See* PARDONS, 11, 12.
11. **Deceased**—Where it was recommended that a pardon be issued to the legal representatives of the deceased, the department stated: "The case is not one in which the incidents and penalties attending desertion could be removed by the granting of a pardon." File 3345–98, Sec. Navy, June 10, 1898. *See also* DESERTERS, 20.
12. **Same**—In view of the fact that a pardon is a personal deed, the validity of which depends upon its proper delivery to, and acceptance by, the person to whom it is granted, and as these essential features can not be complied with, in a case where the person in whose favor the pardon is requested, is dead, *Held*, that the department can not take favorable action and request that a pardon be issued. File 26539–491, Sec. Navy, Sept. 16, 1912.
13. **Declined.** *See* PARDONS, 1; SELF-INCRIMINATION, 13, 14.
14. **Definition.** *See* PARDONS, 19.
15. **Delegation of power to pardon.** *See* PARDONS, 41.
16. **Delivery and acceptance**—A pardon does not become effective, for the purpose of depriving a witness of his right to refuse to answer criminating questions, until delivery and acceptance. (Burdick *v.* U. S., 235 U. S. 267.) C. M. O. 53, 1914, 5. *See also* PARDONS, 12; SELF-INCRIMINATION, 13, 14.
17. **Department of Justice**—Under an understanding between the Department of Justice and the Navy Department and War Department, and also "under the rules relating to applications for pardon adopted by the Attorney General and approved by the President," the Department of Justice "will not consider applications for pardon for desertion or other offenses against the military and naval laws, and when such applications are received they are referred to the Secretary of the Navy and the Secretary of War, respectively." The Department of Justice "does, however, issue the formal warrants of pardon in Army and Navy cases where such pardon has been recommended by the Secretary of the Navy or the Secretary of War." *See* File 7466–04. *See also* PARDONS, 48.
18. **"Desertion."** *See* DESERTERS, 17–20; DESERTION, 41; PARDONS, 2, 11, 37, 40, 52, 54.
19. **Effect of**—"A pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. In contemplation of law, it so far blots out the offense, that afterwards it can not be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position. But it does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the Government any obligation to give it. * * * Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offense, or which have been acquired by others whilst that judgment was in force." (Knote *v.* U. S., 95 U. S. 149, 153.) File 26282–2.
20. **Same**—Purges the offense but does not restore position. *See* PARDONS, 45.
21. **Same**—"A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity." (Ex parte Garland, 71 U. S. 333, 380–381. *See also* U. S. *v.* Padelford, 9 Wall. 531, 537.) File 5789–99, Sec. Navy, Sept. 2, 1899. *See also* File 26282–2. *But see* In re Spencer, 22 Fed. Cas. No. 13234; 11 Op. Atty. Gen. 228; Roberts *v.* State, 100 N. Y. 217.

Where certain steps had been taken in accordance with statute with a view to the dismissal of cadets from the Naval Academy, but the proceedings had not been completed by the actual dismissal of the offenders, the President could, in the exercise of

Digitized by Google

the pardoning power, relieve the offenders from the punishment of dismissal, leaving them in the Academy, their connection with which had not been served. (Op. Atty. Gen., Aug. 14, 1888, Exec. Press Copy Book, Navy Dept. No. 7, p. 245.) But where a midshipman has been actually dismissed, a pardon will not have the effect of reinstatement. File 5252-73, J. A. G., Oct. 1, 1915.

22. **Same**—"The effect of a pardon is to obliterate the offense, and make him who has been an offender, as innocent, in legal contemplation, as if he had never offended; to remove all disabilities incident to the offense charged and to restore to him all civil rights which he would have had if he had not offended." (Op. Atty. Gen., June 16, 1908.) File 26282-2.
23. **Same**—A full pardon by the executive removes all penal consequences, except executed forfeitures, attached to the commission of an offense. File 26251-1963:1, J. A. G., Aug. 17, 1910, p. 2.
24. **Same**—A pardon "can not and does not restore that which is already lost and gone beyond the reach of the Government. But as to the future, it relieves the person from all disabilities and consequences to which he would be subject but for the pardon, so that, thereafter, nothing can be imputed to him based upon the allegation of his offense." (Op. Atty. Gen., June 16, 1908.) File 26282-2.
25. **Same**—"There has been some difference of opinion among the members of the court as to cases covered by the pardon of the President, but there has been none as to the effect and operation of a pardon in cases where it applies. All have agreed that the pardon not merely releases the offender from the punishment prescribed for the offense, but that it obliterates in legal contemplation the offense itself." (Carlisle *v.* U. S., 16 Wall. 147, 151.) File 26282-2.
26. **Embezzlement.** *See* PARDONS, 37.
27. **Form of pardon**—May take form of a proclamation of amnesty or be individual in nature. The form which a pardon may assume is not at all important. *See* DESERTION, 41.
28. **Formal warrants**—Issued by the Department of Justice. *See* PARDONS, 17, 43.
29. **Fraudulent enlistment.** *See* File 26251-8539:1, J. A. G., Jan. 21, 1914, Sec. Navy, Jan. 24, 1914, which holds restoration to duty of a person who fraudulently enlists (ratifying the fraudulent enlistment constructively) is not a constructive pardon. *See also* FRAUDULENT ENLISTMENT, 75; PARDONS, 47.
30. **General pardon and amnesty.** *See* DESERTION, 41; PARDONS, 27.
31. **Implicit pardon.** *See* PARDONS, 41.
32. **Mark of desertion.** *See* MARK OF DESERTION, 4.
33. **Midshipman**—Where dismissal has not been consummated. *See* MIDSHIPMAN, 60; PARDONS, 21. *See* PARDONS, 5, where a midshipman received a constructive pardon.
34. **Same**—Dismissed for hazing in 1906—Pardoned by President. File 26282-267.
35. **Numbers, loss of**—Where an officer while in the grade of second lieutenant was sentenced to loss of numbers, was not pardoned, but *subsequently promoted* to grade of first lieutenant, *Held*, the sentence was completely executed, and there was no way, under existing law, in which he could be restored to the rank he held before he was sentenced. File 26261-246, Sec. Navy, Mar. 18, 1914; 26262-1794, Jan., 1917.
36. **Same**—An officer in the grade of lieutenant was sentenced to a loss of 150 numbers in 1908. Proceedings, findings, and sentence were approved. In 1909, *while in the same grade*, the President issued a "partial pardon" reducing the loss of numbers to 50. File 26282-26, Sec. Navy, Mar. 2, 1909.
37. **Offenses other than "Desertion"**—A request was made that the President pardon a former enlisted man of the Navy who had been dishonorably discharged in accordance with the sentence of a general court-martial after trial on the charge of "scandalous conduct tending to the destruction of good morals," the specifications thereunder alleging that he had embezzled property and funds of the United States while a Navy mail clerk.

    The department has held that where a naval prisoner has been convicted and served sentence for an offense, it will not recommend that he be pardoned, except in such cases of desertion as result in loss of the rights of citizenship.

    In all cases of requests for pardon, in accordance with the rules adopted, no application for a pardon will be considered until *at least two years* have elapsed from the date of the release from confinement of the applicant. File 26282-245, Sec. Navy, Dec. 16, 1915; C. M. O. 49, 1915, 28, *See also* File 2628-214, Mar. 18, 1915; 1 Op. Atty. Gen. 359; 23 Op. Atty. Gen. 360.
38. **Officer appealed**—For pardon and relief from effect of general court-martial sentence. File 4435-04, and 4445-04, J. A. G., May 19, 1904.

Digitized by Google

39. **"Partial pardon"**—Reducing loss of numbers suffered by an officer by reason of a general court-martial sentence. *See* PARDONS, 36.
40. **Same**—Pardons to deserters remitting the disabilities resulting from conviction without pardoning the offense. File 26282; 28067. *See also* DESERTERS, 17–20; DESERTION, 41; PARDONS, 2, 11, 37, 40, 52, 54.
41. **President of the United States**—The pardoning power under the Constitution is vested exclusively in the President of the United States and can not be delegated. The Secretary of the Navy may remit or mitigate the sentence of a naval court-martial in whole or in part but he can not pardon the offense. File 26806–117, J. A. G., Apr. 21, 1914. *See also* File 26251–1963:1, J. A. G., Aug. 17, 1910; 26251–8539:1, J. A. G., Jan. 1, 1914; COMMUTING SENTENCES, 1; SECRETARY OF THE NAVY, 54.
42. **Prior to conviction**—The Navy Department has adopted the rule formulated by the Department of Justice and approved by the President, of declining to recommend the issuance of a pardon in any case prior to conviction. File 26282–84, Mar. 7, 1912. *See also* File 26262–1344:5. *But see* File 26282–85, Apr. 8, 1912.
43. **Procedure**—Where the Secretary of the Navy approves an application for pardon and transmits it to the President with favorable recommendation, if a pardon is to be granted, this letter is returned with the President's approval indorsed thereon; the papers are then transmitted to the Department of Justice, where the formal warrant of pardon is prepared for the President's signature; when signed by the President, the warrant of pardon is sent by the Department of Justice to the Navy Department, to be transmitted to the recipient, together with a blank form of receipt and acceptance to be signed by the recipient of the pardon and returned by him to the Navy Department for file. File 26282; 28067. *See also* PARDONS, 17.
44. **Promotion of an officer**—Is a constructive pardon of an unexecuted sentence, or where the officer is under arrest on charges, etc. But where steps have been taken with a view to the promotion of an officer, before the promotion is consummated he may be tried by court-martial for offenses previously committed. (G. C. M. Recs. 23553, 26451, 28681, 28798.) And where an officer was nominated and confirmed for advancement in rank, after he had been recommended for trial by court-martial, but the commission was not signed by the President, the necessary steps for his trial were proceeded with until stayed by the acceptance of said officer's resignation "for the good of the service." File 26251–2833, Mar. 31, 1910. *See also* COMMISSIONS, 21; 6 Op. Atty. Gen. 123; 8 Op. Atty. Gen. 237; DESERTION, 41. *See also* 4 Op. Atty. Gen. holding that the promotion of a passed midshipman is an implicit pardon of sentence of suspension on half pay.
45. **Purges offense**—But does not restore position. *See* File 5789–99, J. A. G., Sept. 2, 1899; 1768–D, 1902. *See also* 11 Op. Atty. Gen. 19.
46. **Refusal to accept.** *See* PARDONS, 1, 16; SELF-INCRIMINATION, 13, 14.
47. **Restoration to duty**—Restoration of a court-martial prisoner to duty by the Secretary of the Navy is never a "pardon." Only the President can "pardon" an offense, and the department has heretofore decided that inasmuch as the Secretary of the Navy has no power to expressly pardon an offense, *a fortiori*, restoration of a man to duty could not possibly operate as a "constructive pardon." File 26251–6297:9, Sec. Navy, Dec. 28, 1914; C. M. O. 6, 1915, 15. *See also* File 26251–1963:1, Aug. 17, 1910, p. 13, approved by Sec. Navy, Aug. 17, 1910; 9212–59, Sec. Navy, Aug. 26, 1915; 26251–8539:1, J. A. G., Jan. 21, 1914; 26806–117, J. A. G., Apr. 21, 1914; U. S. *v.* Landers, 92 U. S. 77.
48. **Retroactive**—"No pardon is retroactive, it can not alter or reverse the facts of a completed record, nor can it act to restore an executed forfeiture." File 26251–1963:1, J. A. G., Aug. 17, 1910, p. 3. *See also* PARDONS, 19–25.
49. **Revised Statutes 4756, 4757**—The recipient of a pardon is entitled to the benefits of these sections in the same manner as if he had never been discharged for misconduct. File 5789–99, Sec. Navy, Sept. 2, 1899.
50. **"Rules Relating to Applications for Pardon"**—Issued by the Department of Justice, dated July 1, 1904. *See* File 7466–04.
51. **Time**—Two years must elapse from date of release from confinement before pardon will be considered. *See* PARDON, 37, 52.
52. **Two years**—In cases of enlisted men convicted of "Desertion," the rule of the Department of Justice as approved by the President is followed by the Navy Department of recommending that a pardon be issued for the purpose of restoring citizenship rights, where the applicant had served sentence for the offense, and then only after two years from date of discharge and provided the applicant produces satisfactory affidavits to the effect that he has lived an upright and industrious life since the date

Digitized by Google

of his discharge. File 26282-84, Sec. Navy, Mar. 27, 1912. *See also* C. M. O. 29, 1914, 11; G. C. M. Rec. 24805; File 26262-1359, J. A. G., Mar. 1, 1912; 26282-241, Sec. Navy, Nov. 9, 1915; DESERTERS, 17-20; PARDONS, 37. *But see* File 26282-157:1, Sec. Navy, May 25, 1914, where pardon was recommended within less than two years from date of discharge.

53. **Unconditional pardon.** *See* PARDONS, 19-25.
54. **War**—Persons convicted of "Desertion" in time of war can not have their citizenship rights restored except by pardon. *See* DESERTION, 29, 135.
55. **Warrants**—Formal warrants for pardons are issued by the Department of Justice. *See* PARDONS, 17, 43.
56. **When pardon may be granted**—The President "has power to pardon for a crime of which the individual has not been convicted and which he does not admit." (U. S. *v.* Burdick, 211 Fed. Rep. 492.) C. M. O. 53, 1914, 5.

PAROLE.

1. **Interned belligerents**—Parole of. *See* INTERNMENT.
2. **Jurisdiction**—Of naval authorities over men paroled by civil courts. *See* JURISDICTION, 99, 100.
3. **Policy of department**—It is not the policy of the department to parole any person convicted by a naval general court-martial. File 26267-157, Sec. Navy, September, 1916.
4. **Violator.** *See* CIVIL AUTHORITIES, 8; PAROLE VIOLATOR, 1.

"PAROLE VIOLATOR."

1. **Discharged**—As undesirable and turned over to civil authorities. *See* CIVIL AUTHORITIES, 8.

PASSED ASSISTANT ENGINEER.

1. **General court-martial**—Tried by. C. M. O. 21, 1883; 22, 1883; 11, 1885.

PASSENGERS.

1. **Boatswain**—Passenger in a ship's boat tried by general court-martial for "Neglect of duty." File 26251-12847.
2. **Division commander**—Responsibility of a division commander for the navigation of his flagship when he is a passenger. *See* NAVIGATION, 31 (p. 413).

PATENT LOG. *See* File 7893-03, J. A. G., Sept. 22, 1903; 13 J. A. G., 99.

PATENTS.

1. **Laws relating to.** *See* File 8247-293, J. A. G., March 14, 1916.
2. **Officers, enlisted men or employees**—Of the Government securing patents. *See* File 4496-116, J. A. G., May 1, 1908.
3. **Securing of.** *See* File 27219-322, J. A. G., June 17, 1916.

PATIENTS AT THE GOVERNMENT HOSPITAL FOR THE INSANE. *See* GOVERNMENT HOSPITAL FOR THE INSANE.

PATROL.

1. **Member of a patrol**—Killed by member of another friendly patrol. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 86.

PAWNED OR STOLEN GOODS.

1. **Recovery**—Of pawned or stolen property of the United States. C. M. O. 30, 1916. *See also* PUBLIC PROPERTY, 7.

PAY. *See also* EMOLUMENT; SALARY.

1. **Absence, unauthorized**—According to decisions of the Comptroller of the Treasury, enlisted men acquitted by court-martial of the charge of desertion, and thereby acquitted by implication of the lesser offense of absence without leave, are entitled to pay during the period of their alleged desertion. (10 Comp. Dec. 760; 16 Comp. Dec. 480, 107 S. & A. Memo. 1325; 12 Comp. Dec. 328, 59 S. & A. Memo. 53; 15 Comp. Dec. 661.) C. M. O. 14, 1914, 4; 29, 1914, 10; 49, 1915, 8. *See also* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 24; 11 Comp. Dec. 659, 755.
2. **Same**—His acquittal upon a trial should be accepted by the Government as conclusive in his behalf that the civil proceedings against him were without legal justification.

Digitized by Google

"A soldier under arrest by the civil authority on a criminal charge will be entitled to his pay for the time he was in custody, provided he is tried and acquitted, or discharged without trial." (Dig. Dec., 2 Comp. Dec., par. 1311.)

In 1896, in the case of a seaman charged with killing a man while on shore on liberty, the comptroller said (2 Comp. Dec. 585):

"His pay should be held in abeyance, for if acquitted he will be entitled to it, while if convicted it will be forfeited from the date of his arrest."

And decisions to a similar effect will be found in 9 Comp. Dec. 249; 14 S. & A. Memo. 129; 34 Id. 282. If, then, a discharge without trial, or an acquittal, by the civil authorities gives the accused man a right to his pay during the enforced absence, it can not be doubted that the absence should not be regarded as of such a character as to render the man liable to punishment therefor.

As held by the second comptroller (Dig. 2d Comp., par. 1312):

"When a soldier is convicted by the civil authority of a crime, and is thereby withdrawn from the service of the United States through his own fault, all pay, etc., due at the time of his conviction is forfeited." C. M. O. 5, 1912, 13–14. *See also* CRITICISM OF COURTS-MARTIAL, 19.

3. **Accounting officers**—Jurisdiction over questions pertaining to pay. *See* File 26254–599, Jan. 4, 1911.
4. **Acquittal**—Pay for time under arrest. *See* CONFINEMENT, 7; PAY, 1, 2.
5. **Action withheld**—Forfeiture of pay and deposits. *See* File 26516–17.
6. **Ad interim appointments.** *See* PAY, 82.
7. **Additional pay**—For aids. *See* File 26254–292; 26254–1917, Sec. Navy, Nov. 4, 1915; 26254–53; 26254–2014, J. A. G., May 8, 1916.
8. **Same**—Aids to brigade commander, U. S. M. C. *See* File 26254–685:1.
9. **Advances to officers.** *See* C. M. O. 4, 1916; R–4458; ADVANCES OR LOANS BY PAYMASTERS; FRAUD, 5.
10. **Aids.** *See* PAY, 6, 7.
11. **Allowances**—And pay distinguished. *See* ALLOWANCES, 13.
12. **Arrest and acquittal by civil authorities**—No bar to receipt of pay. *See* CONFINEMENT, 7; PAY, 2.
13. **Attorney General**—Jurisdiction regarding questions concerning pay. *See* ATTORNEY GENERAL, 12.
14. **Awaiting orders pay.** *See* PAY, 61.
15. **Awaiting trial**—It has been brought to the department's attention that in several cases commanding officers, in pursuance of Navy Regulations, 1913, R–3669 (3), have issued special money requisitions to enlisted men against whom charges have been preferred; also that prompt notification has not been given to pay officers of amounts to be deducted pursuant to the sentences of courts-martial in certain cases of enlisted men in order that proper deductions might be made in lieu of such men being allowed to draw their money.

    Loss has resulted to the Government by virtue of the above, for cases of late have gone to the Comptroller of the Treasury on appeal by pay officers from auditor's disallowance and have been allowed by reason of lack of notice to said pay officers. (*See* Comp. Dec. of Feb. 24, 1916.) Commanding officers should make every effort to safeguard the Government from any further losses from similar causes. File 26806–131:35, J. A. G., Mar. 22, 1916; C. M. O. 9, 1916, 10.
16. **Bail**—Pay of enlisted men on bail from civil courts. *See* BAIL, 2.
17. **Checkage of pay for value of property lost**—In an opinion of the Judge Advocate General rendered December 8, 1909 (File 3980–452:2), it was concluded that, in the absence of statutory authority, there is no warrant of law for checking the pay of an officer or man for loss or damage to Government property, notwithstanding a contrary decision rendered by the Comptroller of the Treasury February 9, 1909 (96 S. & A. Memo. 957). Pursuant to said opinion of this office, article 1260 (5), C. N. R. 4, June 25, 1909, was revoked by the President upon recommendation of the Secretary of the Navy. (*See* S. & A., Ind., May 10, 1916, No. 186–362; 26834–594.)

    Accordingly, advised: That there is no authority of law under which an officer of the Navy, who is not required to render returns for property in his possession, can be checked for the value of missing property. In this connection attention is invited to the fact that there is no legal obstacle in the way of such officer's depositing to the credit of the United States, if he is willing to do so, a sum sufficient to cover the cost of missing property for which he has been held responsible. (File 26834–594; S. & A. File 186–364.) File 18140–35, J. A. G., July 25, 1916.

Digitized by Google

18. **Same**—There is no authority of law to check the pay of an officer or enlisted man for the loss of a library book. File 2657-04, J. A. G., April 5, 1904, referred to in File 3980-452:2, J. A. G., Dec. 8, 1909, p. 9.
    Or for loss or damage to public property. 14 J. A. G. 230.
    Or for a boat taken without permission and lost. File 170-04, J. A. G., Jan. 21, 1904.
    Or for careless enlistments by recruiting officers of the Navy. File 5942-34.
    Or for windows broken through carelessness. File 18140-16, Sec. Navy, Feb. 27, 1912.
    Checkage of pay in lieu of punishment—*Held;* That the practice of having enlisted men attached to a receiving ship, checked for the loss or destruction of Government property upon their request in lieu of being punished for the offense involved therein, is wholly unauthorized by law. File 3773-149, J. A. G., Dec. 26, 1912.
19. **Checkage of pay made erroneously.** *See* AUDITOR FOR THE NAVY DEPARTMENT, 6.
20. **Civil employees**—Procedure when civil employees are not paid from the pay car at the regular time. File 26283-961, Sec. Navy, Dec. 21, 1915.
21. **Same**—Suspension without pay by the Secretary of the Navy. File 26283-961, Sec. Navy, Dec. 21, 1915.
22. **Same**—Leave of absence without pay. *See* LEAVE OF ABSENCE, 13.
23. **Clemency**—The department has held, in considering a question of remitting the loss of pay imposed by a court-martial, that it should be done, in general, only as an act of clemency. (File 26287-560, Sec. Navy, Aug. 3, 1910.) File 26251-7004:2, Sec. Navy, Mar. 31, 1913; C. M. O. 22, 1915, 9.
    Loss of pay of an accused is frequently remitted by the Secretary of the Navy on condition that the accused allot all pay except necessary prison expenses, transportation, and gratuity to be paid on discharge. *See* ALLOTMENTS, 6, 7; CLEMENCY, 39, 53.
24. **Commences**—A commission bears date, and the salary of an officer commences from his appointment, not from the transmission or acceptance of his commission. (Marbury *v.* Madison, 1 Cr. 137.) File 22724-16:1, J. A. G., Apr. 24, 1911, p. 9.
25. **Same**—More recently it was enacted that officers of the Navy advanced in grade or rank pursuant to law should be paid "from the date stated in their commissions." (Act of Mar. 4, 1913, 37 Stat. 892.) File 5460-76, J. A. G., July 12, 1915.
26. **Conditionally remitted.** G. C. M. Rec. 28810; File 26287-251:69, Feb. 12, 1914.
27. **Confinement**—Forfeiture of pay in general courts-martial cases should agree with the period of confinement. *See* CONFINEMENT, 32.
28. **Confinement at hard labor**—The sentence should include forfeiture of pay—In view of the fact that a prisoner does not perform the duties of his rank or rating, but, on the contrary, is a source of expense to the Government, it is considered that the best interests of the Government would be served if the court would adhere to the usual form of punishment for enlisted men, which includes forfeiture of pay during confinement at hard labor. C. M. O. 1, 1913, 3; 5, 1914, 6. *See also* C. M. O. 100, 1894, 2; CONFINEMENT, 27; Navy Regulations, 1913, R-816.
29. **Confinement without discharge**—A court should never adjudge a sentence, not including dishonorable discharge, in which there is no limitation upon the period during which the loss of pay (and allowances) should continue as it therefore is made applicable to the entire remaining portion of the enlistment of the accused. C. M. O 42, 1909, 3; 14, 1910, 7; 26, 1910, 8; 21, 1912, 4; 1, 1913, 3; 14, 1913, 5.
30. **Continuous service pay.** *See* File 28550-20.
31. **"Creditable records"**—Commissioned warrant officers. *See* PAY, 114.
32. **Date**—Pay of an officer commences. *See* PAY, 24, 25.
33. **De facto officers**—"The invariable rule has been to hold that one who performed the duties of an office or employment is entitled to retain compensation therefor, notwithstanding the fact that the original appointment was illegal." File 26254-1451:11, J. A. G., Apr. 12, 1915, p. 14. *See also* PAY, 82.
34. **Same**—"It is well settled that where an officer *de facto* has rendered service and received pay in good faith, the money paid to him can not be recovered back. (Palen *v.* U. S., 19 Ct. Cls. 389; Badeau *v.* U. S., 130 U. S. 452.)" Comp. Dec., Nov. 25, 1910, File 26254-578.
35. **Debts**—Collection of by department from pay. *See* DEBTS, 1, 13, 15, 17, 18; PAY, 71.
36. **Deck court sentences**—In no case shall a deck court adjudge forfeiture of pay for a longer period than twenty days. C. M. O. 24, 1909, 3; 34, 1913, 6; 1, 1914, 5.
37. **Same**—Deck courts and summary courts-martial are authorized by section 8 of the act of February 16, 1909 (35 Stat. 621), to award loss of pay by itself without confinement. *See* DECK COURTS, 36.

Digitized by Google

38. **Same**—Amount of pay forfeited and not period of time should be stated in sentences *See* DECK COURTS, 35.
39. **Definition**—"Pay" or "pension," compensation of retired officers. *See* RETIRED OFFICERS, 16.
40. **Same**—"Allowances" and "pay" distinguished. *See* ALLOWANCES, 13.
41. **Desertion**—The offense of "Desertion" *per se* entails loss of all pay at the time of desertion. *See* DESERTERS, 12; DESERTION, 96.
42. **Discharge**—Operates as a remission of unexecuted pay adjudged forfeited by courts-martial. *See* BAD-CONDUCT DISCHARGE, 3; PAY, 87.
43. **Erroneously checked.** *See* AUDITOR FOR THE NAVY DEPARTMENT, 6.
44. **Disease**—"Where the disease was contracted by a soldier during the enlistment in which he is serving, but prior to the passage of the act of August 24, 1912 [37 Stat., 572], pay for absence on account of such disease should not be deducted." (19 Comp. Dec., 572, quoted and followed in File 7657-394, Sec. Navy.) File 7657-394:1, Sec. Navy, Sept. 20, 1916.
45. **Same**—The act of August 29, 1916, provides: "Hereafter no officer or enlisted man in the Navy or Marine Corps in active service who shall be absent from duty on account of sickness or disease resulting from his own intemperate use of drugs or alcoholic liquors, or other misconduct, shall receive pay for the period of such absence, the time so absent and the cause thereof to be ascertained under such procedure and regulations as may be prescribed by the Secretary of the Navy: *Provided*, That an enlistment shall not be regarded as complete until the enlisted man shall have made good any time in excess of one day lost on account of sickness or disease resulting from his own intemperate use of drugs or alcoholic liquors, or other misconduct." *Held:* [1] That where such disease has been contracted prior to August 29, 1916, pay shall not be deducted for absence on account of such disease. (*See* 19 Comp. Dec., 483.) File 7657-394, Sec. Navy, Sept. 11, 1916; C. M. O. 33, 1916. [2] That enlisted men shall be required to "make good" any time lost during current enlistment in excess of one day on account of sickness or disease resulting from their own intemperate use of drugs or alcoholic liquors, or other misconduct, *only* where such sickness or disease was contracted on or subsequent to August 29, 1916. (*See* 19 Comp. Dec., 583.) File 7657-394:1, Sec. Navy, Sept. 20, 1916; C. M. O. 33, 1916. *See also* File 7657-399:4, Sec. Navy, Oct. 12, 1916; 7657-394:10, Sec. Navy, Oct. 21, 1916; 20 Comp. Dec., 349, 22025-121:2, J. A. G., Nov. 7, 1916; 7657-394:21, J. A. G., Jan., 1917; C. M. O. 3, 1917, 6.
46. **Same**—The act of April 27, 1914 (38 Stat. 353), provides: "That hereafter no officer or enlisted man in active service who shall be absent from duty on account of disease resulting from his own intemperate use of drugs or alcoholic liquors or other misconduct shall receive pay for the period of such absence, the time so absent and the cause thereof to be ascertained under such procedure and regulations as may be prescribed by the Secretary of War." (*See* G. O. 100, June 15, 1914.) *See* GENERAL ORDER No. 100, June 15, 1914.
47. **Fixed by statute**—The pay of officers and enlisted men of the Navy is fixed by law, and being thus fixed it is not the subject of contract, which might be varied by the terms of such agreement. 14 J. A. G., 233; File 3930-452:2, J. A. G., Dec. 8, 1909, p. 4.
48. **Same**—Since the law fixes the salary, the incumbent of an office is entitled to the salary attached thereto, and neither the appointing power not disbursing officers have control, beyond the limits of the statute, over the compensation. *See* "OFFICE," 17, 18.
49. **Fleet Naval Reserve.** *See* File 28550-20.
50. **Four months' gratuity.** *See* File 28550-20.
51. **Fraudulent enlistment**—Proof of receipt of pay *or* an allowance. *See* FRAUDULENT ENLISTMENT.
52. **Same**—Liability of disbursing officers for amounts paid as pay to enlisted men serving under a fraudulent enlistment. *See* FRAUDULENT ENLISTMENT, 32.
53. **General Order No. 100.** *See* GENERAL ORDER No. 100, June 15, 1914; PAY, 46.
54. **Hard labor.** *See* CONFINEMENT, 27; PAY, 28.
55. **I-4893.** *See* NAVAL INSTRUCTIONS, 1913, I-4893.
56. **Increase of pay of enlisted men**—Can not be increased without an act of Congress. File 7657-393, J. A. G., Sept. 23, 1916.
57. **Increase of pay of commissioned warrant officers**—Under the provisions of the act of August 29, 1916. *See* PAY, 114.
58. **Insane**—Receipt of pay by an enlisted man who is a patient in the Mendocino State Hospital for the Insane. File 8528-406:1, J. A. G., June 24, 1916; 8528-406, J. A. G., May 6, 1914. *See also* File 8528-410.

Digitized by Google

59. **Same**—Patients and prisoners in the Government Hospital for the Insane. *See* GOVERNMENT HOSPITAL FOR THE INSANE, 1–5.
60. **Leave of absence without pay.** *See* LEAVE OF ABSENCE, 12–13.
61. **Leave or waiting orders pay**—Navy Regulations, 1913, R–4406 (11), R–4410 (2), provide that warrant officers "when on leave or waiting orders shall receive the leave or waiting orders pay fixed by section 1556, R. S.," as amended by the act of May 13, 1908. (35 Stat. 127.) [*See also* act June 24, 1910, 36 Stat. 605.] In view of the above where a warrant officer was absent on leave of eight days, the department held that he should receive leave or waiting orders pay as provided by the Navy Regulations. File 17789–24, Sec. Navy, July 19, 1915; C. M. O. 27, 1915, 8.
62. **Longevity.** *See* CONSTRUCTIVE SERVICE, 1; LONGEVITY, 1–3.
63. **Marines**—Marines not sentenced to dishonorable discharge should be sentenced to forfeiture of pay only (not allowances), during confinement. C. M. O. 42, 1909, 3; 14, 1910, 7; 15, 1910, 6; 17, 1910, 5; 14, 1913, 3.
64. **Marine officers**—Section 1612 Revised Statutes is express that "the officers of the Marine Corps shall be entitled to receive the same pay and allowances * * * as are or may be provided by or in pursuance of law for the officers * * * of like grades in the infantry of the Army.
Thus, although officers of the Marine Corps serve side by side with officers of the Navy, and although in both cases they are governed by the same laws and regulations and are ordered to duty by the same authority, nevertheless they receive pay under two different laws, the Marine Corps being in all cases paid in accordance with laws relating to the Army, while the Navy proper is paid under specific laws relating to it. It has frequently happened that the two rates of pay differ for precisely the same duty. For example, officers of the Navy since 1908 have received additional pay for sea duty, while *until recently* no such additional pay was allowed officers of the Marine Corps although serving on board the same vessels as the officers of the Navy. Marine officers "wherever serving" are entitled to be paid according to the laws governing the pay of the Army, as those laws are or may become. (Reid *v.* U. S., 18 Ct. Cls. 638.) File 26280–61, Sec. Navy, July 10, 1915.
65. **Midshipmen**—Suspension without pay. *See* MIDSHIPMEN, 62.
66. **Minors**—Reenlistment. *See* PAY, 86.
67. **Mounted**—Marine officer on duty in the Office of the Judge Advocate General is not entitled to mounted pay. File 26254–305. *See also* ALLOWANCES, 12.
68. **Naval Instructions, 1913, I–4893.** *See* NAVAL INSTRUCTIONS, 1913, I–4893.
69. **Naval Militia**—Retired officers of the Regular Navy holding a commission in the Naval Militia. *See* NAVAL MILITIA, 24; PAY, 94.
70. **Same**—Pay of Naval Militia in joint maneuvers with the Regular Navy. *See* NAVAL MILITIA, 25.
71. **Officers**—The Navy Department has not such control over the pay of an officer that it can compel him to pay private debts, nor does it act as an agency for their collection. An officer can be proceeded against in the civil courts for private debts, if it is desired, in the same manner as civilians, but creditors must not expect the Navy Department to assist them in collecting debts. (Routine letter of Bureau of Navigation in private debt cases.) *See* DEBTS, 1, 13–18.
72. **Same**—Pay forfeited by court-martial sentence. *See* PAY, 100–105.
73. **Same**—Pending trial by general court-martial. *See* File 4657–98. *See also* PAY, 15.
74. **Same**—Can not be deprived of, etc. *See* PAY, 47, 48, 71, 75, 76; RETIRED OFFICERS, 18.
75. **Same**—After an officer actually receives pay legally due him under a commission, such money becomes his personal property, and the Government retains no interest or claim therein. File 13673–1442:1, J. A. G., Jan. 13, 1912. *See also* LEAVE OF ABSENCE, 12, 13; PAY, 74, 76, 115, 116.
76. **Same**—"With some exceptions, Congress may at any time make alterations of the salaries of public officers, to take effect from the passage of the act. The only contract which arises upon a statute establishing a salary is to pay the incumbent of the office that salary while the law remains in force and unchanged." (Fisher *v.* U. S., 16 Ct. Cls., 323, 329.) File 3980–452:2, J. A. G., Dec. 8, 1909, p. 6. *See also* "OFFICE," 2.
"A salary that is established by statute can not be increased or diminished by executive officers. It is not a subject of contract between such officers. The incumbent of an office is entitled to the salary attached thereto by law, and if he receives a less sum from the disbursing officers he can claim and receive the balance." (Dyer *v.* U. S., 20 Ct. Cls. 166, 171.) File 3980–452:2, J. A. G., Dec. 8, 1909, p. 6.

Digitized by Google

"The law creates the office, prescribes its duties, and fixes the compensation. * * * The appointing power has no control, beyond the limits of the statute, over the compensation, either to increase or diminish it. This has been substantially decided in many cases. * * * If the appointing officer has no power to change the compensation of an inspector, certainly the paying officer has not." (Adams *v.* U. S. 20 Ct. Cls. 115, 117, 118.) File 3980-452:2, J. A. G., Dec. 8, 1909, p. 6.

"It is clear that when the statute gives a right to compensation in a given case * * * accounting officers can not dispense with the statute or make stipulations for allowing more or less than it gives. (1st Comp. Dec., v. 5, 501.)" File 3980-452:2, J. A. G., Dec. 8, 1909, p. 7.

"As the department appointed him to perform a duty required by law, for which the compensation was fixed by law, and the money appropriated to pay it, he is entitled to the compensation given by law, if he has performed the duty, for the Secretary has no more discretionary power to withhold what the law gives than he has to give what the law does not authorize." (Converse *v.* U. S., 21 How., 474.) File 3980-452:2, J. A. G., Dec. 8, 1909, p. 7.

"The right to compensation being, therefore, created by law, and not being a subject of contract, nothing can be assumed to modify that right, such as the regulations of an executive department, except such as are in conformity with the provisions of a statute existing or made in accordance with a later statute." File 3980-452:2, J. A. G., Dec. 8, 1909, p. 6.

77. **Pay-account status of an accused**—The pay-account status of an accused is incorporated in the instructions governing summary courts-martial merely as an aid in preventing an excessive or illegal sentence involving pay. *See* ACCUSED, 54.
78. **"Pay miscellaneous."** *See* DETENTIONERS, 2.
79. **Prisoners.** File 6628-00. *See also* PAY, 15, 28; DETENTIONERS.
80. **Rate of pay**—Should be included in records of deck courts and summary courts-martial. C. M. O. 12, 1915, 7. *See also* ACCUSED, 54.
81. **Rear admirals.** *See* REAR ADMIRALS, 2-6.
82. **Recess appointments**—"No money shall be paid from the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate." (R. S. 1761.) (*See* 26 Op. Atty. Gen. 234 construing R. S. 1761. *See also* 21 Comp. Dec. 722; 21 Comp. Dec. 726). File 26521-152, J. A. G., Sept. 22, 1916.
83. **Reduction in rating**—Forfeiture of pay by sentence of court-martial is based on pay of rating to which accused has been reduced. *See* REDUCTION IN RATING, 30.
84. **Same**—Article 32 of the Articles for the Government of the Navy is so construed that sentences by summary courts-martial which *involve loss of pay* are deemed to be such as deprive the offender of pay in stated terms of amount; and that "disrating" alone is not, within the meaning of the law, to be regarded as involving loss of pay, but as a reduction of rating only. U. S. Navy Reg. Cir. No. 19, June 4, 1879.
85. **Reduction of period of confinement by convening authority**—The convening authority should also make a corresponding reduction in the forfeiture of pay and allowances. *See* CONFINEMENT, 34.
86. **Reenlistment of minors**—A person who enlists in the Navy for minority, is honorably discharged within three months before the expiration of his enlistment and reenlists for four years, within four months thereafter, is, and is entitled to all the benefits accruing to, "an enlisted man," (20 Comp. Dec., 409). File 7657-300, Sec. Navy, Aug. 11, 1915; C. M. O. 29, 1915, 8.
87. **Remitted by discharge**—Where the bad-conduct discharge is executed before sufficient pay has accumulated under the provisions of I-4893 to execute the total loss of pay to which an accused was sentenced, the execution of the bad-conduct discharge operates itself as a remission of the balance. (158 S. & A. Memo. 3035; File 26806-131:12.) C. M. O. 53, 1914, 7; 22, 1915, 5. *See also* BAD CONDUCT DISCHARGE, 3.
88. **Retained beyond enlistment**—Enlisted persons in the Marine Corps are entitled to an increase of one-fourth their former pay while detained beyond their terms of enlistment, but this is not to be computed upon the 20 per cent increase for service in time of war, as provided by the act of April 26, 1898 (30 Stat. 364), to enlisted men of the Army. 5 Comp. Dec. 524.
89. **Retainer pay**—Increase of 25 per cent in pay for enrolling in the Fleet Naval Reserve. *See* File 28550-20.

Digitized by Google

90. **Retired officers detailed on active duty**—The act of August 29, 1916, provides: "Hereafter any retired officer of the naval service who shall be detailed on active duty shall, while so serving, receive the active duty pay and allowances of the grade, not above that of lieutenant commander in the Navy or of major in the Marine Corps, that he would have attained in due course of promotion if he had remained on the active list for a period beyond the date of his retirement equal to the total amount of time during which he has been detailed on active duty since his retirement." *Held:* That, provided a retired officer meets the other requirements of the law above-quoted, that said law operates *ex proprio vigore* to confer upon such officer the benefits mentioned, and it is accordingly decided that the issuance of "new orders to active duty" is not necessary to accomplish the purpose of the law. (*See* 20 Op. Atty. Gen., 687.) File 27231-77, Sec. Navy, Sept. 19, 1916; C. M. O. 33, 1916.
91. **Same**—Retired Marine officer ordered to active duty by the Secretary of the Navy under the provisions of the act of August 22, 1912 (37 Stat. 329). *See* MARINE CORPS, 91; RETIRED OFFICERS, 1.
92. **Retired officers employed in civil offices or positions.** *See* RETIRED OFFICERS.
93. **Retired officers admitted to naval home.** *See* NAVAL HOME, 1.
94. **Retired officers when holding a commission in the Naval Militia.** File 26254-207, Aug., 1916. *See also* RETIRED OFFICERS, 54-58.
95. **Retired officers pay**—Whether considered as "pay" or "pension." *See* RETIRED OFFICERS, 16.
96. **Sea pay for Marine officers.** *See* PAY, 64.
97. **Sentences of deck courts.** *See* DECK COURTS, 35-41, 51-56.
98. **Sentences of enlisted men**—General courts-martial—A court is not authorized to adjudge a sentence, not including discharge, in which there is no limitation upon the period during which the loss of pay (and allowances in the cases of marines) should continue, as the forfeiture is thereby made applicable to the entire remaining portion of the enlistment of the accused. (C. M. O. 42, 1909, 3; 14, 1910, 7; 26, 1910, 8; 21, 1912, 4; 1, 1913, 3; 14, 1913, 5; Comp. Dec. Nov. 21, 1914, App. No. 24095, File 26254-1658:1). C. M. O. 49, 1914, 7.
99. **Same**—"In the case of enlisted men, loss of pay and allowances due and that may become due during the current enlistment of the accused, is added to the limit of punishment prescribed by the President." The foregoing provision was added to the limitation of punishment for general courts-martial by C. N. R. 5, October 4, 1916, as a substitute for paragraph 4.
100. **Sentences of officers**—A Marine officer was sentenced to lose seventy-five dollars ($75) of his pay per month for a period of six (6) months, total loss of pay amounting to four hundred and fifty dollars ($450). In reviewing the case the Secretary of the Navy remarked in part as follows:

The department considers that a sentence involving loss of numbers is a more appropriate form of punishment than forfeiture of pay for commissioned officers (other then commissioned warrant officers). (*See* C. M. O. 105, 1905, p. 1.)

While the department is on record as favoring loss of pay, rather than loss of numbers, in the case of commissioned warrant officers, it is because loss of pay is the only substantial punishment, less than dismissal, that can be adjudged in their cases. (Forms of Procedure, 1910, p. 42; Index-Digest, 1914, p. 39; C. M. O. 37, 1914; 52, 1914.)

Therefore, while the sentence adjudged and approved by the convening authority in this case is thoroughly legal, it is not in accord with the policy of the department which, as stated above, does not favor a sentence involving solely loss of pay in the case of commissioned officers of the naval service on the active list, other than commissioned warrant officers. C. M. O. 48, 1915, 5.
101. **Same**—A Naval Constructor was sentenced *inter alia* "to lose pay amounting to one hundred and fifty dollars ($150) per month for six (6) months." C. M. O. 40, 1913.
102. **Same**—Officers have been sentenced by general courts-martial to forfeit pay. *See* G. O. 52, April 15, 1865; C. M. O. 37, 1886, 2.
103. **Same**—In a case where an officer was sentenced "to have the sum of ten (10) dollars checked monthly against his pay, which said sums are to be paid to his creditor," the department stated in part: "Pay forfeited by sentence of courts-martial accrues to the United States for the maintenance of Navy Hospitals, and such forfeitures can not be diverted to the benefit of an individual, however justly the amount may be due him." C. M. O. 36, 1881, 3.
104. **Same**—Where a loss of pay was adjudged by a general court-martial in these words, "to lose fifty dollars ($50) per month for six (6) months," the department remarked: "The court in adjudging that part of the sentence relative to loss of pay apparently

Digitized by Google

intended that the loss of $50 per month *be from the pay of the accused.* It is not positively so stated and, therefore, in order that there may be no ambiguity as to the interpretation of the sentence, the record is returned for the purpose of reconsidering" the sentence. The court, in revision, revoked the first and adjudged a new sentence which set forth that the accused would "lose fifty dollars ($50) per month of his pay," etc. C. M. O. 11, 1915.

105. **Same**—Sentences which include forfeiture of pay shall, in the case of officers, state the rate of pay and time of such forfeiture. Those including suspension must state distinctly whether from rank or from duty only. (R-816 (1).)

106. **Sentences of paymasters' clerks**—"To lose one-half (½) of sea pay for six (6) months, amounting to four hundred and six dollars and twenty-five cents ($406.25). C. M. O. 37, 1912.

"To lose one-half (½) of shore-duty pay for five (½) months, amounting to four hundred and sixteen dollars and sixty-seven cents ($416.67)." C. M. O. 30, 1911, 2.

107. **Sentences of summary courts-martial.** *See* SUMMARY COURTS-MARTIAL.

108. **Sentences of warrant officers**—"To lose one-fourth (¼) of his sea pay for a period of one (1) year." C. M. O. 24, 1913.

"To be placed on leave pay for six (6) months." This part of the sentence was remitted by the department. C. M. O. 18, 1912, 2.

"To lose pay amounting to fifty dollars ($50) per month for a period of six (6) months." C. M. O. 22, 1914.

"To be suspended from duty for a period of six (6) months on one-half (½) of shore-duty pay." C. M. O. 31, 1912.

"To be suspended from duty for a period of one (1) year on one-half (½) shore-duty pay." Reduced to six months. C. M. O. 32, 1912.

Sentences involving suspension from duty are not favored by the department. *See* SUSPENSION FROM DUTY.

109. **Same**—An acting boatswain was tried by general court-martial convened by the Commander-in-Chief of the Philippine Squadron and sentenced among other things "to lose one-third (⅓) of all pay and allowances that may become due him for a period of one (1) year." The convening authority in acting on the case stated in part: "That part of the sentence which relates to loss of pay and allowances, is disapproved for the reason that the convening authority deems that full pay is necessary for the proper maintenance of the accused while on active duty." C. M. O. 105, 1905, 1. *See also* File 10988–02; 3852–02; Comp. Dec. Apr. 22, 1902.

110. **Sentences of warrant officers (commissioned)**—"To lose one-half (½) of sea-duty pay for a period of one (1) year." C. M. O. 11, 1913.

"To lose seventy-five dollars ($75) per month of his pay for a period of six (6) months." C. M. O. 16, 1914.

"To lose fifty dollars ($50) per month of his pay for a period of ten (10) months." C. M. O. 21, 1914.

"To lose one-fourth (¼) of his pay for a period of six (6) months." C. M. O. 12, 1914.

"To be suspended from duty for a period of six (6) months on one-half (½) of shore-duty pay." C. M. O. 21, 1910, 17; 1, 1911, 3.

"To forfeit one-half (½) the pay that may become due him during such period of restriction." C. M. O. 1, 1911, 3.

"To be suspended from duty for a period of six (6) months on three-quarters (¾) of shore-duty pay." C. M. O. 25, 1913.

Sentences involving suspension from duty are not looked upon with favor by the department. *See* SUSPENSION FROM DUTY.

111. **Waiting orders pay.** *See* PAY, 61.

112. **Waiver of**—As the department has no lawful power to fix a rate of pay differing from that which is prescribed by law in any given case or under any given circumstances, it would be without effect to grant a leave of absence on condition that it be without pay; even if an officer should request leave of absence without pay, still such a case would be within the rule as laid down in Rush *v.* U. S. (35 Ct. Cls. 223) and Laurey *v.* U. S. (32 Ct. Cls. 259), where it was held that although the parties waived their right to receive certain pay which the law gave to them, yet such a waiver, although not a forced one, did not operate to deprive them of the right to pay which was prescribed by statute, and that they could recover. As a corollary to this, it is also true that although an officer should agree to accept, or even request, a leave of absence without pay, still he would be entitled to recover his salary notwithstanding; this on the authority of Glavey *v.* U. S. (182 U. S. 595). File 13673–1442, J. A. G., Nov. 22, 1911, pp. 16, 17. *See also* "OFFICE," 17, 18; RETIRED OFFICERS, 18, *citing* U. S. *v.* Andrews (240 U. S. 90).

Digitized by Google

113. **Warrant officers' and commissioned warrant officers' sentences.** *See* PAY 108-110.

114. **Warrent officers (commissioned)**—"Creditable records," within the meaning of the act of August 29, 1916—The act of August 29, 1916 (39 Stat. 578), provides as follows: "Hereafter chief boatswains, chief gunners, chief machinists, chief carpenters, chief sailmakers, chief pharmacists, and chief pay clerks on the active list with creditable records, shall, after six years from date of commission, receive the pay and allowances that are now or may hereafter be allowed a lieutenant (junior grade), United States Navy: *Provided*, That chief boatswains, chief gunners, chief machinists, chief carpenters, chief sailmakers, chief pharmacists, and chief pay clerks, on the active list with creditable records, shall, after twelve years from date of commission, receive the pay and allowances that are now or may hereafter be allowed a lieutenant, United States Navy."

"Creditable records," within the meaning of the foregoing, does not import distinguished records, but requires only that a record be such that upon examination for promotion it would be found satisfactory. In passing upon the creditability of an officer's record in these cases, consideration should be given to all matters therein disclosed, whether pertaining to his mental, moral, or professional qualifications, and it is necessary that an officer be satisfactory in all these respects if his record is to be deemed creditable. Further, in determining whether the record of a commissioned warrant officer is creditable, the investigation should ordinarily be limited to a scrutiny of his record in his present grade, and his prior record in the srvice should not be taken into consideration except in the cases where under existing law this would be done in determining his fitness for promotion. And, when a commissioned warrant officer has the necessary length of service, and it has been decided by the department that his record is creditable, this definitely fixes the rate of pay and allowances to which he is entitled under the above-quoted statute, and, in the event of his record ceasing to be creditable, the same can not be affected except by means of disciplinary action as in the case of all officers. File 17789-27, J. A. G., Sept. 21, 1916; C. M. O. 33, 1916, 6.

115. **Withholding pay**—The department can not withhold the compensation, in whole or in part, to which an officer is by law entitled. 16, J. A. G., 85. *See also* PAY, 71, 75, 76, 112; RETIRED OFFICERS, 18, *citing* U. S. *v.* Andrews (240 U. S. 90).

116. **Same**—The department can not enforce a regulation providing for the deprivation or a reduction of the pay of an officer, unless there is some plain statutory authority therefor. 15, J. A. G., 362.

PAY CLERKS AND CHIEF PAY CLERKS.

1. **Appointment of, under act March 3, 1915 (38 Stat. 942)**—Under the act of March 3, 1915 (38 Stat. 942), all appointments as chief pay clerk must be made from the grade of pay clerk, all appointments as pay clerk must be made from the grade of acting pay clerk, and all appointments as acting pay clerk must be made from the enlisted men of the Navy having the required service. However, certain exceptions are made in that law, as follows: (a) Paymasters' clerks who were in the service on March 3, 1915, who are eligible for appointment without having had previous service as enlisted men, and (b) persons in civil life who had the required service as paymasters' clerks in the Navy, but whose appointments were revoked within six months prior to the passage of the act. (*See* C. M. O. 12, 1915, p. 13.)

Therefore, where a paymaster's clerk being eligible for appointment under the above law as chief pay clerk was examined and found not qualified, which finding was approved by the Secretary of the Navy and made final by the revocation of his appointment, he can not be examined again for appointment as chief pay clerk with a view to appointment as one of the exceptional cases specified in the law.

If he were so examined, found qualified and appointed, this would not only be contrary to the law, but would not entitle him to the pay of the office to which thus illegally appointed. File 28554-135:1, J. A. G., Aug. 14, 1915; C. M. O. 29, 1915, 8-9. *See also* File 5460-77, Sec. Navy, Sept. 7, 1915.

2. **Same**—The naval appropriation act of March 3, 1915 (38 Stat. 942), provides in part that "paymasters' clerks now in the service and former paymasters' clerks whose appointments have been revoked within six months next preceding the passage of this act * * * may, upon the passage of this act, be warranted as pay clerks without previous service as enlisted men or as acting pay clerks."

Digitized by Google

In the case of a former paymaster's clerk who was otherwise eligible for appointment as pay clerk if found qualified by examination, except that instead of having his appointment "revoked" he presented his "resignation" and his "resignation" was accepted by the department, it was held that such former paymaster's clerk was not eligible for appointment as pay clerk under that part of said act above quoted, as his appointment was not "revoked" within the meaning of the law. However, this former paymaster's clerk, having had over nine years' honorable, continuous service in the Navy as yeoman, would be rendered immediately available for appointment as acting pay clerk in the event that he should enlist in the Navy and be given an acting appointment as chief yeoman, in accordance with other provisions of the act cited above. File 5460–71, J. A. G., Mar. 25, 1915; C. M. O. 12, 1915, 13.

3. **Same**—Service on board the "receiving ship" at Cavite, P. I., and at the Naval Hospital, Yokohama, Japan, is not service "on board a cruising vessel of the Navy" within the meaning of the act approved March 3, 1915 (38 Stat. 942), with reference to the appointment of acting pay clerks from enlisted men. In this case the vessel doing duty as receiving ship was also a cruising vessel, but the pay clerk concerned was attached to such vessel as a member of the receiving ship's personnel, and not as a member of the personnel attached to the vessel as a cruising ship. (*See* Naval Instructions, 1913, I–585–587.) File 5460–79, J. A. G., Sept. 18, 1915; C. M. O. 31, 1915, 5.
4. **Bonds**—It has repeatedly been decided by the Supreme Court that the department has the right to require a bond in certain cases without express statutory authority, and Naval Instructions, 1913, I–3901, expressly provide that such officers "as the Secretary of the Navy may direct" shall be required to furnish bonds. File 3980–1283, J. A. G., Oct. 18, 1916.
5. **Chief pay clerk**—Tried by general court-martial. C. M. O. 46,1915; 36, 1916.
6. **Embezzlement**—"A pay clerk could not consistently be charged with 'embezzling' Government funds which were in contemplation of law in the possession of the officer of the Pay Corps under whom he was serving and were not received by the clerk in the lawful performance of the duties of his office." File 3980–1283, J. A. G., Oct. 18, 1916.
7. **Haiti**—The act of June 12, 1916 (39 Stat. 223), entitled "An act to authorize and empower officers and enlisted men of the Navy and Marine Corps to serve under the Government of the Republic of Haiti, and for other purposes," is construed as authorizing the President to detail such chief pay clerks, pay clerks, and acting pay clerks to assist the Republic of Haiti "as may be mutually agreed upon by him and the President of the Republic of Haiti," notwithstanding that such clerks may, under such detail, be in the performance of duty independent of pay officers. By this construction the above act modifies the act of March 3, 1915 (38 Stat. 943), providing that "chief pay clerks, pay clerks, and acting pay clerks shall be assigned to duty with pay officers under such rules as the Secretary of the Navy may prescribe," to the extent above indicated. File 5460–84, J. A. G., Aug. 16, 1916; C. M. O. 30, 1916, 8.
8. **Legality**—Of pay clerks, not connected with pay office, witnessing payment to enlisted men and civil employees. File 26254–2050, Sec. Navy, July 14, 1916.
9. **Pay clerks**—Tried by general court-martial. C. M. O. 6, 1916.
10. **Status**—Of pay clerks who fail professionally or physically for permanent appointments under the act of March 3, 1915 (38 Stat. 942). File 5460–75, J. A. G., June 29, 1915.
11. **Same**—"Pay clerks have by law been given a permanent status and are assigned to duty with officers of the Pay Corps who no longer have the selection of their clerks." File 3980–1283, J. A. G., Oct. 18, 1916.

PAY OFFICERS. *See also* DISBURSING OFFICERS; EMBEZZLEMENT.

1. **Confinement of.** C. M. O. 33, 1896, 4.
2. **Delegation of responsibility**—Paymasters may not delegate any part of their responsibility to their subordinates. This practice subjects the subordinate to the possibility of unjust suspicion, it exposes him to temptation, and it is a culpable avoidance on the part of the paymaster of the care and labor necessarily incident to the faithful and proper performance of his duties. G. O. 74, Apr. 7, 1866.
3. **Responsibility of**—Order of superior of pay officer to make payment. *See* File 26543–66, Sept. 8, 1911; R. S. 285.
4. **R. S. 285**—An order by the Secretary of the Navy has been held to be within this section. File 26254–1451:11, Apr. 12, 1915, citing Swaim *v.* U. S. (165 U. S. 557) and 30 Op. Atty. Gen.

Digitized by Google

PAY RECEIPTS.

1. **Destroyed**—By paymaster's clerk. C. M. O. 26, 1915.
2. **Evidence**—Photographs of—Certified photographs of pay receipts admitted in evidence. G. C. M. Rec. 30684, p. 263.

PAY ROLLS.

1. **Evidence**—Pay roll introduced in evidence in a general court-martial trial. C. M. O. 30684, p. 20.

PAYMASTERS, ASSISTANT. *See* ASSISTANT PAYMASTERS.

PAYMASTER'S CLERKS.

1. **"Absence from station and duty after leave had expired"**—Charged with. C. M. O. 38, 1913.
2. **"Absence from station and duty without leave"**—Charged with. C. M. O. 31, 1905.
3. **Desertion**—Charged with. *See* DESERTION, 98.
4. **General court-martial**—Tried by. G. O. 143, Oct. 28, 1869; C. M. O. 3, 1903; 31, 1905; 39, 1905; 32, 1908; 4, 1907; 29, 1911; 30, 1911; 26, 1912; 37, 1912; 35, 1913; 38, 1913; 24, 1915; 26, 1915.
5. **Pay clerks**—Tried by general court-martial—Court-martial orders called them "pay clerks." C. M. O. 102, 1894; 160, 1901; 26, 1902.
6. **Reserve ships**—When assignable to. *See* File 13352–407, J. A. G., Mar. 16, 1912.
7. **Retirement of.** *See* RETIREMENT OF OFFICERS, 38.
8. **Sentence**—Of dismissal by general court-martial—Not necessary to be confirmed by the President as a paymaster's clerk is neither a commissioned nor a warrant officer. The sentence may be carried into execution when approved by the convening authority. C. M. O. 173, 1902; 16 J. A. G. 65, Nov. 2, 1911. *See also* PAYMASTER'S CLERKS, 9.
9. **Same**—The two last sentences of dismissal adjudged in the cases of paymaster's clerks were confirmed by the President. C. M. O. 24, 1915; 26, 1915.
10. **Status of**—The status of paymaster's clerks is somewhat similar to that of midshipman in that they both serve under appointments made by the Secretary of the Navy, although that of a midshipman contains the words, "By direction of the President." 16 J. A. G. 68, Nov. 2, 1911. *See also* APPOINTMENTS, 30.
11. **Same**—Upon detachment of pay officer. File 26254–359, J. A. G., Nov. 9, 1909.
12. **Same**—Prior to act, June 24, 1910 (36 Stat. 606). *See* File 5460–59, J. A. G., Nov. 26, 1912.

PAYMASTER'S CLERKS, MARINE CORPS (CLERKS TO ASSISTANT PAYMASTERS).

1. **Acting paymaster's clerk.** *See* PHILIPPINE CAMPAIGN BADGES, 2.
2. **Allotments**—A clerk to an assistant paymaster is an officer of the Marine Corps within the meaning of the act of June 10, 1896 (29 Stat. 361), authorizing officers of the Navy and Marine Corps to make allotments. (121 S. & A. Memo. 1699.) File 19245–43, J. A. G., Sept. 8, 1911, p. 5.
3. **General court-martial**—Paymaster's clerk, U. S. M. C., tried by general court-martial on charge of "Knowingly and willfully misappropriating and applying to his own use and benefit money of the United States intended for the naval service thereof." C. M. O. 10, 1916.
4. **Number of.** *See* PAYMASTER'S CLERKS, MARINE CORPS, 5.
5. **Retirement of**—A clerk, *one of the authorized five*, to an assistant paymaster, U. S. Marine Corps, is entitled to retirement under the provisions of R. S. 1444, made applicable to him (1) by the clause in the act, June 24, 1910 (36 Stat. 625), relating to clerks to assistant paymasters, U. S. Marine Corps; (2) by the clause in the act, March 3, 1911 (36 Stat. 1044), providing for the retirement of paymaster's clerks in the Army; and (3) by the provision in the act, June 24, 1910 (36 Stat. 606), authorizing the retirement of paymaster's clerks in the Navy. If the clerk in question is a clerk to an assistant paymaster, U. S. Marine Corps, one of the "five in all" and is 62 years of age or over, he is entitled to retirement under the provisions stated, otherwise not. File 27231–34, J. A. G., Apr. 25, 1911.
6. **Same**—Since employment in connection with the Marine Corps in the Philippines during the Philippine campaign in a civilian capacity did not operate to make such employee an officer or enlisted man of said corps (File 19245–43:1, Sec. Navy, Mar. 8, 1912), the department held that a pay clerk, having been so employed, should not be considered as having been in the military service in connection with questions of precedence or retirement for length of service. File 19245–43:3, Sec. Navy, July 6, 1915; C. M. O. 27, 1915, 10.

Digitized by Google

7. **Status of**—"Formerly clerks to Assistant Paymasters in the Marine Corps were not regarded as officers except in a very limited sense and within the purview of certain statutes, although their status is *now* assimilated to that of paymaster's clerks in the Army, and they are entitled to retirement as are paymaster's clerks in the Navy (File 27231-34). File 19245-43, J. A. G., Sept. 8, 1911, p. 4. *See also* J. A. G. Memo., Sept. 13, 1916.
8. **Same**—There was no such office in the Marine Corps as clerk to a Paymaster or an Assistant Paymaster until 1910 (act June 24, 1910, 36 Stat. 625). File 19245-43, J. A. G., Mar. 7, 1912.
9. **Warrant officers**—The provisions of the act of March 3, 1915 (38 Stat. 942), in regard to warranting pay clerks of the Navy, is not sufficiently broad to include clerks to Assistant Paymasters of the Marine Corps. File 5460-81, J. A. G., May 12, 1916.

PAYMASTER GENERAL OF THE NAVY.

1. **Death gratuity**—Decision of Paymaster General conclusive as to payment. *See* DEATH GRATUITY, 21-23.
2. **General court-martial**—Tried on the charges of "Scandalous conduct tending to the destruction of good morals" and "Culpable inefficiency in the performance of duty." C. M. O. 8, 1886.
3. **Rank**—And commission for—Act of June 24, 1910 (36 Stat. 605). *See* BUREAU CHIEFS, 9.
4. **Retired Paymaster General**—Issuance of commission to. *See* File 22724-18, J. A. G., Dec. 4, 1911.

PEACE CONFERENCE.

1. **Retired officer**—Appointed as a delegate to The Hague Conference. *See* RETIRED OFFICERS, 38.

PEERS.

1. **Accused**—Was convicted by a "tribunal composed of his peers." C. M. O. 17, 1915, 3.

PENAL CODE. (Act of Feb. 16, 1909, 35 Stat. 1088.) C. M. O. 12, 1911, 6.

PENAL STATUTES.

1. **Act of August 5, 1882 (22 Stat. 28)**—Is not a penal statute. File 26260-392, J. A. G., June 29, 1911, p. 22.
2. **Construction of.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 88-92.

PENALTY ENVELOPES.

1. **Foreign countries**—Mail for. *See* File 3980-1185.
2. **Naval Militia.** *See* NAVAL MILITIA, 26.
3. **Newfoundland.** *See* NEWFOUNDLAND.

"PENDING QUESTIONS."

1. **Attorney General's opinion**—Requested only on. *See* ATTORNEY GENERAL, 17.

PENITENTIARY.

1. **Officers**—Sentence involved imprisonment in penitentiary. C. M. O. 173, 1902; 15, 1908, 3; 31, 1913; 50, 1914.
2. **Paymaster's clerk**—Sentence involved imprisonment in a penitentiary. C. M. O. 26, 1915.
3. **Paymaster's clerk, U. S. M. C.**—Sentence involving confinement in penitentiary. C. M. O. 10, 1916.

PENNSYLVANIA, STATE OF.

1. **Governor of**—Made a requisition on naval authorities for delivery of an enlisted man. C. M. O. 35, 1915, 8.
2. **Law approved**—April 22, 1794—Sunday ball playing at navy yard. C. M. O. 31, 1914, 16. *See also* SUNDAY LAWS.

PENSIONS.

1. **Enlistment**—Receipt of pension—Receipt of pension is no bar to enlistment. G. C. M. Rec. 23586; File 26251-4685:1, J. A. G., Apr. 18, 1911.
2. **Enlistment in Naval Militia**—Effect of, on pension. *See* NAVAL MILITIA, 11, 28.
3. **Jurisdiction**—*Recommended:* That the department furnish the Commissioner of Pensions with all facts of record bearing upon the service of claimants, leaving the determination of doubtful questions and the drawing of inferences from such facts to the jurisdiction of the Pension Bureau, which is claimed by the Interior Department to be exclusive. The law, as interpreted by the Interior Department, having made it the duty of the Commissioner of Pensions and his superiors to decide all

Digitized by Google

questions of *law and fact* which may be involved in pension claims, there is no reason why this department should be called upon to render an "opinion" upon such questions for the information or guidance of another department of the Government, which claims that its jurisdiction thereof is exclusive. File 26510–1214, J. A. G., Sept. 2, 1915.

4. **Same**—Requests for information concerning pensions should be addressed to the Commissioner of Pensions, under whose jurisdiction lies the authority of granting pensions to claimants and deciding questions of law and fact relative thereto. File 26250–709:1, Jan. 5, 1916. *See also* File 26510–1247, Sec. Navy, Feb. 8, 1916; 26250–1285, Sec. Navy, July 21, 1916; C. M. O. 49, 1915, 26; NAVAL MILITIA, 27.
5. **Naval Militia**—Member of Naval Militia dies on cruise with Regular Navy. *See* NAVAL MILITIA, 27.
6. **Same**—Effect on pension of enlistment in Naval Militia. *See* NAVAL MILITIA, 11, 28.
7. **Retired officers**—Whether compensation is "pay" or "pension." *See* RETIRED OFFICERS, 16.
8. **Right to**—No pensioner has a vested legal right to his pension. Pensions are the bounties of the Government, which Congress has the right to give, withhold, distribute, or recall, at its discretion. (U. S. *v.* Teller, 107 U. S. 64, 68.) 15 J. A. G. 368, June 29, 1911.

PERJURY.

1. **Charging of**—In prosecutions for "Perjury" committed on examination before a naval general court-martial, or for the subornation thereof, it shall be sufficient to set forth the offense charged on the defendant, without setting forth the authority by which the court was held, or the particular matters brought before, or intended to be brought before, said court (R. S. 1023). "Perjury" committed by persons in the naval service is punishable under R. S. 1624, article 14, clause 4, and article 42.
2. **Civilian witness**—Testifying before a court of inquiry. File 28478–25:7, Jan. 4, 1916. *See also* section 175, act of March 4, 1909, Criminal Code (35 Stat. 1111); section 12, act of February 16, 1909 (35 Stat. 622).
3. **Court of inquiry**—False testimony before a court of inquiry under oath will sustain a charge of "Perjury." C. M. O. 51, 1014, 9. *See also* COURTS OF INQUIRY, 40. *See* Ct. Inq. Rec. 6004 for a case of an enlisted man who made conflicting statements and perjured himself while testifying in his own defense.
4. **Definition**—Perjury is defined and made punishable by fine and imprisonment by the Criminal Code, act of March 4, 1909, section 125 (35 Stat. 1111), as follows: "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisonment not more than five years." *See* File 26251–12446, J. A. G., Nov. 1, 1919.
5. **Enlisted men**—Charged with. C. M. O. 47, 1910, 5; 22, 1913, 5; File 26251–12446; G. C. M. Rec. 30146; 31992; 32762.
6. **Evidence necessary to prove.** File 26262–1569, Sec. Navy, Dec. 18, 1912.
7. **False swearing**—Since the passage of the act of March 4, 1909, 35 Stat. 1111 (Criminal or Penal Code) false swearing and perjury are synonymous.
8. **False testimony**—Under oath before a court of inquiry will sustain a charge of "Perjury." *See* COURTS OF INQUIRY, 40.
9. **Fraudulent enlistment involved in**—Every fraudulent enlistment includes the offense of "Perjury," and that is a crime which has always been visited with most serious consequences by the civil laws, being recognized as *malum in se* and not merely *malum prohibitum*. File 14535–1088, J. A. G., Nov. 14, 1911. *See also* DESERTERS, 13; IMPEACHMENT, 9.
10. **General court-martial**—False testimony before a naval general court-martial constitutes "Perjury." C. M. O. 47, 1910, 5.
11. **Intent**—Specific intent required in "Perjury." C. M. O. 8, 1911, 5.
12. **Officer**—Charged with. C. M. O. 50, 1914; G. C. M. Rec. 29422.
13. **Reenlistment**—Of man guilty of "Fraudulent enlistment." *See* DESERTERS, 13.
14. **"Scandalous conduct tending to the destruction of good morals"**—An enlisted man was charged with "Scandalous conduct tending to the destruction of good morals" instead of "Perjury," because the summary court-martial before which he is alleged to have testified falsely, on its face was not properly convened. The

Digitized by Google

precept and action were signed by the commanding officer, disciplinary barracks instead of commandant, marine barracks. File 26251-7617. *See also* File 26287-415; 26287-1013; 26287-1183.

15. **Specific intent**—Required in "Perjury." C. M. O. 8, 1911, 5.
16. **Specifications**—Necessary allegations in specifications—In this case the specification of the charge alleging perjury was faulty, in that, while it properly alleged that the testimony given by the accused was false, it did not set forth what was the truth in regard to the matter. (U. S. *v.* Pettus, 84 Fed. Rep. 791, 794; Bartlett *v.* U. S., 105 Fed. Rep. 884.) C. M. O. 47, 1910, 5. *See also* CHARGES AND SPECIFICATIONS, 92.
17. **Statutory**—Perjury committed by persons in the United States is punishable under R. S. 1624, article 14, clause 4, and article 42. Perjury is defined and made punishable by fine and imprisonment by the Criminal Code, act March 4, 1909, section 12, (35 Stat. 1111). *See* PERJURY, 4.

PERJURY, TENDING TO THE DESTRUCTION OF GOOD MORALS AND DISCIPLINE—Enlisted man—Charged with. C. M. O. 15, 1879. This offense is now charged as "Perjury."

PERMANENT LEGISLATION.

1. **"Hereafter"**—As indicated by. C. M. O. 12, 1915, 12. *See also* "HEREAFTER."

PERSISTENT DELINQUENCY IN THE RENDITION OF ACCOUNTS, IN VIOLATION OF THE UNITED STATES NAVY REGULATIONS.

1. **Paymaster**—Charged with. C. M. O. 92, 1903.

PERSISTENT DELINQUENCY IN THE RENDITION OF ACCOUNTS, IN VIOLATION OF SECTION 12 OF AN ACT OF CONGRESS ENTITLED "AN ACT MAKING APPROPRIATIONS FOR THE LEGISLATIVE, EXECUTIVE, AND JUDICIAL EXPENSES OF THE GOVERNMENT FOR THE FISCAL YEAR ENDING JUNE 30, 1895, AND FOR OTHER PURPOSES."

1. **P. A. Paymaster**—Charged with. C. M. O. 92, 1903.
2. **Paymaster**—Charged with. C. M. O. 33, 1896.

PERSONAL EFFECTS.

1. **Disposition of**—Deceased officers and men of the naval service. *See* DESERTERS, 11, 12; DISPOSITION OF EFFECTS.
2. **Loss of, by an officer by reason of shipwreck.** *See* File 26893-235:1, J. A. G., Sept. 2, 1916.

PERSONAL RELATIONS.

1. **Accused (officer)**—And other officers of the ship. C. M. O. 5, 1903. *See also* CLEMENCY, 40.

PETTY OFFICERS.

1. **Drunk**—A petty officer intrusted with important duties, who periodically renders himself unfit for duty through alcoholism, is criminally untrustworthy and worse than useless in the naval service. C. M. O. 88, 1896. *See also* C. M. O. 1, 1914, 8.
2. **Instructors**—At military and naval institutions. File 7657-361, J. A. G., May 6, 1916. *See also* RETIRED ENLISTED MEN, 6, 10, 12.

PHARMACISTS AND CHIEF PHARMACISTS.

1. **Command.** *See* COMMAND, 21.
2. **Pay of.** *See* File 26254-1898, J. A. G., Nov. 8, 1915.
3. **Total number**—Under acts of June 17, 1898, and August 22, 1912. *See* File 27213-3, J. A. G., May 6, 1913. *See also* act of August 29, 1916 (39 Stat. 572).

PHILADELPHIA NAVY YARD.

1. **Jurisdiction.** *See* JURISDICTION, 105; MURDER, 22-24.
2. **Sunday ball playing**—Pennsylvania statute, April 22, 1794. *See* SUNDAY LAWS.

PHILIPPINE CAMPAIGN. *See* PHILIPPINE CAMPAIGN BADGES.

PHILIPPINE CAMPAIGN BADGES.

1. **Part of uniform**—The Philippine campaign badge is a "part of the uniform" and should not be issued to any person except as has been, or now is, entitled to wear the "uniform." File 19245-43, J. A. G., Sept. 8, 1911.

Digitized by Google

2. **Philippine campaign badge**—A paymaster's clerk, U. S. Navy, requested that a Philippine campaign badge be issued him. He was appointed under date of August 30, 1901, an "acting paymaster's clerk" in the office of the assistant quartermaster. U. S. Marine Corps, at Cavite, P. I., under the provisions of the act of July 1, 1902 (32 Stat. 687). *Held*: That inasmuch as it does not appear from the facts that the applicant was, on June 27, 1908, the date of Special Order No. 52 (par. 10c), authorizing the issue of the Philippine campaign badge, in the Marine Corps in any capacity, nor that he has since been in the Marine Corps, he is not entitled to the badge in question. File 19245-43, J. A. G., Sept. 8, 1911.
3. **Revocation of**—Where an enlisted man of the Marine Corps was discharged as "unfit for the service" in order that a life sentence of penal servitude, pursuant to conviction in a civil court on the charge of murder, might be carried into effect, an award of "the China and Philippine campaign badges for his services in those campaigns should be revoked." The authority to revoke under such circumstances in cases of enlisted men of the Marine Corps may be exercised by the Commandant of the Marine Corps. File 26519-3:2, Sec. Navy, March 11, 1915, explaining file 26510-3, Sec. Navy, Dec. 1, 1914; C. M. O. 12, 1915, 8.

PHILIPPINE ISLANDS.

1. **Bilibid prison**—Confinement of prisoners in. File 26254-1843. *See also* GUAM, 6.
2. **Campaign.** *See* PHILIPPINE CAMPAIGN BADGES.
3. **Campaign badges.** *See* PHILIPPINE CAMPAIGN BADGES.
4. **Cavite**—Jurisdiction. *See* JURISDICTION, 11, 106.
5. **Cebu, P. I.**—Report and recommendation relative to the proposed transfer of the naval reservation at Cebu, P. I., to the War Department. 13 J. A. G. 437, April 22, 1905.
6. **Citizenship**—By act of July 1, 1902 (32 Stat. 691), inhabitants of the Philippines who were Spanish subjects on April 11, 1899, other than those who had elected to preserve their allegiance to Spain, were declared "to be citizens of the Philippine Islands and as such entitled to the protection of the United States." C. M. O. 49, 1915, 24. *See also* FILIPINOS, 3.
7. **Civil courts**—Jurisdiction. *See* JURISDICTION, 11, 94-96, 106.
8. **Foreign country**—Not a foreign country within meaning of A. G. N. 30, par. 1. File 26237-580.
9. **General Order No. 121**—With regard to General Order No. 121, September 17, 1914, it is directed that in cases arising in the Philippine Islands the Secretary of the Navy be communicated with in advance of the delivery of persons to the civil authorities only when the circumstances are such as, in the judgment of the commanding officer, make such action desirable. (*See* File 26524-274.) C. M. O. 9, 1916, 9-10.
10. **Jurisdiction.** *See* JURISDICTION, 11, 94-96, 106.
11. **Naturalization**—Of Filipinos by enlistment in Navy—Act of June 30, 1914. *See* FILIPINOS, 2.
12. **Same**—Of Filipinos under act of June 29, 1906, sec. 30. *See* FILIPINOS, 3.
13. **Olongapo**—Jurisdiction. *See* JURISDICTION, 94, 95, 96.
14. **Sangley Point, Manila Bay, P. I.**—Title of the United States to. *See* File 7561-03, J. A. G., Sept. 19, 1903.
15. **Subig Bay naval reservation**—Jurisdiction. *See* JURISDICTION, 94, 95, 96.
16. **Treaty with Spain ratified.** *See* FILIPINOS, 3.

PHOTOGRAPHS.

1. **Checks**—Photographic copies of checks. *See* CHECKS, 6; EVIDENCE, DOCUMENTARY, 37.
2. **Evidence.** *See* PAY RECEIPTS, 2.
3. **Pay receipts.** *See* PAY RECEIPTS, 2.

PHOTOSTAT COPIES.

1. **Court of inquiry record.** File 28478-25:5, J. A. G., Nov. 11, 1915.
2. **Identification records of enlisted men.** *See* G. O. No. 9, War Department, March 9, 1916.
3. **General court-martial records**—Furnished on call of civil court at expense of interested party. *See* File 12475-64:2, Sec. Navy, Aug. 20, 1915.

PHYSICAL CONDITION OF ACCUSED. *See* CLEMENCY, 41, 42; COURT, 133.

Digitized by Google

PIRATE. *See* G. O. 58, June 20, 1865.

PLACE OF OFFENSE. *See* CHARGES AND SPECIFICATIONS, 39, 82, 92.

PLEA IN BAR.

1. **Accumulation of offenses.** *See* ACCUMULATION OF OFFENSES, 2.
2. **Court**—Criticized for sustaining. *See* CRITICISM OF COURT-MARTIAL, 48.
3. **Jurisdiction of court**—Offense committed while under Army jurisdiction and accused tried by naval court-martial. *See* MARINES SERVING WITH ARMY, 7.
4. **Same**—Regular Navy on board Naval Militia ship. *See* NAVAL MILITIA, 34, 39–41.
5. **Officer**—Severely criticized for shielding himself behind a plea in bar of trial. *See* OFFICERS, 89.
6. **Public reprimand**—The accused pleaded in bar of trial on the ground of former jeopardy, he having received a letter of reprimand from the department which ended with these words, "You will acknowledge receipt of this communication, a copy of which will be placed with your record and the incident will be considered closed." The court overruled the plea and found the accused guilty. The department approved. The case was sent to the Attorney General, who upheld the action of the department. G. C. M. Rec. 21478a, p. 5; G. C. M. Rec. 21478. *See also* Op. Atty. Gen., June 15, 1906 (25 Op. Atty. Gen. 623); JEOPARDY, FORMER, 30.
7. **Restored to duty**—As a basis of. *See* PARDONS, 47. *See also* File 1493–04.
8. **Reviewing authority**—Court can not be ordered to try charges. C. M. O. 9, 1893; 50, 1893; 4, 1914, 11; REVIEWING AUTHORITY, 15; REVISION, 24; *overruling* C. M. O. 16, 1911, 3. *See also* OFFICERS, 88.
9. **Service records**—No entry should be made on service records, of a summary court-martial, if a plea in bar of trial is held valid. File 26287–1677, Aug. 22, 1913.
10. **Statute of limitations.** *See* STATUTE OF LIMITATIONS.

PLEDGES AND PROMISES.

1. **Debts.** *See* DEBTS, 21, 22.
2. **Drunkenness**—A commissioned officer of the Navy, having broken his voluntarily signed pledge to abstain from use of intoxicants, except when prescribed as a medicine, for a period of five years, was tried by general court-martial under "Conduct unbecoming an officer and a gentlemen." G. C. M. Rec. 31509; C. M. O. 1, 1916.
3. **Same**—A warrant machinist having been found guilty by a general court-martial of "Drunkenness," and "Culpable inefficiency in the performance of duty," clemency was extended because of the unanimous recommendation of the members of the court and the fact that "he signed a pledge to abstain from the use of intoxicants." C. M. O. 34, 1908. *See also* C. M. O. 9, 1879; 31, 1882.
4. **Same**—When an officer pledges himself to abstain from the use of intoxicants, either to escape a well-merited punishment, or to attempt to restore the confidence of his superiors which his actions have impaired, and subsequently violates his pledge, his conduct can not be too strongly reprobated. C. M. O. 118, 1905, 2.
5. **Same**—A boatswain was tried for violating his pledge to abstain from intoxicants, under the charge of "scandalous conduct tending to the destruction of good morals." C. M. O. 118, 1905.
6. **Same**—A naval officer took the following pledge: "I hereby pledge myself to abstain from the use of all intoxicating liquors during the time I am attached to this vessel." Having violated said pledge he was tried by general court-martial for "Conduct unbecoming an officer of the Navy." C. M. O. 36, 1898, 1.
7. **Same**—A pledge to abstain from intoxicants and a conditional resignation presented at same time. File 26251-1989, Sec. Navy, May 14, 1909. *See also* RESIGNATIONS, 5.

POLICE DUTIES. *See also* EXTRA POLICE DUTY.

1. **Defined.** *See* File 8254–03, J. A. G., Oct. 20, 1903; 5879–00; 5471–97, Oct. 29, 1897; 106–00.

POLICE OFFICER.

1. **Witness, as.** C. M. O. 7, 1911, 10. *See also* EVIDENCE, 34.

POLICEMAN.

1. **Enlisted man**—Assaulted a policeman and was tried by general court-martial. C. M. O. 45, 1883.

Digitized by Google

POLL TAXES.

1. **"Honorable discharge"**—Department is aware of no law by which a person is exempt from the payment of "road poll tax and school poll tax" by reason of having served in, and received an honorable discharge from the Navy; nor is the department aware of any law which would exempt the wife of such a person from payment of "school poll tax." File 9212-76, J. A. G., June 13, 1916. *See also* File 9212-75, J. A. G., June 5, 1916.
2. **Liability of persons in naval service**—The case of Ex parte White (228 Fed. Rep. 88), decided November 30, 1915, holds in general that enlisted men of the Army who have parental domiciles beyond the State of New Hampshire may not be liable to pay poll taxes required by a State law, even though such men establish a temporary residence in New Hampshire outside the Army post at which they are doing duty.
   The above decision is of importance to the Navy Department, as several enlisted men of the naval service were being prosecuted for nonpayment of poll taxes and the Department of Justice arranged with the State authorities of Maine and New Hampshire to suspend further action until this point was settled by the above-mentioned case. (*See* File 9212-47: 14.) C. M. O. 49, 1915, 28. *See also* File 9386-14, J. A. G., Nov. 5, 1915; 9212-22, Feb. 21, 1912; 26252-330: and b.
3. **Same**—"Persons in the naval service can not lawfully be required to pay poll taxes in places where they happen to be residing temporarily, incident to the performance of duty," and any "attempt by State officers to collect such taxes" will "meet with vigorous resistance by the United States." File 9212-74, Sec. Navy, May 20, 1916.
4. **Same**—An enlisted man was *advised* by the department to refuse payment of such taxes unless and until the court decides that the collection thereof is lawful; and to notify the department immediately by wire should any attempt be made to arrest him. File 9212-47:17, Sec. Navy, May 4, 1916.
5. **Purchase, discharge by**—The department is aware of no law by which a person in the State of Vermont is exempt from the payment of poll tax because of service in the Navy terminated "by a purchase discharge." File 9212-80, J. A. G., Aug. 1, 1916.
6. **Road poll tax.** *See* POLL TAXES, 1.
7. **School poll tax.** *See* POLL TAXES, 1.

"POOL FUND."

1. **Receiving ship, Norfolk, Va.** *See* File 3773-148, J. A. G., Dec. 27, 1912.

PORTO RICO.

1. **Ceded to United States**—By article 2 of the treaty between the United States and Spain, proclaimed April 11, 1899 (30 Stat. 1755), Spain ceded to the United States the island of Porto Rico. By article 8 of the same treaty (30 Stat. 1758) Spain ceded in Porto Rico all the buildings, wharves, barracks, forts, structures, public highways, and other immovable property which, in conformity with law, belong to the public domain, and as such belong to the Crown of Spain. File 26524-32, J. A. G., July, 1911.
2. **Citizenship.** *See* CITIZENSHIP, 31, 32.
3. **Jurisdiction.** *See* JURISDICTION, 108; MURDER, 25.
4. **Marine Corps**—Citizen of Porto Rico not eligible for appointment as second lieutenant. *See* CITIZENSHIP, 31.
5. **Naval reservation**—Interpretation of the order of the President of June 30, 1903, modifying proclamation of June 26, 1903, reserving lands in Porto Rico. File 7142-03 J. A. G., Sept. 21, 1903.
6. **Navy yard**—Employees at navy yards. *See* CITIZENSHIP, 32.
7. **R. S. 1860**—Section 1860, Revised Statutes, as amended, applies to Porto Rico, which has been held to be "Territory" under the terms of this section. File 1831-8, Sec. Navy, Aug. 30, 1907; 5381-1, Sec. Navy, Aug. 30, 1907; 11 Comp. Dec. 336, 339; 9736-18, J. A. G., June 25, 1910, p. 16.

POST-GRADUATE COURSE AT THE NAVAL ACADEMY. *See* MIDSHIPMEN, 65.

POST MORTEM. *See* AUTOPSY.

POST TRADERS.

1. **Abolished.** *See* File 3980-741, J. A. G., Dec. 3, 1912.
2. **Indebtedness to.** *See* File 10318-2, J. A. G., Jan. 15, 1910.
3. **Permitted.** *See* letter to Colonel Commandant, Marine Corps, Sec. Navy, March 16, 1883.

Digitized by Google

POSTPONEMENT. *See also* ARMY, 13; CONSTITUTIONAL RIGHTS OF ACCUSED, 17; COUNSEL, 20; COURT, 134; TRIALS, 7.

1. **Court**—Should grant if accused desires postponement for reasonable time to secure witnesses. *See* COURT, 134.

PRECAUTIONARY ORDERS IN TIME OF DANGER. *See* COLLISION, 17, 19.

PRECEDENCE. *See also* COMMAND; COMMISSIONS; R–1009.

1. **Army and Navy officers.** *See* PRECEDENCE, 16, 17.
2. **Boards.** *See* PRECEDENCE, 10.
3. **Change of precedence requested.**—*Held*, That as no mistake was made in the original determination of a certain officer's date of precedence and as his precedence since his appointment has not been affected by change in law, etc., his request for change in precedence should be disapproved. File 11130–9, J. A. G., July 18, 1910.
4. **Chiefs of Bureaus.** *See* File 4649–02, July 17, 1902; 5050–99, July 18, 1899; 6417, Feb. 18, 1907.
5. **Command**—Succession to, during temporary absence of commandant of a navy yard. *See* COMMAND, 14.
6. **Commanding officer**—Has precedence over all under his command. *See* COMMANDING OFFICERS, 30.
7. **Commissions of same date.** *See* COMMISSIONS, 28; PRECEDENCE, 17, 18; MIDSHIPMEN, 66.
8. **Constructive service.** *See* CONSTRUCTIVE SERVICE.
9. **Courts of inquiry.** *See* PRECEDENCE, 10.
10. **Courts-martial**—In processions on shore, on general courts-martial, summary courts-martial, courts of inquiry, boards of survey, and all other boards, line and staff officers shall take precedence according to rank. *See* R. S. 1489.
11. **Ensigns and second lieutenants of Marine Corps**—Appointed from graduates of Naval Academy, same date of commission but no prior commissioned service. *See* MIDSHIPMEN, 66.
12. **Febiger Board.** *See* File 5258–04; 5519–97; 6104–97; Navy Register, Jan., 1882, and Jan., 1885.
13. **Line officers**—By law, regulation, and established customs, take precedence according to rank and date of commission, and not by length of service. File 13559–17:1, Sec. Navy, June 19, 1916. *See also* File 3809–640:2, J. A. G., June 12, 1916; 26253–460:1, J. A. G., May 13, 1916; WARRANT OFFICERS, 23.
14. **Marine Corps**—Inasmuch as officers of the Marine Corps take rank with the Navy according to the date of commission, the precedence list having nothing to do with the Marine Corps, the officer whose commission bears the older date takes rank. File 5519–97, Sec. Navy, Nov. 1, 1897.
15. **Marine and Army officers.** *See* PRECEDENCE, 16, 17.
16. **Marine officers and officers of Navy**—Same rank—There is no express provision of law which fixes the relative rank and precedence of officers of the Marine Corps and officers of the line of the Navy.

    By an unwritten law of the Army and Navy, officers of the Army and officers of the Navy take relative rank, as respects the two classes, according to their respective grades; and if of similar grade, then according to dates of commission.

    Officers of the Marine Corps, who are "in relation to rank on the same footing as officers of similar grades in the Army," take rank and precedence relatively to line officers in the Navy according to grade; and if of similar grade, then according to dates of commission.

    There is no law making any distinction as to relative rank and precedence between the officers of the Marine Corps who are, and those who are not, graduates of the United States Naval Academy, either as respects themselves or officers of the line of the Navy. (25 Op. Atty. Gen. 517; 26 Op. Atty. Gen. 16; 29 Op. Atty. Gen. 264.) File 11130–27, J. A. G., Aug. 26, 1915. *See in this connection* File 3980–575:17, J. A. G., Aug. 19, 1911, p. 10.
17. **Marine officers and officers of Navy when of same rank, same dates of commission, and prior commissioned service**—With reference to this situation in the Army it is provided by law (sec. 1219, R. S.) that "in fixing relative rank between officers of the same grade and date of appointment and commission, the time which each may have actually served as a commissioned officer of the United States, whether continuously or at different periods, shall be taken into account. And in computing such time, no distinction shall be made between service as a commissioned officer

Digitized by Google

in the Regular Army and service since the 19th day of April, 1861, in the Volunteer forces, whether under appointment or commission from the President or from the governor of a State."

There is no similar statutory provision with reference to officers of the Navy, but the Navy Regulations, 1913, R-1010 (2) provide: "In fixing the relative rank of officers of the Army, officers of the Navy, and officers of the Marine Corps, of the same grade and date of appointment and commission, the time which each may have actually served as a commissioned officer of the United States, whether continuously or at different periods, shall be taken into account." File 11130-27, J. A. G., Aug. 26, 1915. *See in this connection* 13 J. A. G., 459, 1905; File 3980-575, J. A. G., Aug. 19, 1911, p. 10; COMMISSIONS, 28.

18. **Marine officers and officers of the Navy, same rank, same date of commission, but no prior commissioned service.** *See* MIDSHIPMEN, 66.
19. **Midshipmen**—Appointed to Marine Corps. *See* MIDSHIPMEN, 66.
20. **Same**—Midshipmen are graded according to proficiency in studies and not by dates of entry into the Academy (sec. 1483, R. S.). Therefore a midshipman who graduated at the head of his class and who entered in September would take precedence over a midshipman of the same class standing below him in studies, but who entered the Academy in May preceding September.

The departmental construction of laws relating to the relative precedence of line and staff officers should not be changed.

A staff officer would take precedence with but after the midshipmen entering the service six years before the staff officer.

Questions of precedence are determined by the law and not by the individual desire of the person affected. File 11130-2b, J. A. G., July 31, 1909. *See also* COMMISSIONS, 28. *See also* File 11130-37, J. A. G., Jan., 1917, for precedence of midshipmen as affected by Act of Mar. 4, 1913 (37 Stat. 891).
21. **Navy yard**—Succession to command in temporary absence of commandant. *See* COMMAND, 14.
22. **Precedence list**—Has nothing to do with Marine Corps. *See* PRECEDENCE, 14.
23. **Processions on shore.** *See* PRECEDENCE, 10.
24. **Professor of mathematics.** *See* PROFESSORS OF MATHEMATICS.
25. **Rear admirals**—Divided into senior and lower nines for pay, not precedence. *See* REAR ADMIRALS, 3.
26. **Retired officers**—With those on the active list. File 4991-1, Apr. 8, 1907. *See also* COMMAND, 14.
27. **Same**—Marine Corps. *See* COMMISSIONS, 17, 18.
28. **Secondary to devotion to public interests**—"Whenever men are associated in any calling or undertaking where the reward attainable for efficiency and faithful performance of duty is advancement to higher position according to length of service, those so associated naturally regard the matter of precedence with great jealousy. So it is with the officers of the naval and military forces of the Government. To them precedence is advancement. It is the very essence of the reward for which they constantly strive and to the attainment of which they must subordinate all other personal aims. First with them always is unselfish and unqualified devotion to the public interests they are pledged to serve. Then foremost among secondary considerations comes the reward promised for duty done." 13 J. A. G. 471.
29. **Secretary of the Navy, absence of**—In the absence of the Secretary of the Navy, the Assistant Secretary of the Navy [and the Chief of Naval Operation] the duties of the Secretary of the Navy, by direction of the President, are to be performed by the following designated chiefs of bureaus, in the order named: The Chief of the Bureau of Navigation; in his absence, the Chief of the Bureau of Ordnance; and in the absence of those two, the Chief of the Bureau of Steam Engineering. File 12753-9, July 29, 1912.
30. **Staff officers**—Marine officers take rank with line officers of the Navy according to the dates of their commissions while staff officers of the Navy take rank with line officers in accordance with their dates of precedence. File 5519-97, Sec. Navy, Nov. 1, 1897. *But see* Act of Mar. 4, 1913 (37 Stat. 891), and R-1009 (2), quoted in File 11130-37, J. A. G., Jan., 1917; pp. 3, 4.
31. **Succession to command**—Navy yards. *See* COMMAND, 14.

PRECEDENTS. *See also* RES JUDICATA; STARE DECISIS.

1. **Care**—Should be taken not to make erroneous precedents. C. M. O. 43, 1906, 3. *See also* C. M. O. 88, 1895, 1; 104, 1897, 5-6; 89, 1897; 7, 1914, 15.

Digitized by Google

2. **Conclusive**—Where department's precedents establish a uniform practice. *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 23–26.
3. **Customs of the service**—When they may be taken as precedents. *See* CUSTOMS OF THE SERVICE, 4.
4. **Department, of**—The decisions and instructions of the Navy Department upon such points as this are in such easily accessible form in court-martial orders that ignorance of or inattention to them are inexcusable. C. M. O. 42, 1915, 8.
5. **Disapproval**—To emphasize necessity of naval courts-martial conforming to correct precedents and procedure. C. M. O. 49, 1915, 11.
6. **Sentence disapproved**—To avoid creation of false precedents. C. M. O. 8, 1915, 3.
7. **Same**—Better that the accused should escape punishment than that a manifestly improper sentence should receive the approval of the department and thus become a precedent for the guidance of naval courts-martial in future cases. *See* CRITICISM OF COURTS-MARTIAL, 35. *See also* SECRETARY OF THE NAVY, 33.

PRECEPTS.

1. **Accused**—Should be present when precept is read. *See* ACCUSED, 1–9.
2. **Adjournment of court-martial**—Court may be granted authority by convening authority to adjourn over holidays in precept. *See* ADJOURNMENT OF COURTS-MARTIAL, 1.
3. **Addressed**—Precept should be addressed to president of general court-martial. *See* PRECEPTS, 17.
4. **Amendments to**—Precept not to be amended by the judge advocate of court. C. M. O. 216, 1901, 2.
5. **Board of Medical Examiners.** *See* BOARDS OF MEDICAL EXAMINERS, 5.
6. **Certified copy**—The certified copies of the precepts in many general court-martial cases have been prefixed instead of *appended* to the records. (Navy Regulations, 1913, R–768; Forms of Procedure, 1910, pp. 18, 55; C. M. O. 16, 1912, p. 3.) C. M. O. 42, 1914, 4. *See also* C. M. O. 1, 1894, 3; 3, 1894; 62, 1894; 12, 1895; 53, 1895; 2, 57, 1897; 58, 1897; 54, 1898; 17, 1910, 12; 36, 1914, 6; 41, 1914, 5. (C. M. O. 10, 1897, stating that the precept should be "prefixed" is overruled. *See also in this connection* G. O. 114, Mar. 22, 1869.)
7. **Challenge**—An error in statement of the rank, title, or relative position of any member in the precept will not affect the validity of the order. *See* CHALLENGES, 15.
8. **Commander in chief**—May not change precepts convening Boards of Medical Examiners and Naval Examining Boards. *See* BOARDS OF MEDICAL EXAMINERS, 5. NAVAL EXAMINING BOARDS, 4.
9. **Discussed.** G. C. M. Rec. 22761; 22810; 22924; 22925; 23003; 23095; 23119; 23218; 23431.
10. **Error in**—Rank, title, or relative position of a member. *See* CHALLENGES, 15; PRECEPTS, 7.
11. **Examining Boards, Naval**—Signed by Secretary of the Navy. *See* BOARDS OF MEDICAL EXAMINERS, 5; NAVAL EXAMINING BOARDS, 4.
12. **Judge advocate**—Precept is sufficient authority for judge advocate to act as such. C. M. O. 38, 1895, 2; 53, 1895, 2.
13. **Same**—The copy of the precept appended to the record shall be certified as true by the judge advocate. C. M. O. 17, 1910, 12; 21, 1910, 16; 27, 1913, 12.
14. **Marking of.** *See* CHARGES AND SPECIFICATIONS, 59. *See also* C. M. O. 27, 1913, 12, where marking was in error.
15. **Members and judge advocates of general courts-martial**—The precept is the order of appointment of the members and judge advocate of a general court-martial, and is the *only* authority for them to act as such during the trial. The orders to officers issued by the Bureau of Navigation, the Major General Commandant of the Marine Corps, or other authority, as the case may be, directing them to report to the president of the court for duty are in no sense appointments to the court and are not essential in order that the officer in question may properly sit as a member or judge advocate of the court. C. M. O. 38, 1910, 5; 33, 1912, 3. *See also* C. M. O. 155, 1897; 74, 1899; 103, 1899; 26, 1910, 8.
16. **Same**—Precept and modifications are alone capable of making changes and substitutions in court. C. M. O. 68, 1898.
17. **Modification of**—The precept and all modifications should be addressed to the president of the general court-martial and should not be confused with the orders to perform the duty. C. M. O. 26, 1910, 8.
18. **Same**—Must be read in court. C. M. O. 103, 1899; 35, 1900.

Digitized by Google

19. **Naval examining boards**—Signed by Secretary of the Navy. *See* BOARDS OF MEDICAL EXAMINERS, 5; NAVAL EXAMINING BOARDS, 4.
20. **New precept.** *See* C. M. O. 4, 1914, 4.
21. **Orders**—The precept orders members and judge advocates to duty on courts-martial. C. M. O. 30, 1910, 7.
22. **Orders to perform duty**—As members and judge advocates should not be confused with precepts and modifications thereto. *See* PRECEPTS, 15.
23. **Original precept**—The original precept should never be appended, a certified copy being all that is required. The original precept shall be returned to the convening authority when the court is dissolved, and shall in all cases be filled in the Navy Department. (Navy Regulations, 1913, R-768; Forms of Procedure, 1910, p. 18; C. M. O. 31, 1910, p. 3.) C. M. O. 42, 1914, 4. (G. O. 114, Mar. 22, 1869, overruled.
24. **Promotion of members or judge advocate**—In the precept a member's rank was "captain," while the record of proceedings disclosed him to be a "commodore, retired." A modification of the precept should have been issued and a certified copy appended to the record ordering this officer as a "commodore, retired" as a member. This irregularly did not invalidate. C. M. O. 23, 1910, 5. *See also* RETIRED OFFICERS, 23.
25. **Reading of precept**—It is incorrect to record that the "judge advocate read *aloud* the precept." *See* ALOUD, 1.
26. **Record of proceedings**—A certified copy of the precept convening a general court-martial must be appended to the record of proceedings. *See* PRECEPTS, 6, 23.
27. **Retired officers.** *See* PRECEPTS, 24.
28. **Substitution of members.** *See* PRECEPTS, 15, 16.
29. **Summary courts-martial.** *See* SUMMARY COURTS-MARTIAL, 61.
30. **Telegrams**—Appointing members. C. M. O. 56, 1897, 2.

PREJUDICE. *See* CHALLENGES, 13.

PRESENTING TO A PERSON IN THE CIVIL SERVICE FOR PAYMENT A CLAIM AGAINST THE UNITED STATES, KNOWING SAID CLAIM TO BE FRAUDULENT IN VIOLATION OF CLAUSE 1 OF ARTICLE 14, A. G. N.

1. **Assistant surgeon**—Charged with. C. M. O. 15, 1908.

PRESENTS. *See also* SUPERIOR OFFICERS.

1. **Superior officer shall not accept presents, etc., from inferior**—Navy Regulations, 1913, R-1520 (2) provides in part that no officer shall "receive any gift or present offered or presented to them as a contribution from persons in Government employ receiving a less salary than themselves." (R. S. 1748.) Paragraph 3 of same articles provide "No officer or other person under the Navy Department shall solicit subscriptions for the purpose of making a gift to a member of the immediate family of an officer of the naval service." *See* G. C. M. Rec. 30485, p. 531.

PRESIDENT OF THE UNITED STATES.

1. **Appeals to, by naval officers.** *See* APPEALS, 10, 11, 12, 13.
2. **Civil authorities**—It rests entirely in the discretion of the President in what cases and upon what conditions persons in the naval service shall be delivered to the civil authorities. *See* CIVIL AUTHORITIES, 19.
3. **Commander in chief**—Congress may provide for the organization of naval forces, active or reserve, but it can not require the President to order such naval forces to perform specified duty, or in fact any duty at all. The orders to be given to the land and naval forces of the United States are the function of command which belongs to the President as the constitutional commander in chief. (*See* Swaim *v.* United States, 28 Ct. Cls. 221, affirmed, 165 U. S. 553; Ex parte Milligan, 4 Wall. 139; 9 Op. Atty. Gen. 463.) File 28550-3, J. A. G., May 12, 1915.
4. **Same**—The President, as Commander in Chief, has authority to order a naval detachment to Raleigh, N. C., to participate in ceremonies attending unveiling of a monument to a late ensign. File 3679-2. *See also* BANDS, 1.
5. **Criticism of the President by a naval officer**—Tried by general court-martial. *See* OFFICERS, 89.

"A Court of Inquiry, begun and held at the Navy Yard at Brooklyn, in the State of New York, on Thursday the tenth day of May, One Thousand Eight Hundred Twenty One * * * for the purpose of investigating the conduct of * * * " consisting of making to a British consul at Pernambuco "certain declarations and representations, respecting the President and Government of the United States, highly improper, and unbecoming an officer of the Navy " Ct. Inq. Rec. 377 (1821).

Digitized by Google

6. **Commuting sentences.** *See* COMMUTING SENTENCES, 4; DISMISSAL, 18; PRESIDENT OF THE UNITED STATES, 8.
7. **Dismissal**—Phraseology of a dismissal. C. M. O. 19, 1909.
8. **Dismissal mitigated**—The President mitigated a sentence of dismissal to loss of numbers on the theory that latter is included in former. *See* DISMISSAL, 18.
9. **Same.** *See* C. M. O. 9, 1879, 2; 5, 1882, 3; 21, 1882, 3; 51, 1882, 3.
10. **Same**—"To be reduced in rank so that his name shall be placed at the foot of lieutenant commanders in the Navy." C. M. O. 50, 1898, 2.
11. **Same**—In case of midshipmen. *See* PARDONS, 5, 21.
12. **Disrespect**—Naval officer spoke disrespectfully of the President and was tried by general court-martial. *See* OFFICERS, 89.
13. **Heads of department**—President acts through—As the President speaks and acts through the heads of several departments in relation to subjects which appertain to their respective duties, their acts in such matters may be presumed to have been done by the approbation and direction of the President, and may be considered in legal contemplation, as his acts. (Weller *v.* U. S., 41 Ct. Cls. 335; McCollum *v.* U. S., 17 Ct. Cls. 92; McElrath *v.* U. S., 12 Ct. Cls. 201, 214; Wilcox *v.* Jackson, 13 Pet. 498; McElrath *v.* U. S., 102 U. S. 426.) File 5460-60, J. A. G., Jan. 22, 1913, p. 3. *See also* C. M. O. 12, 1915, 11; 29, 1915, 6; 42, 1915, 13.
14. **Marines serving with Army.** *See* MARINES SERVING WITH ARMY.
15. **Midshipmen**—Advisable that sentence of dismissal be confirmed by President. C. M. O. 31, 1915, 11. *See also* HAZING, 6; MIDSHIPMEN, 32.
16. **Ministerial acts**—The President can not be required to perform ministerial acts in person. C. M. O. 12, 1915, 11.
17. **Navy Regulations**—Necessity of approval of Navy Regulations by President. *See* REGULATIONS, NAVY, 16-19.
18. **Officer**—Tried by general court-martial for using disrespectful language to the President of the United States. G. O. 85, Oct. 11, 1867. *See also* OFFICERS, 89.
19. **Officer's dismissal**—Phraseology in confirming. *See* C. M. O. 19, 1909, 1.
20. **Pardons.** *See* PARDONS.
21. **Same**—The President in the exercise of his power to pardon may commute a sentence. *See* COMMUTING SENTENCES, 4; DISMISSALS, 18; PARDONS, 35, 36; PRESIDENT OF THE UNITED STATES, 8.
22. **Pay clerks**—Sentence of dismissal should be confirmed by President, as a pay clerk is a warrant officer.
23. **Paymaster's clerks**—Not necessary that President should confirm sentence of dismissal. *See* PAYMASTER'S CLERKS, 8, 9. *But see* C. M. O. 24, 1915; 26, 1915.
24. **Regulations, Navy**—Necessity of approval of Navy Regulations by President. *See* REGULATIONS, NAVY, 16-19.
25. **Resignations of officers.** *See* RESIGNATIONS.
26. **Secretary of the Navy**—Act of Secretary of the Navy is the act of the President. C. M. O. 12, 1915, 11; 29, 1915, 6; 42, 1915, 13. *See also* PRESIDENT OF THE UNITED STATES, 13.
27. **Sentence**—Imposed by Army court-martial, mitigated by President after return of accused to naval jurisdiction. C. M. O. 49, 1914, 4. *See also* MARINES SERVING WITH ARMY, 6.

PRESS COPY.

1. **Evidence, as.** *See* CARBON COPIES.

PRESUMPTIONS.

1. **Death**—Presumption of death. *See* PRESUMPTIONS OF DEATH.
2. **Law**—Everyone is presumed to know the law. *See* IGNORANCE OF LAW.
3. **Normal**—"The law presumes the normal, not the abnormal." File 26543-87:2, Sec. Navy, Apr. 28, 1913, p. 4.
4. **"Official duties"**—The law presumes that official duties are properly performed. C. M. O. 27, 1913, 15.
5. **Regulations**—Legality of a regulation is presumed. *See* REGULATIONS, NAVY, 48.

PRESUMPTION OF DEATH.

1. **Death gratuity.** *See* DEATH GRATUITY, 24.
2. **Seven years is usual period**—While seven years is the usual period, this time may be shortened by proof of facts which would prove a presumption of death. File 26254-399; 7657-277, J. A. G., Feb. 6, 1915; C. M. O. 10, 1915, 9. *See also* COMMON LAW, 7; LINE OF DUTY AND MISCONDUCT CONSTRUED, 21.

Digitized by Google

PREVIOUS CONVICTIONS.

1. **Accused**—Must be present when evidence of previous convictions is read. *See* PREVIOUS CONVICTIONS, 19.
2. **Army**—Evidence of previous convictions by courts-martial while serving an enlistment in the Army is not admissible as evidence of previous convictions before naval courts-martial (C. M. O. 17, 1910, p. 6.) C. M. O. 29, 1914, 5.
3. **Same**—The "accused objected to the reading of the evidence of previous convictions for the reason that they had no bearing on the present case." The court was cleared and when opened the "president announced that the reasons given by the accused in objecting to the introduction of the evidence of previous convictions were not considered by the court to be valid, and unless the accused presented some valid objection, and still persisted in his objection on the grounds given, the evidence of previous convictions would be introduced over his objection in the regular manner." The accused was thus given every opportunity to make further objection, and as none was forthcoming the record of previous convictions was introduced. The evidence of previous convictions objected to by the accused consisted of a naval general court-martial, a naval summary court-martial, and an Army summary court-martial while serving temporarily with the Army at Vera Cruz, Mexico.

   Subject to the regulations governing evidence of previous convictions such convictions by Army courts under Army Regulations should be regarded as previous convictions in cases of enlisted men of the Marine Corps who have served temporarily with the Army. (File 5945-24, Oct. 17, 1907.) C. M. O. 36, 1914, 8.
4. **Certified copies**—Of extracts of previous convictions must be appended to record. C. M. O. 28, 1910, 4.
5. **Clerical error**—It was noticed by the department that evidence of previous convictions was in the hands of the judge advocate, but the record showed no entry as to it being introduced. Upon inquiry it was ascertained that such evidence had been introduced properly but through a clerical error the entries had been omitted from the record. C. M. O. 55, 1910, 9.
6. **Commanding officers**—"Are enjoined to exercise care to insure that the provisions of Article 1832(2)[Navy Regulations, 1913, R-624(2)] are promptly carried out in all cases, otherwise men whose records are bad, may, when brought to trial, properly object to the introduction of evidence of previous convictions." C. M. O. 6, 1909, 4.
7. **Court-martial orders**—As evidence of. *See* COURT-MARTIAL ORDERS, 26-28.
8. **Current enlistment**—Must relate to current enlistment, except when *last* enlistment was terminated by sentence of court-martial or by discharge as undesirable by order of the department, in which cases all convictions occurring in prior enlistment thereby terminated are admissible. C. M. O. 29, 1914, 4; C. M. O. 36, 1914, 8. *See also* PREVIOUS CONVICTIONS, 20.
9. **Definition**—Of previous convictions is not evidence or testimony in the legal sense, which refers to matter tending to establish the guilt or innocence of the accused upon the charge. C. M. O. 29, 1914, 5. *See also* PREVIOUS CONVICTIONS, 19.

   A case was approved where the court permitted the record of a trial by a civil court as evidence of a previous conviction, but the department extended clemency. C. M. O. 86, 1902.
10. **Disapproval.** *See* PREVIOUS CONVICTIONS, 19.
11. **Extended enlistments.** *See* PREVIOUS CONVICTIONS, 19, 20.
12. **Findings**—Previous convictions are introduced after findings are reached, not before. C. M. O. 11, 1897, 2-3.

    "It is also noted that the fact that there were or were not previous convictions was omitted entirely from the proceedings, which is contrary to the authorized procedure. C. M. O. 36, 1905, 3.
13. **Same**—No evidence, except evidence of previous convictions, shall be admitted after the court arrives at its finding. C. M. O. 15, 1910, 12. *See also* EVIDENCE, 15.
14. **Improperly introduced**—The judge advocate introduced and the court received evidence of previous conviction which was clearly inadmissible. As the introduction of this evidence of previous conviction may have influenced the court in determining the sentence adjudged the court was ordered to reconvene for the purpose of reconsidering the sentence, excluding during such reconsideration the above-mentioned evidence of previous conviction. C. M. O. 17, 1910, 6.
15. **Indorsement on a letter**—The judge advocate introduced in evidence for the purpose of showing previous conviction of the accused, an indorsement of The Adjutant General of the Army, upon a letter of the Adjutant and Inspector of the Marine Corps. This procedure was improper, as such writing is not competent evidence to prove previous conviction. C. M. O. 47, 1910, 4.

Digitized by Google

16. **Judge advocate**—If the judge advocate has notice of the existence of proper evidence of previous convictions, he should obtain same and introduce it. C. M. O. 47, 1910, 9; 14, 1910, 9; 15, 1910, 9; 1912, 4.

17. **Same**—If the judge advocate has in his possession proper evidence of previous convictions he should not fail, either from carelessness or any other reason, to introduce it before the court. C. M. O. 42, 1909, 3; 47, 1910, 8; 15, 1910, 9; 21, 1910, 13.

18. **Judicial notice**—Courts-martial may take judicial notice of court-martial orders containing evidence of previous convictions. *See* COURT-MARTIAL ORDERS, 26–28.

19. **Nature and admissibility of**—Prior to October 4, 1910, evidence of previous convictions, relating to an enlistment from which the accused had been discharged as undesirable, was not admissible; but a change in the Navy Regulations under that date made such evidence admissible.

In order to be admissible, evidence of previous convictions must relate to the current enlistment of the accused (Navy Regulations, 1913, R–617 (3); R–804 (2); Forms of Procedure, 1910, p. 41; C. M. O. 14, 1910, p. 8; 17, 1910, p. 6) *except* in cases where the accused has been previously discharged from the service through sentence of a court-martial (Navy Regulations, 1913, R–804 (2); Forms of Procedure, 1910, p. 41; C. M. O. 14, 1910, p. 8; 17, 1910, p. 6; 28, 1913, p. 4) or by order of the department as undesirable (Navy Regulations, 1913, R–804 (2); C. M. O. 28, 1913, p. 4, overruling C. M. O. 14, 1910, pp. 8–9; 17, 1910, p. 6, both of these orders antedating Oct. 4, 1910). [For modification of the foregoing *see* PREVIOUS CONVICTIONS, 8, 20.]

The exception in which evidence of previous convictions is admissible "Where the accused has been previously discharged from the service through sentence of a court-martial" includes evidence of previous convictions occurring *during* such enlistment as well as evidence of the conviction by which the accused was discharged therefrom (File 26504–214).

In the cases of men who have extended their enlistments, convictions occurring prior to the expiration of the four-year term of enlistment or prior to the current extension of such enlistment, shall not be considered as having occurred during their current enlistment.

It is further required that, in order to be admissible, the evidence of previous convictions must refer to actual trials and convictions that have been approved by the authorities whose action is requisite to give full effect to the sentence (Navy Regulations, 1913, R–617 (3); R–804 (2); Forms of Procedure, 1910, p. 41) *except* in cases upon which action has been withheld and the accused placed on probation (Navy Regulations, 1913, R–804 (2); Forms of Procedure, 1910, p. 41). [*See* PREVIOUS CONVICTIONS, 20.]

Where the accused has previously been tried and found guilty and such finding has been approved, evidence thereof is admissible as a previous conviction although the sentence of the court may have been remitted in whole or in part (File 26806–117, Apr. 21, 1914.)

When the finding and sentence have been disapproved by the proper reviewing authority this is not admissible as a previous conviction on a subsequent trial (Navy Regulations, 1913, R–617 (3); C. M. O. 54, 1899; 35, 1900; 146, 1901; 34, 1903; 106, 1903, 4; 31, 1910, 4).

Evidence of previous convictions by courts-martial while serving an enlistment in the Army is not admissible as evidence of previous convictions before naval courts-martial (C. M. O. 17, 1910, p. 6).

In cases in which the accused has first been found not guilty by the court, but in revision the court revokes this finding and substitutes therefor a finding of guilty, evidence of previous convictions may be introduced during the proceedings in revision; such "evidence" of previous convictions not being evidence or testimony in the legal sense, which refers to matter tending to establish the guilt or innocence of the accused upon the charge rather than to matter introduced after the trial has been finished, for the sole purpose of being considered by the court in arriving at its sentence. (G. C. M. Rec. 28613, Feb. 20, 1914, overruling C. M. O. 42, 1909, p. 3, 21, 1910, p. 13.) In such cases the accused must of course be present when the evidence of previous convictions is introduced. C. M. O. 29, 1914, 4–5. *See also* EVIDENCE, 15.

20. **Same**—Evidence of previous convictions must refer to actual trials and convictions that have been approved by the authorities whose action is requisite to give full effect to the sentence, except in cases upon which action has been withheld and the accused placed on probation. Evidence of previous convictions must relate to the current enlistment of the accused, except when the last enlistment was terminated by sentence of court-martial or by discharge as undesirable by order of the department

Digitized by Google

in which case all convictions occurring in the prior enlistment thereby terminated are admissible. In the cases of men serving under extended enlistments convictions occurring prior to the expiration of the four-year term of enlistment, or prior to the current extension of such enlistment, shall not be considered as having occurred during their current enlistment. (R-617 (3); R-804 (2)). *See* C. M. O. 36, 1914, 8.

21. **Object**—Accused must be given an opportunity to enter reasonable objection to the introduction of evidence of previous convictions. C. M. O. 21, 1910, 13. *See also* C. M. O. 9, 1908, 7.
22. **Offense**—Committed *after* that for which the accused is on trial. File 26287-173.
23. **Rerevision**—The judge advocate neglected to introduce evidence of previous conviction at the proper time. The record was returned for revision with reference to the sentence and proceedings and called attention to the neglect of the judge advocate in not introducing the evidence of previous conviction. The court then received evidence of previous conviction introduced by the judge advocate in revision. The record was returned for a rerevision of the sentence and with a statement that that part of the proceedings referring to previous conviction should be struck out and not be considered in arriving at a sentence. The court in rerevision struck out that part of the proceedings in first revision referring to the introduction of previous conviction. C. M. O. 42, 1909, 3.
24. **Revision**—Illegal to enter in revision. C. M. O. 42, 1909, 3; 21, 1910, 13, 16. *But see* PREVIOUS CONVICTIONS, 19, for a modification of this.
25. **Sentence remitted.** *See* PREVIOUS CONVICTIONS, 19.
26. **Sentence terminates enlistment.** *See* PREVIOUS CONVICTIONS, 10, 20.
27. **"Set aside"**—In a case where a court permitted the introduction as evidence of a previous conviction by a summary court-martial in which the sentence had been "set aside by the Navy Department" the department *held* that the court erred. C. M. O. 34, 1903, 1.
28. **Trials and convictions.** *See* PREVIOUS CONVICTIONS, 19, 20.

PRIMA FACIE.

1. **"Absence from station and duty after leave had expired"**—Prima facie case of. *See* ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED, 18.
2. **"Desertion"**—Prima facie case of. *See* DESERTION, 102-104.
3. **Embezzlement.** *See* EMBEZZLEMENT, 24.
4. **Evidence.** C. M. O. 31, 1915, 15. *See also* DESERTION, 105; FRAUDULENT ENLISTMENT, 72; SERVICE RECORDS, 16.
5. **Fraudulent enlistment**—Prima facie case of. C. M. O. 12, 1911, 4; 10, 1913, 3. *See also* FRAUDULENT ENLISTMENT, 23, 27, 71, 72.
6. **Incapacity to perform active duty**—Right of officer to promotion. *See* PROMOTION, 19, 64, 97.
7. **Officers**—Prima facie responsible. C. M. O. 41, 1888, 5; 128, 1905, 2.
8. **Promotion**--Officers found prima facie not qualified for promotion. *See* PROMOTION, 19, 64, 97.
9. **Theft**—Prima facie case of. *See* THEFT, 14-16.

PRIMARY EVIDENCE. *See* CARBON COPIES.

PRINTER, CHIEF. *See* RATING, 2.

PRINTING PRESS.

1. **Requisition for**—A requisition for a printing press by the Boston Naval Prison was rejected. Although printing for navy yards is not required by law to be done at the Government Printing Office, it is not considered that the cost of a press should properly be charged to the appropriation "Expenses of courts-martial, prisoners and prisons," even though the press is to be operated by prisoners, because the amount of printing to be done thereby for the use of the prison itself is comparatively negligible. File 12494-155, J. A. G., Mar. 30, 1912.

PRISONS.

1. **Disciplinary Barracks.** *See* DETENTIONERS.
2. **Printing press for.** *See* PRINTING PRESS.

Digitized by Google

PRISONERS.

1. **Absence of, during trial.** *See* ACCUSED, 1-9.
2. **Allotments.** *See* ALLOTMENTS, 6, 7.
3. **Allowances**—In general. *See* ALLOWANCES, 6, 7.

   Men discharged pursuant to this schedule (G. O. 110, Revised), except those who have served pursuant thereto a term of imprisonment in a naval prison on shore, will not be regarded as "discharged naval prisoners" within the meaning of the acts of February 16, 1909, sec. 13 (35 Stat. 622), and March 3, 1909 (35 Stat. 756), providing for allowances to prisoners on discharge. General Order No. 110 (Revised, July, 1916), p. 5.
4. **Awaiting trial**—Status of—The department has recently received complaints from relatives and those interested in enlisted men on account of the fact that certain men awaiting trial by general court-martial while retained in the brig on a receiving ship were required to wear clothing on which was stamped the word "Prison," and that such men on first entering the brig have their hair closely clipped.

   Attention is invited to the fact that men confined in the brig of a receiving ship awaiting trial by general court-martial are not undergoing punishment and have not been sentenced to imprisonment, but are merely confined pending trial and awaiting action thereon. It should be distinctly understood that the status of these men is not that of prisoners undergoing punishment, and it is contrary to the policy of the department to subject them to treatment which unnecessarily savors of a prison status.

   The department disapproves of the use of the word "Prison" on the clothing which is worn by men in this status, and directs that if some mark is necessary to distinguish these men from other enlisted men for the purpose of preventing their escape, some inconspicuous designating mark be used instead of the word "Prison." The department also regards as unnecessary for the strict rules of cleanliness that the hair of men so confined be clipped and directs that this custom be discontinued.

   The department is not unmindful of the necessity of cleanliness and discipline at all times and commends the efforts of officers in charge of brigs to effect the same; at the same time it is not the policy of the department to impose unnecessary hardships on men in the above status nor to make their confinement awaiting trial punitive in its character. (*See* Navy Regulations, 1913, R-1426; R-1427 (1).) File 26251-10542, Sec. Navy, July 10, 1915; C. M. O. 27, 1915, 9.
5. **Civil authorities**—Naval prisoners wanted by civil authorities. *See* CIVIL AUTHORITIES, 37, 38; GENERAL ORDER No. 121, Sept. 17, 1914, 16; JURISDICTION, 111.
6. **Civilian outfits for**—Chargeable to "Pay, miscellaneous." *See* 27210-150, J. A. G., Feb. 9, 1912.
7. **Clothing allowances.** *See* DETENTIONERS, 2.
8. **Clothing, useless**—Disposition of useless clothing. *See* PUBLIC PROPERTY, 1, 6.
9. **Death of.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 80, 81.
10. **Debts**—Liquidation of. *See* File 26507-214:29, J. A. G., Feb. 25, 1916; 26287-560; 26251-7004:2, Sec. Navy, Mar. 31, 1913; 26287-560, Sec. Navy, Aug. 3, 1910.
11. **Dental services.** *See* DENTAL SERVICES, 1.
12. **Detentioners.** *See* DETENTIONERS.
13. **Disposition of effects.** *See* DISPOSITION OF EFFECTS, 7, 8.
14. **Employment of.** *See* File 26288-215: 2.
15. **"Enticing a prisoner to escape"**—Enlisted man charged with. C. M. O. 48, 1889.
16. **Escape of prisoners from a naval prison**—Court of inquiry convened to investigate. Ct. Inq. Rec. 5025. *See also* File 7657-125.
17. **Escaped court-martial prisoners**—Jurisdiction of civil and naval authorities over an escaped court-martial prisoner on parole for civil offense. *See* JURISDICTION, 99.

    In reply to a question as to the status of a naval prisoner who "escaped" from the guard after having been convicted of "Desertion" the following reply was made: "In reply you are informed that the case stated in your letter is such that this department could not with propriety express an opinion on the subject or give consideration to a person who is in the status" of the man in question. "That he is amendable to trial and punishment is unquestioned; and he should be advised to surrender himself to the nearest navy yard or marine barracks to be dealt with according to law." File 26516-221, J. A. G., Oct. 12, 1916.
18. **Escaping prisoner**—Guard fired at escaping prisoner and killed innocent bystander. *See* MANSLAUGHTER, 9.

Digitized by Google

19. **Same**—"If a prisoner or detentioner attempts to escape the sentinel shall call 'halt.' If the prisoner or detentioner fails to halt when the sentinel has once repeated the call, and if there be no other apparent means of preventing his escape, the sentinel shall fire upon him. A sentinel will use his firearms only in cases of attempted escape or mutiny, and then only after giving due warning; but when, in his judgment, the time has arrived to fire, or he is ordered to fire, he must aim to hit and disable the offender." (Manual for the Government of United States Naval Prisons and Detention Systems. 1916, p. 19.) *See also* MANSLAUGHTER, 9.
20. **General Order No. 121.** *See* GENERAL ORDER NO. 121, SEPT. 17, 1914.
21. **Government Hospital for the Insane**—Prisoners and patients at. *See* GOVERNMENT HOSPITAL FOR THE INSANE.
22. **Injury to prisoner while in confinement.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 81.
23. **Jurisdiction**—Over prisoners after discharge or expiration of enlistment. *See* ENLISTMENTS, 8-11; JURISDICTION, 52, 110.
24. **Letters, right to open**—"Prison authorities have no right to open and inspect letters to or sent by prisoners or detentioners second class without the consent of such prisoners or detentioners second class. They may, however, retain unopened letters until the prisoners or detentioners second class are released or the letters otherwise lawfully disposed of." (Manual for the Government of United States Naval Prisons and Detention Systems, 1916, sections 62-68, pp. 36-44.)
25. **Marriage of.** *See* MARRIAGE, 2.
26. **Pay.** *See* DETENTIONERS, 2; PAY, 15, 28, 79.
27. **Probation.** *See* GENERAL ORDER NO. 110, JULY 27, 1914; NAVAL INSTRUCTIONS, 1913, I-4893; PROBATION.
28. **Process**—Service of. *See* GENERAL ORDER NO. 121, SEPT. 17, 1914.
29. **Receipts for.** *See* G. O. 46, JAN. 5, 1865.
30. **Restoration to duty**—Does not operate as a constructive pardon. *See* PARDONS 47.
31. **Same**—As a bar to further disciplinary proceedings. File 1493-04; 26251-8539: 1, J. A. G., Jan. 21, 1914. *See also* JEOPARDY, FORMER, 32.
32. **Specialists**—Prisoners examined by specialists. *See* File 26262-1625: 21. Sec. Navy, May 20, 1813.
33. **Transportation of**—When distance to home is excessive the prisoner should be transported to place of enlistment instead of his home.
34. **Treatment and place of confinement.** *See* PRISONERS, 4; SWEAT BOXES.
35. **Uniforms.** *See* DETENTIONERS, 2.
36. **War**—Prisoners of war. *See* PRISONERS OF WAR.
37. **Wedding**—Prisoner married while in prison. *See* MARRIAGE, 2.
38. **Witnesses**—Naval prisoners wanted by civil authorities as witnesses in civil courts. *See* CIVIL AUTHORITIES, 38; GENERAL ORDER NO. 121, SEPT. 17, 1914, 23.
39. **Same**—Where the department had directed the release of a prisoner, it was subsequently directed that the discharge be withheld in order that the prisoner might be available as a witness. File 2847-31, Sec. Navy, May 12, 1808.

PRISONERS OF WAR.

1. **Treatment and internment**—Of belligerents by neutrals. *See* File 28573-1, J. A. G., Dec. 20, 22, 1915; 28573-4, J. A. G., Dec. 23, 1915.

PRIVATE ADMINISTRATOR. *See* DISPOSITION OF EFFECTS, 2.

PRIVATE DEBTS.

1. **Order to pay.** *See* DEBTS, 17, 18.

PRIVATE DETECTIVE AGENCY.

1. **Reward for deserters**—Payment to. *See* REWARDS, 11, 12.

PRIVATE LITIGATION. *See also* CIVIL COURTS.

1. **Board of inquest**—Copy of record requested. *See* BOARDS OF INQUEST, 6.
2. **Debts**—Of officers. *See* MESSES.
3. **Divorce.** *See* CIVIL COURTS, 7.
4. **Officers**—Government will not compel officers to testify in private litigation. *See* WITNESSES, 89.
5. **Promotion**—Litigation pending in civil courts—Procedure of a Marine Examining Board. *See* MARINE EXAMINING BOARDS, 3.
6. **Wife**—Support of. *See* CIVIL COURTS, 7.
7. **Witnesses.** *See* GENERAL ORDER NO. 121, SEPT. 17, 1914, 15, 23.

Digitized by Google

PRIVATE REPRIMANDS.

1. **Nature of**—A letter of reprimand to an officer, although necessarily seen by several persons before reaching its destination, is nevertheless a "private" reprimand, and not public. File 26251-2993, J. A. G., Mar. 10, 1910. *See also* LIBEL, 1.
   A private reprimand is executed by addressing a letter to the officer concerned through the usual official channels. File 26251-2992, J. A. G., Mar. 10, 1910, p. 8.
2. **Plea in bar**—Private reprimand not good grounds on which to base a plea in bar of trial. C. M. O. 28, 1907, 3. *See also* JEOPARDY, FORMER, 23, 25.
3. **Same**—A private reprimand, administered by the commander in chief of a fleet to a naval officer in accordance with the recommendation of a court of inquiry, as a punishment for an offense, such as neglect of duty, is no bar to a subsequent trial of such officer by general court-martial for the same offense. (25 Op. Atty. Gen., 623.) C. M. O. 7, 1914, 6. *See also* JEOPARDY, FORMER, 23.

PRIVILEGE.

1. **Attorney and client.** *See* C. M. O. 5, 1917; PRIVILEGE, 2, 3; WIFE, 13.
2. **Attorney in fact**—Letters from a person to his attorney in fact do not come within the class of privileged communications. File 26251-12159, Sec. Navy, Dec. 9, 1916, p. 8.
3. **Letter written by officer to attorney**—A communication was addressed by a naval officer to his agent or attorney in fact containing libelous statements concerning his superior officer; the agent thereafter employed an attorney at law and gave him, among other papers, the original of said libelous communication; this libelous communication was forwarded by the attorney at law to the Secretary of the Navy as part of a report made by him to the Navy Department in behalf of the writer of said communication against the officer libeled; the attorney at law contends that said libelous communication was privileged, was negligently sent by him to the Navy Department contrary to his authority and without the actual or implied consent of the writer thereof, and that accordingly said libelous communication can not be used in evidence against the officer by whom it was written. *Held:* The letter is not privileged and may be used as evidence against the writer. (*See* 40 Cyc. 2377; Pearson *v.* State, 56 Tex. Cr. 607, 120 S. W. 1004; 5 Cyc. 708; 38 Cyc. 295; Sec. 856 Penal Code of N. Y.; People *v.* Loveless, 84 N. Y. Sup. 1114; People *v.* Wickes, 98 N. Y. Sup. 163; 40 Cyc. 2365, citing Turner *v.* Turner, 123 Ga. 5, 50 S. E. 969; Collins *v.* Johnson, 16 Ga. 458; Phoebus *v.* Webster, 40 Misc. (N. Y.) 528, 82 N. Y. Sup. 868; 25 Cyc. 367; 25 Cyc. 570; 25 Cyc. 572; 25 Cyc. 581; State *v.* Shaffner, 44 Atl. 620, 621; Swindle *v.* State, 10 Tenn. 581, 582; Mankin *v.* State, 41 Tex. Cr. R. 662; Haase *v.* State, 53 N. J. Law, 34; Brungger *v.* State, 49 Fed. Rep. 124; Collins *v.* Hoffman, 26 Ann. Cas. 13; Greenleaf, secs. 237, 239; Wigmore, sec. 2286, 2300; Rice on Evidence, p. 651; Best on Evidence, sec. 581; 23 A. & E. Encycl. of L. 56, 58, 60; Lifschitz *v.* O'Brien, 127 N. Y. Supp. 1091, 1092; Conn. Mut. Life Ins. Co. *v.* Schaefer, 94 U. S. 457; Blackburn *v.* Crawfords, 13 Wall. 175; Glover *v.* Patten, 165 U. S. 394; Stone *v.* Minter, 50 L. R. A. 359; Federal Criminal Code, section 146, 35 Stat., 1114; File 26251-20933, J. A. G., Mar. 10, 1910.) File 26251-12158-12159, J. A. G., August, 1916; C. M. O. 5, 1917.
4. **Self-incrimination.** *See* SELF-INCRIMINATION.
5. **State secrets.** *See* EVIDENCE, 82.
6. **Wife.** *See* WIFE, 8, 11-13.

PRIZE COURTS.

1. **Advance bases**—Treatment of neutral merchant ships seized as prizes by belligerents and taken to an advanced base where prize proceedings can not be had and it may be impossible for military reasons to send such vessels to another port. File 28573-13:18, J. A. G., Nov. 18, 1916.
2. **Belligerent rights over vessels**—Awaiting action of prize court. File 28573-13:18, J. A. G., Nov. 18, 1916.

PRIZE FIGHTING. *See* MANSLAUGHTER, 13.

PRIZE MONEY.

1. **Prohibited in Navy**—Allowance of prize money to persons in the Navy is prohibited. File 27601-116:2, J. A. G., May 17, 1915; 27673-342, J. A. G., Dec. 23, 1915. *See also* SALVAGE, 2; An. Rep. J. A. G., 1900, p. 5.
2. **Sentence of general court-martial**—An acting master's mate was sentenced among other things to lose "all prize money and pay that may become due him." G. O. 46, Jan. 5, 1865.
3. **Spanish War.** *See* An. Rep. J. A. G., 1898, pp. 11-12; Ann Rep. J. A. G., 1899, p. 8; File 4853; 9520-02.

Digitized by Google

PROBATION.
1. **Additional punishment**—For misconduct during probation. C. M. O. 21, 1910, 11-12; G. C. M. Rec. 23368; GENERAL ORDER No. 110, JULY 27, 1914, 16.
2. **Clemency**—Accused placed on probation because of a recommendation to clemency by the members of a court-martial. *See* CLEMENCY, 44, 64, 65.
3. **Convening authority**—Action of convening authority regarding probation. *See* CONVENING AUTHORITY, 46.
4. **Department**—Accused placed on probation by department. C. M. O. 42, 1909, 9.
5. **Desertion**—Accused convicted of "Desertion," placed on probation—Pay status of C. M. O. 16, 1912, 4.
6. **Same**—Accused placed on probation and deserted. C. M. O. 42, 1909, 9.
7. **Detentioners.** *See* DETENTIONERS.
8. **G. O. 110.** *See* GENERAL ORDER No. 110, JULY 27, 1914.
9. **I-4893.** *See* NAVAL INSTRUCTIONS, 1913, I-4893.
10. **Officers**—Procedure to place an officer on probation who has been sentenced to dismissal. The case should be laid before the President with the recommendation that the officer be placed on probation. File 26251-5882, J. A. G., Apr. 17, 1912. *See* C. M. O. 33, 1911, where this was done. *See also* DISMISSAL, 18, 19.
11. **Same**—Sentenced to dismissal, placed on probation. *See* DISMISSAL, 19; PRESIDENT OF THE UNITED STATES, 8-11.
12. **Same**—Officers placed on probation. C. M. O. 33, 1911; 20, 1912, 4.
13. **Pay of probationers.** C. M. O. 16, 1912, 4. *See also* PAY, 15; PROBATION, 14.
14. **Prisoners**—Under section 9 of the act, Feb. 16, 1909 (35 Stat., 621), the Secretary of the Navy is authorized to suspend the sentences of courts-martial and restore prisoners to duty on probation and during such period the probationers are entitled to receive the full pay of their respective ratings. (Comp. Dec., Nov. 2, 1910; 17 Comp. Dec. 311.) *See* File 26254-529.
15. **Same**—Restored to duty on probation. C. M. O. 6, 1915, 11. *See also* CONVENING AUTHORITY, 55.
16. **Procedure**—In different offenses. *See* File 26504-108, J. A. G., Apr. 6, 1911.
17. **Reports.** *See* C. M. O. 47, 1910, 10; 1510, 4; 17, 1910, 5, 12; 21, 1910, 12; 21, 1912, 3, 4.
18. **Secretary of the Navy**—Is the only convening authority with power to place accused on probation. *See* CONVENING AUTHORITY, 46. *But see* GENERAL ORDER No. 110, JULY 27, 1914; NAVAL INSTRUCTIONS, 1913, I-4893; Manual for the Government of United States Naval Prisons and Detention Systems, 1916, sec. 12.
19. **Status of probationers.** C. M. O. 16, 1912, 4.
20. **Warrant officers**—Placed on probation. C. M. O. 48, 1914.

PROCEEDINGS NOT PREJUDICIAL TO ACCUSED'S INTERESTS. *See* ERROR, WITHOUT INJURY.

PROCESS. *See* CIVIL AUTHORITIES; GENERAL ORDER No. 121, SEPT. 17, 1914.

PROCLAMATIONS.
1. **Judicial Notice.** *See* STATUTES, 10.

PROCURING STORES, ARTICLES, AND SUPPLIES FOR, AND DISPOSING THEREOF TO, ENLISTED MEN AT A NAVAL STATION, FOR HIS OWN ACCOUNT AND BENEFIT.
1. **Enlisted man**—Charged with. File 26251-12358.

PROFANE AND THREATENING LANGUAGE.
1. **Massachusetts laws.** File 26251-2993:12.

"PROFANE SWEARING," ETC.
1. **Specific intent**—Not necessary. *See* INTENT, 2.

PROFESSORS OF MATHEMATICS.
1. **Abolished**—"Hereafter no further appointments shall be made to the corps of Professors of Mathematics, and that corps shall cease to exist upon the death, resignation, or dismissal of the officers now carried in that corps on the active and retired lists of the Navy." (Act of Aug. 29, 1916.)
2. **Advancement in rank.** *See* File 26289-9, J. A. G., Mar. 30, 1912.
3. **Date of precedence.** *See* File 11130-9, J. A. G., July 18, 1910.
4. **Promotion.** File 11130-29, Sec. Navy, Oct. 7, 1915.
5. **Vacancy**—Filling of, by President. *See* File 26289-11, Sec. Navy, Dec. 17, 1913.

Digitized by Google

PROMISES.

1. **Confessions.** *See* CONFESSIONS, 1–4, 6, 21.
2. **Debts**—Promises to pay debts. *See* DEBTS, 21, 22.
3. **Drunkenness**—Promises to abstain from intoxicants. *See* PLEDGES AND PROMISES.
4. **Reenlist.** *See* DISCHARGE OBTAINED BY FRAUD.

PROMOTION. *See also* APPOINTMENTS; COMMISSIONS; MARINE EXAMINING BOARDS; NAVAL EXAMINING BOARDS; PROMOTION BY SELECTION.

1. **Acquittal by court-martial**—Examining board shall investigate facts independently. *See* PROMOTION, 45.
2. **Act of Aug. 29, 1916** (29 Stat. 556). *See* PROMOTION, 16–18, 85, 99, 111, 137, 138, 139, 142, 165, 166, 186, 194–196, 213; PROMOTION BY SELECTION.
3. **Acting assistant surgeons**—Failure to pass may be waived. *See* ACTING ASSISTANT SURGEONS, 2.
4. **Action of the President.** *See* PROMOTION, 129.
5. **Action upon the record by the department**—The department's province in the case of action upon a record of examination for promotion of officers of the Navy proper is to lay said record before the President "for his approval or disapproval of the findings," with such recommendations as it may deem proper. (*See* R. S. 1502.) File 26256–128.
6. **Same**—Upon Marine Examining Boards records. *See* PROMOTION, 71, 134.
7. **Additional numbers.** *See* ADDITIONAL NUMBERS.
8. **Admonition**—Officers promoted but admonished. *See* MARINE EXAMINING BOARDS, 2.
9. **Appointments.** *See* APPOINTMENTS.
10. **Army**—Promotion in Army. *See* PROMOTION, 131, 132, 186.
11. **Auditor for the Navy Department**—Jurisdiction of the auditor over matter involving promotion. *See* AUDITOR FOR THE NAVY DEPARTMENT, 5.
12. **Binding of examining board records.** File 26260-3395, Sec. Navy, Mar. 17, 1916.
13. **Boards, examining.** *See* MARINE EXAMINING BOARDS; NAVAL EXAMINING BOARDS.
14. **Boards of investigation**—Considered by naval examining boards. File 26260-3421, Sec. Navy, May 1, 1916.
15. **Boards of medical examiners.** *See* BOARDS OF MEDICAL EXAMINERS.
16. **Brigadier generals of the Marine Corps**—The act of Aug. 29, 1916 (39 Stat. 609), provides, in part: "That brigadier generals shall be appointed from officers of the Marine Corps senior in rank to lieutenant colonel: *Provided further*, That the promotion to the grade of brigadier general of any officer now or hereafter carried as an additional number in the grade or with the rank of colonel shall be held to fill a vacancy in the grade of brigadier general: *Provided further*, That in determining the officers with rank senior to colonel there shall be included the officer serving as major general commandant." *See* File 28687-7, J. A. G., Aug. 7, 1916, for date commissions should bear. (Commissions were dated Aug. 29, 1916.)
17. **Same**—Before being promoted, the officers selected to be promoted from the grade of colonel to that of brigadier general in the line of the Marine Corps, are required to pass a physical, mental, and moral examination, such as is now prescribed by law for other officers of the Marine Corps. A professional examination is not required by Naval Instructions, 1913, I-3662. File 26521-144:3, J. A. G., Oct. 20, 1916.
18. **Same**—Two colonels on duty in Haiti and Santo Domingo were examined for promotion to the grade of brigadier general on their records. Medical officers were appointed in the above-mentioned countries to examine these officers physically and report the results of the examination by cable and in addition send in a written report. File 26521-144:3.
19. **Burden of proof**—"As to the burden of proof in cases of officers found prima facie not qualified for promotion in the Navy, any objection on that score would seem to be sufficiently answered by the authorities already considered. However, attention is invited to the fact that the act of Congress approved May 5, 1892 [27 Stat. 25], providing 'that any Chinese person or person of Chinese descent arrested under the provisions of this act, or the acts thereby extended, shall be adjudged to be unlawfully within the United States unless such person shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States,' has been repeatedly held to be constitutional (In Re Lee; In Re Ching Jo, 54 Fed. Rep. 334; U. S. *v.* Wong Dep Ken, 57 Fed. Rep. 206); and it has been held that proceedings to commit a minor to a reform school upon the application of his father are not in the nature of a prosecution, conviction, and punishment for crime, within the rules governing such cases (Rule *v.* Geddes, 23 App. Cas. D. C. 48).

Digitized by Google

"In the present case the law provides that no officer of the Navy shall be promoted to a higher grade 'until his mental, moral, and professional fitness to perform all his duties at sea have been established to the satisfaction of a board of examining officers appointed by the President' (Section 1496, 1497, R. S.). The same rule, therefore, applies to the officer's moral qualifications as to his mental and professional qualifications. All alike must be 'established' to the satisfaction of the board. The result of failing morally is discharge under the act of [August 5, 1882 [22 Stat. 286]; the result of failing professionally is suspension from promotion or discharge under section 1505, R. S. [as amended by the act of March 11, 1912, 37 Stat. 73]. There is no reason for a distinction with respect to the *burden of proof* as to the method of determining the candidate's moral and his professional qualifications, even if such a distinction were possible under the law.

"Much might be said regarding the deplorable results which must follow from a construction of the law requiring that an officer's unfitness for promotion be proved by the Government beyond a reasonable doubt. However, such a construction would so obviously not 'promote the efficiency of the Navy' that comment thereon is not deemed necessary." File 26260-1392, 26260-697, J. A. G., June 29, 1911, pp. 31-33.

The laws relating to examinations prior to promotion are not in the affirmative providing that all officers of the Navy under certain conditions shall be examined for promotion, but are in the negative, viz: that "No officer shall be promoted to a higher grade on the active list of the Navy * * * until he has been examined by a board of naval surgeons and pronounced physically qualified to perform all his duties at sea (1493 R. S.)." Similiar provisions are made with reference to professional examination (1496 R. S.). File 27231-63, J. A. G., May 27, 1915.

20. **Same**—The onus of establishing professional fitness shall be held to rest entirely upon the officer under examination. The mental and moral fitness of the candidate shall be assumed unless a doubt shall be raised on either head, in the mind of any member of the board, from the answers contained in any of the interrogatories or reports on fitness, from the general reputation of the candidate, or from other sources of evidence of record. It shall be held obligatory upon any member of the board to decline to recommend the promotion of an officer until he is satisfied of the officer's entire mental, moral, and professional fitness for promotion. The board, while careful not to do injustice to any officer regarding whom there is any doubt, shall take equal care to safeguard the honor and dignity of the service, recommending no officer for promotion as to whose fitness a doubt exists. (R-334 (10)). File 9020-03, J. A. G., Nov. 2, 1903, p. 8; 13 J. A. G. 139. *See also* NAVAL EXAMINING BOARDS, 11.

21. **Same**—During the examination of a Marine officer for promotion the Marine Examining Board had under consideration a telegram containing alleged false statements by the candidate. The candidate contended "that in order to prove the offense charged, it is necessary to show that at the time the telegram was sent he knew the statements therein to be false," and furthermore claimed "that the charge is not proved beyond a reasonable doubt, and that he should be given the benefit of such doubt."

The connection which the Board had under consideration in connection with this telegram was whether the candidate had the moral qualifications for promotion.

A doubt had been raised in the minds of the members of the Board as to the candidate's moral qualifications by reason of his having sent this telegram, and, under the provisions of Navy Regulations, R-1766 (10) [Navy Regulations, 1913, R-334 (10)] it was incumbent upon the candidate to dispel it. To do this it was necessary for him to show, not that he did not know the telegram to be false, but that he knew, or with sufficient reason believed, it to be true. This he failed to do. 13 J. A. G. 140; File 9020-03, J. A. G. Nov. 2, 1903, p. 10.

22. **Bureau chiefs.** *See* BUREAU CHIEFS.

23. **Candidate as a witness.** *See* NAVAL EXAMINING BOARDS, 23-26.

24. **Candidate's status**—"The proceedings of examining boards in cases of promotions can not be assimilated to criminal or court-martial proceedings, which they in no sense resemble, and the rules of evidence which apply to the latter are not, in general applicable to the former. The candidate stands in the position of an applicant for an office; it is for him to show that he has the necessary qualifications, and any reasonable doubt that may arise out of the evidence is to be resolved, *not in his favor*, but in favor of the Government." 13 J. A. G. 141; File 9020-03, J. A. G., Nov. 2, 1903, p. 10. *See also* NAVAL EXAMINING BOARDS.

Digitized by Google

25. **Challenges**—Non-medical members—Candidate entered a challenge to a non-medical member of a marine examining board on ground that owing to their former official relations the member would be unable to give him "an impartial examination." Objection sustained. Candidate objected to member ordered to relieve above member on ground that he had been a member of a general court-martial which tried him two weeks before. Challenge sustained. Candidate made a third challenge of a member on ground that owing to their "relations both personal and official" he could not give "an impartial examination." Challenge not sustained. The board was then dissolved and a new board convened. File 26260-308 a, b, Sec. Navy, April 8, 1909; 829-M, Sec. Navy, April 14, 1909.
26. **Same**—All members present to consider validity of challenges. File 26260-308 (Marine Examining Board record).
27. **Same**—Medical members—The candidate entered an objection to a medical member of a Marine examining board sitting as a member of the board when it resolved itself into a Marine retiring board. The reason assigned was that said member had formed and expressed an opinion on the merits of the case based on the findings of the candidate's entire medical history, etc. The challenged member replied that he was perfectly able to make a fair report in the case and that he was open to conviction if any further evidence was submitted. The challenge was sustained. File 26260-2076:2 (Marine Examining Board record).
28. **Chief carpenter**—With Civil War service. *See* CIVIL WAR SERVICE, 6.
29. **Chief of Bureaus.** *See* BUREAU CHIEFS.
30. **Civil courts.** *See* MARINE EXAMINING BOARDS, 3.
31. **Civil engineers.** *See* APPOINTMENTS, 13.
32. **Commissions.** *See* COMMISSIONS.
33. **Conditional promotion.** *See* PROMOTION, 67.
34. **Congress**—May stop promotion or abolish "offices" entirely. *See* "OFFICE," 16; APPOINTMENTS, 8.
35. **Same**—Restoration by Congress of lost numbers. *See* PROMOTION, 155, 156.
36. **Constructive pardon**—Promotion as a constructive pardon of an unexecuted sentence. *See* PARDONS, 44.
37. **Court of inquiry record**—May be considered by an examining board. 13 J. A. G. 299; File 3468-04, J. A. G., April 21, 1904, p. 8.
38. **Court-martial**—"It appears from an examination of the record that the board apparently treated the matter of the trial of the candidate by court-martial, in 1892, as having been finally settled by the action of the department and the President thereon, without examining into the bearing of the facts developed by the trial upon the candidate's fitness for promotion to the grade of paymaster in the Navy. The department is of opinion that in determining the question of fitness for promotion this is one of the considerations that should be weighed and reported upon, on its merits in the mind of the board, and independently of the action of any reviewing or mitigating authority. In other words, neither the finding of the court-martial on the one hand, nor the mitigation of its sentence on the other, is conclusive, but each is entitled to such consideration at the hands of the board as it sees fit to give." Decision of the department, dated December 8, 1897, quoted approvingly in File 3468-04, J. A. G., April 21, 1904, pp. 8-9; 13 J. A. G. 299-300.
39. **Same**—Record of trial by general court-martial introduced in evidence by candidate. File 26260-308, 1909.
40. **Same**—A naval examining board in a recent case found, in effect, that, "no matter what its [the board's] personal feelings may be," a certain candidate was morally qualified for promotion because the members of a court-martial had acquitted him of serious offenses with which he had been charged, and the board "has not the power to question the findings of said court."

    The finding of the naval examining board in this case was not satisfactory and was not accepted by the department for the reason that it withheld the very opinion which the board was ordered to express—that of the board itself—and relied instead upon the finding of a general court-martial, which finding in point of fact was disapproved by the convening authority. It is well settled that the fact that a case has been acted upon, or that no action has been taken in certain premises, does not close that portion of an officer's record to which it relates in such a manner as to relieve an examining board from the responsibility of scrutinizing it; and, even in the event of an acquittal by a court-martial, an examining board still has the duty cast upon it by express provisions of law to examine into the facts and outcome of such trial in order to determine for itself the effect, if any, that should be given thereto with reference to the officer's qualifications for promotion. (File 5878-97; 26260-697; 26260-1392.)

Digitized by Google

Moreover the finding of a court-martial, even if approved, would not be conclusive upon an examining board for the reason that a court-martial can not properly arrive at a finding of "guilty" unless the evidence establishes the guilt of the accused beyond a reasonable doubt; while, on the other hand, members of an examining board are not required to be satisfied beyond a reasonable doubt that a candidate is not qualified for promotion, but instead are forbidden to recommend any officer for promotion "as to whose fitness a doubt exists." In other words, before a court-martial every doubt must be resolved in favor of an accused, while before an examining board any doubts must be resolved against the candidate, and the existence of even a doubt as to his fitness requires that he be not recommended for promotion. File 26260-3342:1, Sec. Navy, April 7, 1916; C. M. O. 13, 1916, 6-7.

41. Same—"A naval examining board has authority and exercises functions as extensive in their nature as those exercised by courts-martial themselves, and in its consideration of an officer's qualifications for promotion it determines for itself all questions arising, independently of any disciplinary action that may or could have been taken in the premises. (Op. of J. A. G., Dec. 4, 1897, * * * file 5878-97; Brief and Opinion Book No. 9, pp. 296, 316, 319; Davis *v.* U. S., 24 C. Cls., 442.) In the case of * * * , the examining board treated 'as closed' certain matters brought to its attention for which the candidate had been tried and punished by general court-martial. In commenting upon this action of the board, the Judge Advocate General stated:

"'This doctrine carried to its logical conclusion, would place a man who has been repeatedly tried by a court-martial and adequately punished for numerous and grave offenses, upon the same plane before an examining board as an officer of unblemished record. Is it conceivable that the only cases in which the trial and conviction of an officer should be considered by an examining board are those in which the board is satisfied that he has not received adequate punishment and, if justice is to be done, requires to be further dealt with by having promotion denied? Assuredly not. It is not the function of an examining board to supplement the action of a court-martial, and promotion should never be withheld as a measure of punishment. This principle can not be too clearly enunciated. But, on the other hand, it is by no means repugnant to the principles of justice, and it is essential to the interests of naval discipline and the establishment and maintenance of a high standard in the service, that trial and conviction by court-martial should be recognized as possible obstacles to advancement which should be gravely weighed by examining boards. The fact that a case has been finally acted upon by the highest authority, or that no action whatever has been taken, does not close that portion of the officer's record to which it relates in such a manner as to relieve an examining board from the responsibility of scrutinizing it. Where an officer's record is found not good, it seems to me then to become the especial duty of the board to make a thorough and exhaustive examination. It should be well understood that positions of high honor and responsibility in the American Navy are to be attained only by men of good character and ability, and that such rewards are not open to those who have been convicted of grave offenses, and whose record is open to serious criticism.'" File 26260-1392, 26260-697, J. A. G., June 29, 1911, pp. 14-15.

42. Same—Even where a general court-martial acquits accused, the examining board should consider the facts independent of such acquittal or the remarks of the convening and reviewing authorities. *See* NAVAL EXAMINING BOARDS, 15; PROMOTIONS, 45.

43. Same—The board is in no sense a court before which the candidate is on trial for his misdeeds. *See* NAVAL EXAMINING BOARDS, 8.

44. Same—With reference to the authority of an examining board to consider the proceedings of a court-martial and other facts shown by the officer's record bearing upon his moral fitness for promotion, a civil court stated: "The board was charged with the duty of examining into his mental, moral, and professional qualifications for advancement. What better evidence could it have of these qualifications than the candidate's actual career in his then grade. It was natural and proper for the board to look into his record. If a good officer he would proudly rely upon it and demand its examination as a right." File 26260-3342:1, Sec. Navy, Mar. 27, 1916, p. 2.

45. Same—The question of an officer's amenability to trial by court-martial for acts affecting his moral fitness can not have any bearing upon the question now under consideration, for should the officer be so tried and convicted, or *even acquitted*, by court-martial, an examining board would still have the duty cast upon it by express provisions of law, of examining into the facts and outcome of such trial in order to

Digitized by Google

determine *for itself* the effect, if any, that should be given thereto with reference to the officer's qualifications for promotion. File 26260-697, 26260-1392, J. A. G., June 29, 1911, p. 17; 26260-3342:1, Sec. Navy, Mar. 27, 1916, p. 2.

46. **Same**—The fact that a case has been finally acted upon by the highest authority, or that no action whatever has been taken, does not close that portion of the officer's record to which it relates in such a manner as to relieve an examining board from the responsibility of scrutinizing it. Where an officer's record is found not good it seems then to become the especial duty of the board to make a thorough and exhaustive examination. File 5878-97; 26260-3342:1, Sec. Navy, Mar. 27, 1916, p. 2.

47. **Same**—"The contention that such cases [moral] should be disposed of by court-martial proceedings is based upon an utter misconception of the causes involving moral unfitness, as well as the duties and powers of examining boards. In the first place, as the history of the service shows, moral disqualification in a vast majority of cases is due to a series of matters, each perhaps trivial in itself, but which, taken as a whole, amount to a habit sufficiently serious to disqualify an officer for promotion in the United States Navy." File 26260-1392, 26260-697, J. A. G., June 29, 1911, p. 14.

48. **Same**—"The matter of determining an officer's moral fitness for promotion is not analogous to the question of determining whether or not he should be brought to trial by court-martial for alleged offenses. On the contrary, an examining board is required to report the opinion of its individual members concerning the fitness of a candidate for promotion regardless of whether unfavorable matters upon the candidate's record have been acted upon by a court-martial or not, and regardless of the finding reached by the court-martial, if one has been convened." File 26260-3623:1 J. A. G., Aug. 25, 1916.

49. **Date of promotion**—Additional numbers. *See* ADDITIONAL NUMBERS.
Commissions, dating of. *See* COMMISSIONS, 18, 19, 40.

50. **Same**—Higher rank—"The giving to officers of the higher rank from the date of the vacancies which are filled by their promotions is a custom which obtains in all branches of the service, and this custom has received the approval of Congress in various enactments, either expressly or by implication. Nevertheless, where the filling of vacancies is discretionary with the President, the commissions need not be made to date from the occurrence of the vacancy unless the appointing power so decides. (File 7151-03)." File 28687-7, J. A. G., Oct. 7, 1916. *See also* COMMISSIONS, 19.
Midshipmen. *See* APPOINTMENTS, 11.

51. **Deafness**—With reference to R. S. 1494. *See* PROMOTIONS, 164, 165.

52. **Death**—An officer's "death occurred after nomination for promotion but prior to confirmation by the Senate." File 28687-4:4, J. A. G., Oct. 30, 1916.

53. **Debts**—Any case of repeated failure to discharge indebtedness would constitute an instance of moral unfitness for promotion. File 26260-1392, 26260-697, J. A. G., June 29, 1911, p. 11.

54. **Same**—A first lieutenant of Marines was found not morally qualified for promotion owing to nonpayment of debts; the finding was approved by the Secretary of the Navy June 21, 1909, and the officer was suspended from promotion for one year. File 26260-988, J. A. G., Aug. 5, 1910. *See also* File 26260-308, 1909.

55. **Same**—Indebtedness was the cause of the moral failure of a major upon his examination for promotion to lieutenant colonel. File 26260-3624:3, Sec. Navy, Oct. 3, 1916. *See also* PROMOTION, 195.

56. **Delayed**—The promotion of an officer was held up until certain defects in his manner of handling enlisted men, as shown by his reports of fitness, were completely eradicated. In this case the department stated: "In the opinion of the department, a dictatorial and an unnecessary severe manner in handling enlisted men is one of the most serious defects that can be possessed by an officer. An officer is necessarily charged with much authority, and the abuse thereof, more than any other one feature in an officer's character, is conclusive as to his unfitness for the trust imposed in him." File 26260-2879:1, Sec. Navy, Nov. 3, 1915; C. M. O. 42, 1915, 11.

57. **Same**—The following authority was granted in the case of an acting pay clerk: "Authority is hereby granted to delay making final report and recommendation in the case of Acting Pay Clerk * * *, pending receipt of special monthly reports in regard to his efficiency, and his habits and conduct, and especially in regard to his faults as noted in his reports on fitness, viz: 'lack of painstaking care and thoroughness, and insubordination and criticism of his seniors,' which will be required of his commanding officer." File 26260-3403, Sec. Navy, July 5, 1916.

Digitized by Google

58. **Same**—An officer of the Navy having been held up for six months in order that the Secretary of the Navy might receive six monthly reports from the candidate's commanding officer, these reports turned out unfavorable and the department *held:* That "irritability and hastiness, especially with enlisted men, and indolence, are the most serious defects that can be possessed by" a young officer. Action was accordingly suspended in the case for six months and special monthly reports required of the candidate's commanding officer in regard to the above-mentioned defects. File 26260-3146, Sec. Navy, Apr. 15, 1916.
59. **Same**—A Naval Examining Board was authorized "to delay making its decision and report in the case of Passed Assistant Paymaster * * * for the period of one year. He will be retained on board the U. S. S. * * * and special quarterly reports will be required of his commanding officer during said period in regard to his efficiency, and his habits and conduct." File 26260-3319:2, Sec. Navy, May 11, 1916.

An officer, due for promotion, may be kept in his present rank for a year to see whether or not he keeps sober. File 3849-02, J. A. G., June 6, 1902: 20 J. A. G., 290.
60. **Dental Corps**—Scope of examination. File 13707-53. *See also* DENTAL SURGEONS, 5.
61. **Divorce.** *See* MARINE EXAMINING BOARDS, 3.
62. **Domestic trouble.** *See* MARINE EXAMINING BOARDS, 3.
63. **Drunkenness.** *See* PROMOTION, 78, 97.
64. **"Due process of law"**—"The discharge of an officer under the act of [August 5], 1882 [22 Stat. 286], is by no means a summary proceeding. His case is heard by a board constituted in accordance with express provisions of law and sworn to 'honestly and impartially examine and report upon the case of * * *, now before the board and about to be examined;' all matters considered by the board, whether affecting the officer's physical, mental, moral, or professional qualifications for promotion are entered of record; the candidate, if his record shows him *prima facie* unfit for promotion, is so informed by the board and given an opportunity to be heard; the findings and recommendation of the board are expressly stated in all cases to be based upon matters recorded, and are so referred to the department and the President for review.

"If the constitutional provision relating to due process of law applied to this case [officer discharged from the Navy for failing morally to qualify for promotion], therefore, it would be more than satisfied by the procedure established. (*See* In Re Sing, 54 Fed. Rep. 336; Turner *v.* Williams, 194 U. S. 289, 290; Murray *v.* HobokenLand Company, 18 How. 274.)" File 26260-1392, 26260-697, J. A. G., June 29, 1911, p. 31. *See also* "OFFICE," 16.
65. **Evidence**—Record of a naval examining board as evidence before naval courts-martial. G. C. M. Rec. 28681, p. 52. *See also* NAVAL EXAMINING BOARDS, 12.
66. **Same**—Rules of evidence. *See* PROMOTION, 24.
67. **Exigencies of the service of a Marine officer preventing his examination for promotion at the time prescribed by law**—The Attorney General has held (25 Op. Atty. Gen. 577) that the provisions of the act of February 2, 1901 (31 Stat. 755) authorizes the President to promote a Marine officer who may, through the *exigencies of his service,* not be able to obtain his examination at the time he is entitled to promotion. His promotion is, however, subject to examination, and there is the further stipulation that if the officer who is thus promoted, fails in his examination he shall be treated in the same manner as if he had been examined prior to promotion. This conditional promotion by the President does not entitle the officer to a new commission, or to the increased pay of the higher rank, but merely authorizes the President, when a vacancy occurs, to promote the absent officer who is thus enabled to retain his position on the Navy Register, without loss of precedence. This gives the officer the benefit of the presumption that when the opportunity for his examination arrives he will successfully pass it. A courtesy, a convenience, and practically a military necessity. But when he fails, the law says he shall be treated in the same manner as if he had been examined prior to promotion. File 26260-308/D, J. A. G., June 4, 1909.
68. **Same**—Section 32 of the act of February 2, 1901 (31 Stat. 748, 755), made applicable to the Marine Corps by the act of July 28, 1892 (27 Stat. 321), extends at most to the cases of officers who are prevented by any exigency of their service from appearing before an examining board, and is not for the benefit of officers who have appeared before such board but have been unable to pass the required examination. In other words, this law does not contemplate cases where *promotion* is delayed as the result of an examination, but instead refers to cases where the *examination* itself is delayed as the result of an exigency of the officer's service. File 26521-94, Sec. Navy, Mar. 6, 1914. *See also* File 26521-108:2, J. A. G., Dec. 24, 1914; 26260-2504, Sec. Navy, Aug. 18,1914, p. 5; 26521-125, Sec. Navy, Aug. 31, 1915.

Digitized by Google

69. **Existing grade**—No fact which occurred prior to the last examination shall be again inquired into. *See* PROMOTION, 125–127.
70. **Extra numbers.** *See* ADDITIONAL NUMBERS.
71. **Findings**—The law does not empower the department to modify the finding or to substitute a different one, and when this power of approval or disapproval, in the case of a marine examining board, has been finally fully exercised by the Secretary of the Navy, it is exhausted as to that case. File 26260–3624:2, Sec. Navy, Sept. 29, 1916.
72. **General efficiency of marine officers**—A marine examining board made the following report: "The board is of the opinion that * * * has the physical and professional qualifications, but has not the general efficiency to perform the duties of the grade to which he will be eligible, and does not, therefore, recommend his promotion thereto * * *." The department returned the record to the board quoting Naval Instructions, 1913, I–3669, and stating that this article requires that officers below the grade of major shall be examined in the following order: (a) Mental and physical; (b) moral; (c) professional, and that the report shall show under which of these heads the candidate's qualifications are considered satisfactory, and under which, if any, they are unsatisfactory. The act of June 3, 1916, requires that a professional examination is required for major. As "general efficiency" is shown in I–3674 (11) to be a part of the professional examination, if the board should find the candidate not qualified for promotion on account of general efficiency, it follows that he has failed professionally. The department, therefore, holds that the report, with facts given, should state that the candidate has been found mentally, and physically, and morally, but not professionally qualified, in view of his being unsatisfactory in "general efficiency." File 26260–3624, Sec. Navy, Aug. 15, 1916.

    In revision the board decided to revoke its former finding and to substitute therefor the following finding: "The board is of the opinion that * * * has the mental and physical, but not the professional nor moral qualifications, to perform the duties of the next grade to which he will be eligible, and does not, therefore, recommend his promotion thereto." *See also* File 26260–3919, Sec. Navy, Nov. 2, 1916.
73. **Grade**—Promotion in rank but not in grade—Not necessary that a commission be issued and the letter of notification "is in lieu thereof." File 28687–16, Dec., 1916. *See also* COMMISSIONS, 9.
74. **Grades limited in number by law.** *See* MARINE CORPS, 66; PROMOTION, 109.
75. **Held up.** *See* PROMOTION, 56–59.
76. **Illegal promotions.** *See* COMMISSIONS, 20.
77. **Incapacitated for active duty**—Due for promotion but incapacitated for active duty. C. M. O. 6, 1915, 16. *See also* RETIREMENT OF OFFICERS, 33.
78. **Intemperance**—With reference to moral qualifications. *See* Memo., J. A. G., No. 1, p. 43, Dec. 6, 1884. *See also* R. S. 1494; 23 Op. Atty. Gen. 324; PROMOTION, 97.
79. **Law**—All persons are required by law to pass physical, mental, and professional examinations prior to appointment to any office in the Navy. File 5460–60, J. A. G., Jan. 22, 1913.

    Questions of law should be referred to the Judge Advocate General. *See* MARINE EXAMINING BOARDS, 12.

    For statutes relating to the promotion of marine officers. *See* PROMOTION, 84, 186.

    For statutes relating to the promotion of officers of the Navy. *See* PROMOTION, 19, 64, 94, 95, 102, 111, 123, 125–127, 152, 160–164, 172, 183, 190, 199, 200, 207.
80. **Legal right**—An officer has not a legal right to be ordered before a board of medical examiners for promotion instead of being ordered before a retiring board, etc. *See* RETIREMENT OF OFFICERS, 33. *See also* BOARDS OF MEDICAL EXAMINERS, 6.
81. **Loss of numbers**—Effect upon an officer not promoted to fill a vacancy. *See* PROMOTION, 102.
82. **Same**—A sentence involving loss of numbers was mitigated because approval of complete sentence would cause a delay in promotion. C. M. O. 5, 1915, 2.
83. **Major General Commandant**—Where a colonel serving a four-year detail as major general commandant under the provisions of the act of December 19, 1913 (38 Stat. 241), was promoted to fill one of the original vacancies in the grade of brigadier general created by the act of August 29, 1916, he became an additional number in the grade of brigadier general as provided in the act of December 19, 1913 (38 Stat. 241), thus permitting the appointment of four other colonels to the four vacancies created by the act of August 29, 1916 (39 Stat. 609). Upon retiring from the position of major general

Digitized by Google

commandant he would continue to be an additional number, ceasing to be as soon as the grade of brigadier general is reduced to the number authorized by law. File 28687-1, J. A. G., August 18, 1916.

84. **Marine officers**—Admonition—Officer promoted but admonished. *See* MARINE EXAMINING BOARDS, 2.

An officer qualified for promotion—The department approved this record and addressed a letter to him calling his attention to adverse matter on same and cautioning him to continue his good record of the past four years since his trial by general court-martial for "drunkenness." File 26260-3664:1, Sec. Navy, Sept. 13, 1916.

Brigadier general—Examination of colonels for brigadier general. *See* PROMOTION, 16-18, 83.

Challenges—Members challenged. *See* PROMOTION, 25-27.

Civil courts—Examination of an officer when a suit for divorce is pending. *See* MARINE EXAMINING BOARDS, 3.

Delay of examination—Due to the exigencies of the service of the officer. *See* PROMOTION, 67, 68, 85.

Divorce. See MARINE EXAMINING BOARDS, 3.

Domestic troubles. See MARINE EXAMINING BOARDS, 3.

Examinations for promotion subsequent to March 3, 1899. See File 6-199; 3056-99; 6418-00; 6779-00; 7037-00; 7123:3.

Exigencies of the service—Of an officer preventing his examination. *See* PROMOTION, 67, 68, 85.

General efficiency. See PROMOTION, 72.

Majors and lieutenant colonels—Section 24 of the act of June 3, 1916, applies to the examination for promotion of officers of the Marine Corps of the rank of major and lieutenant colonel, by virtue of the act of July 28, 1892 (27 Stat. 321). File 26521-144, Sec. Navy, June 24, 1916.

Major general commandant. See PROMOTION, 83.

Mental qualifications. See PROMOTION, 86.

Moral and professional failure. See PROMOTION, 195.

Moral qualifications. See PROMOTION, 19-21, 94-98.

Numbers, loss of—By suspension from promotion. *See* PROMOTION, 194-198.

Physical examination. See PROMOTION, 120, 121.

Prior to existence of vacancy. See PROMOTION, 131.

Procedure—Of a marine examining board. *See* PROMOTION, 134.

Professional failure. See PROMOTION, 137-139.

Professional and moral failure. See PROMOTION, 195.

Reexamination. See PROMOTION, 148.

Restoration of numbers—Lost by suspension from promotion. *See* PROMOTION, 155.

Retiring boards—Marine examining board resolving itself into a marine retiring board. *See* PROMOTION, 27, 85, 86, 165.

Revised Statutes, 1494. See PROMOTION, 160-166.

Staff officers. See PROMOTION, 180, 181.

Summary of laws relating to. See 14 J. A. G. 131; File 26260-153b, J. A. G., June 4, 1909.

Suspension from promotion. See PROMOTION, 194-198.

85. **Same**—The candidate (a captain) was examined for promotion to the grade of major but failed physically. The act of August 29, 1916 (39 Stat. 609) made him number one on the list of majors. On September 18, 1916, a major was suspended from promotion which left a vacancy for the candidate in question in the grade of lieutenant colonel, if five colonels had been appointed brigadier generals. The President approved the finding of the marine examining board which had resolved itself into a marine retiring board and retired the candidate in question.

"On August 29, 1916, Captain * * * was the senior captain in the Marine Corps. The Naval Appropriation Act (39 Stat. 609) of that date created a number of original vacancies in the various grades of the Marine Corps, and had the promotions to fill the vacancies created by that act been made on August 29, 1916, presuming that all officers qualified for promotion, Captain * * * would have been promoted to the grade of major and would have ranked as number one in that grade.

"The law contemplates that Marine officers be examined for promotion anterior to the existing of a vacancy for which they are examined (Act of Oct. 1, 1890, 26 Stat. 562). The law has also been construed to intend that if an officer should not be examined at the proper time, and should later be examined for promotion to a

Digitized by Google

preexisting vacancy, he shall be treated in the same manner as if he had been examined prior to the creation of the vacancy. (25 Op. Atty. Gen. 568–579; *see also* C. M. O. 29, 1916, p. 9.)

"Had Captain * * * been examined anterior to the creation of the vacancy for which he was later examined for promotion, and had the approval of the retiring board in his case been dated on the date the vacancy occurred, August 29, 1916 (File 26260–1658), it is evident that the only rank to which his seniority would entitle him to be promoted would be the rank of major, and he would have been retired from August 29, 1916, with that rank.

"To take into consideration the changed conditions which later occurred, by reason of the failure of Major * * * for promotion, would involve a departure from the rule of treating officers who are improperly examined for promotion after the vacancy for which they are examined occurs, in the same manner as if they had been examined prior to the creation of such vacancies, and I do not consider that the rule laid down should be departed from." Accordingly this officer is entitled to be retired with the rank of major and not lieutenant colonel, and it is unnecessary to consider the bearing upon the question of the fact that the grade of lieutenant colonel was fully occupied at the time of this officer's retirement. File 26260–3604:2, J. A. G., Oct. 16, 1916.

86. **Mental qualification of a marine officer**—"The medical members having found that the candidate is physically but not *mentally* qualified for promotion, and this finding being concurred in by the full board, the board, then, in accordance with the law, resolved itself into a retiring board," etc. The board after maturely deliberating upon the evidence in the case decided that the candidate "is not *mentally* qualified to perform all the duties of the next higher grade, in the Marine Corps, by reason of nervous debility, and that said disability is the result of an incident of the service." He was accordingly placed on the retired list in accordance with the act of October 1, 1890 (26 Stat. 562) and the act of July 28, 1892 (27 Stat. 321). File 2011–3, J. A. G., July 12, 1906, approved by President, July 16, 1906. *See also* PROMOTION, 150, 151.

87. **Midshipmen**—Promotion of midshipmen when deficient. *See* MIDSHIPMEN, 72.

Candidates for commissions in Marine Corps. See MIDSHIPMEN, 53, 55.

Promotion of midshipmen to ensigns when not recommended by the Academic Board of the Naval Academy. See ACADEMIC BOARD OF THE NAVAL ACADEMY, 4; APPOINTMENTS, 17.

Promotion of midshipmen when physically incapacitated. C. M. O. 6, 1915, 6. *See also* RETIREMENT OF OFFICERS, 50.

88. **Moral qualifications**—The burden of establishing moral fitness is on the candidate. *See* PROMOTION, 19–21.

89. **Same**—Court-martial—Contention that an officer should have been tried by a court-martial before he became eligible for promotion. *See* PROMOTION, 47.

90. **Same**—Drunkenness. *See* PROMOTION, 78, 97.

91. **Same**—Indebtedness as a cause for moral failure. *See* PROMOTION, 53–55.

92. **Same**—Intemperance. *See* PROMOTION, 78, 97.

93. **Same**—Marine examining board. *See* MARINE EXAMINING BOARDS, 14.

94. **Same**—Prior to the enactment of an act of August 5, 1882 (22 Stat. 286) when an officer, failed *morally* upon examination for promotion, although otherwise qualified, he was placed on the retired list under the first section of the act of April 21, 1864 (13 Stat. 53), and not recommended for promotion (28 Exam. Bd. Records, No. 34; Navy Register, 1910, p. 174; Davis Admin. v. U. S., 24 Ct. Cls. 442). The act of August 5, 1882, (22 Stat. 286), abolished this practice. File 26260–1392, 26260–697, J. A. G., June 29, 1911, p. 6.

95. **Same**—The purpose of the act of August 5, 1882 (22 Stat. 286) was to abolish the practice of placing upon the retired list of the Navy officers who had failed to qualify for promotion by reason of *moral* deficiency. File 26260–1392, 26260–697, J. A. G., June 29, 1911, p. 8.

96. **Same**—Upon the question of what constitutes moral unfitness it need only be said that no specific definition thereof is desirable or should be attempted. The question of what constitutes moral unfitness should be left to be determined by a board of experienced, intelligent, impartial, military experts in the exercise of a sound discretion. (*See* Swaim v. U. S., 28 Ct. Cls. 173, 228.) File 26260–1392, 26260–697, J. A. G., June 29, 1911, pp. 10–11.

97. **Same**—Where the board determines that it appears *prima facie* that the candidate is not *morally* qualified for promotion by reason of his own misconduct (or, drunkenness, etc.) he should be called before the board and given an opportunity to be heard upon the charges against him. File 26260–3342: 2, Sec. Navy, June 2, 1916.

Digitized by Google

98. **Same**—(1) The moral fitness of the candidate shall be assumed unless a doubt shall be raised by evidence of record or from the general reputation of the candidate.
(2) If the moral fitness of the candidate is not assumed, he shall be furnished full information as to any allegations concerning his moral conduct, names of accusers and witnesses, and documentary evidence against him; he shall be allowed to examine such witnesses and evidence and to testify and introduce evidence in his own behalf.
(3) All proceedings during the examination as to his moral fitness, except deliberations on the findings and on interlocutory questions, shall be in the presence of the candidate and his counsel (if he has counsel present).
(4) The board shall decide concerning the officers or other persons to whom interrogatories shall be sent, and shall decide upon the scope and character of such interrogatories, but no inquiry as to matters of opinion shall be put to any officer who is junior in rank to the candidate.
(5) If the candidate requests that witnesses be examined in his behalf, the board shall, so far as such request appears to the board to be reasonable, examine the witnesses in his presence or by taking their depositions.
(6) The board shall not inquire into nor consider any fact which occurred prior to the last examination of the candidate whereby he was promoted and which has been inquired into and decided upon, unless such fact continuing shows his present unfitness for promotion. [*See* PROMOTION, 125–128.]
(7) The candidate shall be given an opportunity to make a statement with reference to his moral fitness, which statement, if made, shall be appended to the record (I–3673).

99. **Moral and professional failure of a Marine officer**—A major upon examination for promotion failed both morally and professionally subsequent to August 29, 1916. File 26260–3625, Sept. 13, 1916. *See also* PROMOTION, 195.

100. **Naval Militia**—Aeronautic duties—Scope of examinations for officers and enlisted men of the Naval militia for aeronautic duties. *See* NAVAL MILITIA, 12.
District of Columbia—Promotions of officers in the Naval Militia of the District of Columbia. *See* NAVAL MILITIA, 8.
Judge Advocate General—Examining boards reviewed and reported upon by the Judge Advocate General. *See* JUDGE ADVOCATE GENERAL, 17; NAVAL MILITIA, 12.
Physical examination. *See* NAVAL MILITIA, 29.

101. **Naval officers should be examined prior to existence of vacancy.** *See* PROMOTION, 132.

102. **Numbers, loss of**—Effect upon officer not promoted to fill a vacancy—A carpenter was appointed a warrant officer April 19, 1907. Tried by general court-martial and sentenced to lose 15 numbers, which reduced him in the list of carpenters below an officer whose date of appointment was January 30, 1909. The question presented is whether the officer concerned, if otherwise qualified, is entitled to promotion under the act of April 27, 1904 (33 Stat. 324, 346), "after six years from date of warrant." *Held:* That this officer, whose sentence by court-martial has operated to reduce him below other warrant officers in his grade of a later date of appointment, is not entitled to promotion, even though otherwise qualified, until the officers who precede him in the list of carpenters have become due for promotion. File 17789–20, J. A. G., Dec. 18, 1913, approved by Bu. Nav. and Sec. Navy, Dec. 19, 1913. Approved by President, Feb. 18, 1914. *See also* Bu. Nav. File 5796–52; 17789–20:1, Sec. Navy, Feb. 18, 1914.

103. **Same**—Restoration by Congress. *See* PROMOTION, 155, 156.

104. **Same**—Sentence involving loss of numbers mitigated because of effect upon promotion. *See* PROMOTION, 82.

105. **Oath**—Taken by members of a Naval Examining Board. *See* PROMOTION, 64.

106. **Objection**—Challenges of members. *See* PROMOTION, 25–27.

107. **Same**—Objection of candidate to certain parts of the statement of a challenged member overruled. File 26260–308, 1909.

108. **Occurrences since last examination by which promoted.** *See* PROMOTION, 125–128.

109. **Overfilling grades**—The appointment of an officer of the Navy to a grade limited in number by law, would not be valid if it increased the number of said grade beyond that allowed by law (23 Op. Atty. Gen. 30, 35). Accordingly, *Held:* That no promotions can legally be made to the grades of captain and commander while there are in each of said grades the full number of officers allowed by law including officers who have been examined for promotion but in whose cases final action has not been taken. File 26521–67, J. A. G., June 4, 1913; foregoing opinion reconsidered and sustained

Digitized by Google

in File 26521-67, J. A. G., Dec. 4, 1913). File 13261-486, Sec. Navy, June 8, 1916, which affirmed the principle stated above, and applied it to appointments of midshipmen to Marine Corps as second lieutenants. *See also* File 942-310, Bu. Nav., Sec. Navy, Dec. 29, 1913; File 26521-106:2, J. A. G., Dec. 24, 1914; MARINE CORPS, 66.

110. **Pardon**—Promotion as a constructive pardon of an unexecuted sentence. *See* PARDONS, 44.

111. **Partial examination**—The act of August 29, 1916 (39 Stat. 578), speaks and is effective from its date. "Accordingly, the only examinations and promotions to the line grades mentioned in it which can be made subsequent to August 29, 1916, are those made in accordance with the specific terms of the act of that date." "It follows, therefore, that, in any case where an officer was undergoing examination for promotion prior to August 29, 1916, and such examination and promotion was not *completely consummated* prior to that date, the *partial* examination concerned, upon the approval of the law under consideration, therefore, 'became null and void' and 'action at the present time, in view of this change in the law, can carry with it no legal consequences or penalties such as would have obtained had action been taken prior to the change in the law." (File 26260-3648, J. A. G., Sept. 22, 1916.) File 26260-3663:2, Sec. Navy, Oct. 9, 1916. *See also* COMMISSIONS, 42; PROMOTION, 129.

112. **Pay**—Beginning of increase of pay. *See* PAY, 24, 25.

113. **Same**—Increased pay for advancement in rank—The Comptroller of the Treasury has held that assistant paymasters advanced in rank by reason of length of service are not promoted to fill vacancies and therefore are not entitled to receive the increased pay until they get their commissions—the increased pay beginning from that date. File 26509-j-64:1, J. A. G., April 25, 1910, p. 6.

114. **Same**—Pay while holding a recess appointment. *See* PAY, 82.

115. **Penal statutes**—The act of August 5, 1882 (22 Stat. 286) is not a penal statute. File 5925-03, J. A. G., 1903, p. 5.

116. **Physical examination for promotion**—Marine officers. *See* PROMOTION, 120, 121.

117. **Same**—Naval Militia. *See* NAVAL MILITIA, 29.

118. **Same**—Officers of the Navy. *See* BOARDS OF MEDICAL EXAMINERS.

119. **Physical failure**—On reexamination after professional failure on first examination. *See* PROMOTION, 148, 150-152.

120. **Physical failure but professional examination allowed**—A Marine Examining Board found a candidate incapacitated for active service due to line of duty. On candidate's own request, which was approved by the department, he was examined professionally. No action was taken on the record of proceedings, but the candidate was ordered to a naval hospital for observation and treatment and then to be later reexamined physically to establish his fitness for further active service. File 26260-3459, Sec. Navy, May 27, 1916. *See also* File 26260-3432:1, Sec. Navy, April 18, 1916.

121. **Physical qualifications of marine officers**—The medical members of the board reported that the "candidate had the mental and physical qualifications for promotion except that his vision is defective." An investigation was then conducted by the board as to the physical qualifications of the candidate, the candidate being allowed to have counsel. Upon the conclusion of the investigation the board decided "by a majority vote of the members of the Board, not to adopt the report of the medical members of the Board," the medical members being present and voting. The board found that the candidate had the "physical, mental, moral and professional qualifications to perform efficiently all of the duties of the grade to which he will next be eligible, and recommend him for promotion thereto." The action of the Secretary of the Navy was as follows: "In view of the fact, appearing from the evidence submitted in this case, that Captain * * * has, for the last five years, during which his physical infirmity (impaired vision) has existed in substantially its present form and degree, performed to the entire satisfaction of his superior officers all the duties to which he has been assigned, including that of independent command and others of an arduous and important nature, I concur in the opinion of the Examining Board that this officer has the physical, as well as the other requisite qualifications to perform efficiently all of the duties of the grade to which he will next be eligible, viz., that of Major." File 7381-03, Sec. Navy, Aug. 29, 1903.

Sections 1493 and 1494 were made applicable to the Marine Corps by the act of August 29, 1916.

"The mental and physical fitness of the candidate [Marine Corps] and all questions which arise in connection therewith shall be voted upon by each member of the entire board and the votes of a majority shall decide." (I-3670 (3).)

Digitized by Google

122. **"Physico-mental"**—Capacity to perform active service. File 3468-04, J. A. G., April 21, 1904, p. 11.

123. **"Plucking Board"**—Act of March 3, 1899, Section 9 (30 Stat. 1006), as amended by the act of August 22, 1912 (37 Stat. 328). Repealed by the act of March 3, 1915 (38 Stat. 938). *See* COMMISSIONS, 42; RETIREMENT OF OFFICERS, 41.

124. **"Preparedness"**—"All officers know where they stand on the list, and there should be some premium upon 'preparedness.' Under present laws the officer who is not ready suffers; but inasmuch as the approximate date of examination can be computed in advance it is difficult to find a valid excuse for failure to pass professionally." 13 J. A. G. 398, 1904.

125. **Present grade**—All records of the department bearing upon the service of an officer, *in his present grade*, who is undergoing examination for promotion, may be considered by the examining board in arriving at its finding as to the qualifications of an officer, and the fact that the President disapproved the finding of a former board to the effect that the candidate was morally disqualified does not prevent its consideration upon a reexamination of the candidate. File 26521-19.

The act of June 18, 1878 (20 Stat. 165), provides: "That hereafter in the examination of officers in the Navy for promotion no fact which occurred prior to the last examination of the candidate whereby he was promoted, which has been inquired into and decided upon, shall be again inquired into, but such previous examination, if approved, shall be conclusive, unless such fact continuing shows the unfitness of the officer to perform all his duties at sea." File 26521-27:1149, J. A. G., June 23, 1914. *See also* File 26521-169, J. A. G., Nov. 28, 1916, p. 3.

126. **Same**—Occurrences which have happened since the examination by which the officer "*was* promoted" should be considered by the board. Therefore, where an officer has been suspended from promotion on account of failure in examination, occurrences that happened since the last examination by which he was actually promoted, should be considered. File 6789-04.

127. **Same**—The act of June 18, 1878, operating as a specific restriction upon the general provisions of section 1499, contemplates only the normal case of the officer who remains in the service and passes successively from the lower to the higher grades after an examination for promotion to each grade. The Court of Claims, in the case of Davis, Admr., *v.* The United States (24 Ct. Cls. 442), in commenting upon the provisions of sections 1499, 1502, and 1503, Revised Statutes, in connection with the act of June 18, 1878, said:

"Those statutes opened up the whole past life of an applicant for promotion, and made him liable at each step in his career to a fresh investigation, long after the event, of charges before 'inquired into and decided upon.' To remedy any injustice this may have caused, probably, the statute of June 18, 1878, was passed. This statute places a bar in the way of a new examination into old accusations or facts, and starts the officer in his *higher* grade with a clean record, unless such fact be a continuing one, showing the candidate's unfitness to 'perform all his duties at sea.' But the act goes no further; it leaves the examining board *otherwise subject to the mandates of section 1499 of the Revised Statutes*, which, thus limited, authorizes an examination of the files and records of the Navy Department concerning the officer's career *in the grade from which he is at the present time seeking promotion.*"

"What better evidence could it have of these qualifications than the candidate's actual career *in his then grade*. It was natural and proper for the board to look into his record. If a good officer, he would probably rely upon it and demand its examination as a right. * * * It [the act of June 18, 1878] does not take away from the meritorious officer the right to produce his record of faithful, diligent, and gallant service in the rank in which at the time he is serving, as proof of fitness for advancement to higher dignities and greater responsibilities; nor does it take away from the naval service the right to examine into that record for the purpose of promoting meritorious officers and of denying advancement to those who have failed to reach the standard of competency and trustworthiness demanded from all officers in this dignified and honorable career." File 26521-27; 1149, J. A. G., June 23, 1914.

Sections 1496-1504 "opened up the whole past life of an applicant for promotion, and made him liable at each step in his career to a fresh investigation, long after the event, of charges before 'inquired into and decided upon.' To remedy any injustice this may have caused, probably, the statute of June 18, 1878 [20 Stat. 165], was passed. This statute places a bar in the way of a new examination into old accusations or facts and starts the officer in his higher grade with a clean record, unless the fact be a continuing one, showing the candidate's unfitness to 'perform all his duties at sea.'" (Davis *v.* U. S., 24 Ct. Cls. 442.) File 26521-169, J. A. G., Nov. 14, 1916, p. 2.

Digitized by Google

"Not only did the act of 1878 establish a specific legislative policy with reference to the examination of officers for promotion, but that policy was in itself consistent and in entire harmony with the established doctrine of *res judicata*, which has always been of general application in the administrative as well as the judicial department of our Government." File 26521-169, J. A. G., Nov. 14, 1916, p. 4.

128. **Same**—Promotion by selection—Question whether act of June 18, 1878 (20 Stat. 165), applies. *See* PROMOTION BY SELECTION, 8.

129. **President's action**—"It has been held repeatedly * * * that inasmuch as the law requires examination by a board and approval or disapproval by the President, that the President's action is just as much a part of the examination as is the examination by the board itself; the examination is therefore incomplete up to the time it is approved by the President. Therefore, an examination in which the board has finished its part, but which has not yet been acted upon by the President, is as incomplete as if the actual examination before the board had not been completed." File 26260-3648, J. A. G., Sept. 22, 1916, citing Jouett *v.* U. S., (28 Ct. Cls. 257, 266).

In the Jouett case a naval officer [master] was nominated and confirmed for promotion to lieutenant, "subject to the required examination before being commissioned." The commission was signed but not issued. The officer passed the required examination and was recommended for promotion. But the President did not approve the report of the examining board and suspended action on it and ordered the officer to sea. The candidate is again examined and the second board reports that he has not the moral qualifications for promotion. The President approves the report and ordered that the officer be discharged with one year's pay. The court stated, *inter alia* "The President's approval or disapproval of the findings is, then, distinctly required, and it is contemplated that he shall examine the whole records and findings. Having the duty imposed upon him to approve or disapprove, the President had the power to suspend action or to seek further information; these are necessary incidents of the executive reviewing power. (Swaim *v.* The U. S., *ante.*) [28 Ct. Cls. 173.]" *See also* PROMOTION, 111.

President approved the findings and recommendation of a Naval Examining Board notwithstanding the recommendation of the Judge Advocate General that they be disapproved. File 26260-1392:29, February, 1913.

130. **Presumption**—Where an officer requested a reconsideration of the board's findings, which resulted in his suspension from promotion and a consequent loss of several numbers, on the ground that he was ill when examined and all his reports of fitness were excellent, *Held*: That "the presumption is in favor of a board having done its full duty." File 26260-3314:6, Sec. Navy, Aug. 25, 1916. *See also* APPEALS, 18; PROMOTION, 148.

131. **Prior to existence of vacancy**—The law requires that Marine officers be examined for promotion prior to the existence of the vacancy for which they are examined. (Act of Oct. 1, 1890, 26 Stat., 562.) The law also provides that when the examination is delayed through the exigencies of the service, if the officer fails, he shall "be treated in the same manner as if he had been examined prior" to the creation of the vacancy. (Act of Feb. 2, 1901, sec. 32, 31 Stat., 756.) Accordingly, where an officer, examined after the vacancy occurs, fails physically he is properly given the rank of the higher grade from the date of the vacancy to which he would have been promoted if qualified. File 26260-3237:1, J. A. G., Aug. 25, 1915; C. M. O. 29, 1915, 9. *See also* File 26260-1514.

132. **Same**—In all cases in the Navy where it is not absolutely impossible to do so, examinations for promotion should be held prior to the occurrence of the vacancy, as is required by express provisions of law with reference to promotions in the Army and Marine Corps. (Act of Oct. 1, 1890, 26 Stat., 562, and act of Feb. 2, 1901, sec. 32, 31 Stat., 756.) File 26260-2605:2, J. A. G., Aug. 17, 1915, p. 5; C. M. O. 29, 1915, 9.

133. **Probation**—Officers placed on probation. *See* PROMOTION, 56-59.

134. **Procedure**—It is the duty of a Marine Examining Board to report the facts as found. The next step is to lay its report, with its finding and recommendation, before the department, for its approval or disapproval, or if, in the department's judgment, the report has not been completed or the finding not justified by the facts, the record of proceedings would then be returned for further inquiry, or hearing, or correction of its proceedings. The law does not empower the department to modify the finding or to substitute a different one, and when this power of approval or disapproval has been finally fully exercised by the department, it is exhausted as to that case. File 26260-3625.

Digitized by Google

Under the act of July 28, 1892 (27 Stat, 321), the medical members of the board "examine the candidate as to his *physical* and *mental* fitness for promotion and make a written report thereof to the entire board. The mental and physical fitness of the candidate, and all questions which arise in connection therewith, are then voted upon by each member of the *entire board*. This part of the examination precedes the *moral* and *professional* examination. When the candidate is found mentally and physically qualified for promotion, the medical members are excused from further attendance with the board." File 28687-14, J. A. G., Dec. 14, 1916.

135. **Professional**—An officer of the Navy having failed professionally, was suspended from promotion for six months and suffered loss of numbers. File 26260-3091:1, J. A. G., Nov. 3, 1915, and Nov. 19, 1915.

136. **Same**—The onus or burden of establishing professional fitness is on the candidate. *See* PROMOTION, 19, 20, 21.

137. **Same**—Prior to the approval of the act of August 29, 1916 (39 Stat. 611), Marine officers failing professionally were suspended from promotion for one year. File 26260-153, Aug. 18, 1914. *See also* PROMOTION, 196.
Sec. Navy, June 7, 1909; 26260-2201:3, Sec. Navy, Oct. 25, 1913; 26260-2404:1, Sec. Navy.

138. **Same**—Subsequent to the approval of the act of August 29, 1916 (39 Stat. 611, Marine officers failing professionally are suspended from promotion and suffer the loss of numbers as provided by the act of August 29, 1916 (39 Stat., 611). *See* PROMOTION, 194, 195.

139. **Same**—Where a Marine second lieutenant failed professionally subsequent to August 29, 1916, he suffered a loss of eight numbers, and will be reexamined as soon as expedient after the expiration of six months. File 26260-3919, Sec. Navy, Nov. 14, 1916.

140. **Professional and moral failure of a Marine officer.** *See* PROMOTION, 99.

141. **Promotion**—"A promotion in the Army is an appointment to a higher office therein." (30 Op. Atty. Gen. 177). File 28687-4:1, J. A. G., Sept. 12, 1916, p. 5.

142. **Property right**—"In this state of the law [prior to Aug. 29, 1916, 39 Stat. 556], an officer's right to promotion, while not of course a property right, came to be regarded as something at least closely akin thereto, and the deprivation of this right was looked upon as a serious punishment." *But see* PROMOTION, 213. *See also* "OFFICE," 16.

143. **Punishment**—Promotion should never be withheld as a punishment. *See* PROMOTION, 41.

144. **Reasonable doubt.** File 5925-03, J. A. G., 1903, p. 5. *See also* PROMOTION, 20, 21, 24, 98.
Theory of Government proving candidate's unfitness for promotion beyond a reasonable doubt. *See* PROMOTION, 19.

145. **Recommending promotion**—The members of an examining board are forbidden to recommend any officer for promotion as to whose fitness a doubt exists. File 26260-3628:1, J. A. G., August 25, 1916. *See also* PROMOTION, 20.

146. **Records of officers.** *See* NAVAL EXAMINING BOARDS, 11; PROMOTION, 125-128.

147. **Recorder and members**—Failing to sign record. File 26260-3464, Sec. Navy, May 27, 1916.

148. **Reexamination**—A second lieutenant failed professionally for promotion to first lieutenant. At the time he was reexamined there was a vacancy awaiting him in the captain's grade, due to the act of August 29, 1916. (39 Stat. 609.) *Held*: That this officer, "who has been suspended from promotion to first lieutenant by reason of his failure to qualify professionally should be reexamined for promotion to first lieutenant and should he successfully pass such examination, he should then be examined for promotion to captain." File 26260-3314:5, Sec. Navy, July 21, 1916. *See also* APPEALS, 18; PROMOTION. 130.

149. **Same**—An officer who had failed physically ("not line of duty"), failed professionally on reexamination and was discharged with one year's pay. File 26260-2048:1, Sec. Navy, September 23, 1913.

150. **Same**—A Marine officer was found *professionally* not qualified for promotion and after one year's suspension was found *physically* not qualified for promotion owing to disabilities in line of duty, under section 3 of the act of October 1, 1890. (26 Stat. 562.) *Held:* That he should be retired in next higher grade. File 26260-3314:7, Sec. Navy, November, 1916. *See also* File 878-4, 1903; 7331.

151. **Same**—A Marine officer was found professionally not qualified for promotion and after one year's suspension was found physically not qualified for promotion owing to disabilities in line of duty. Notwithstanding this, his examination was continued and he was found qualified in all other respects. He was retired in next higher grade. File 878-4, 1903; 7331. (Udell's Case.) *See also* File 26260-3314:7, 1916; PROMOTION, 86.

Digitized by Google

152. **Same**—A machinist appeared for examination for promotion to the grade of chief machinist and was found mentally, morally, and physically, but not professionally, qualified for advancement. He was accordingly suspended for one year. Upon reexamination the candidate was found mentally and morally, but neither professionally nor physically, qualified. *Held:* That "the records of proceedings of the examining boards in this case should be submitted to the President with recommendation that action upon the findings of the boards be withheld, and that the candidate be ordered to appear before a naval retiring board to determine whether, within the terms of the act of March 4, 1911 (36 Stat. 1267), he is incapacitated for service by reason of physical disability contracted in the line of duty. File 26260-1294, J. A. G., June 10, 1911. *But see* File 26260-3193:2, December, 1916.

153. **Same**—In the event of failure of an Army or Marine officer to pass the first examination for promotion, the procedure of the second, or reexamination, is exactly similar to the first. "The procedure upon *both* the first examination and upon the reexamination is exactly similar and * * * it appears to have been the intention of the department that this law should operate in the Navy in the same manner as it administered in the Army and Marine Corps. 15 J. A. G. 239; File 26260-1294, J. A. G., June 10, 1911, p. 4.

154. **Res judicata.** *See* COMMISSIONS, 14-16; PROMOTION, 127; RES JUDICATA, 12.

155. **Restoration of numbers lost by suspension**—A Marine officer requested permission of the Secretary of the Navy to secure the introduction of a bill in Congress providing for the restoration of numbers lost by suspension from promotion. Permission was granted to take such proper means as the officer deemed necessary. He was informed, however, "that this permission is not to be construed as indicating the department's attitude toward the proposed bill." (File 26509-61, Sec. Navy, Nov. 9, 1911.) A similar request was later received from the same officer and the department replied that the permission granted you on November 9, 1911, "to take such proper means as you deem necessary in the premises" had not been revoked. File 26255-248, Sec. Navy, July 7, 1916.

156. **Same**—The department disapproved legislation proposed in behalf of a lieutenant (junior grade) to replace him to the list in line of officers from which dropped and lost numbers by reason of failing to pass promotion examinations from midshipman. The department also recommended that, should the bill proposed for this officer be passed, it be amended so as to provide that he take the examination required by law before being promoted pursuant to the terms of the bill as drafted. File 26255-232 Sec. Navy, Feb. 1, 1912.

157. **Retirement upon examination**—If an officer fails physically upon examination for promotion and is retired therefor, he takes retired rank only in the grade for promotion. If, during the time action on his case is considered, he becomes due for promotion to a still higher grade, he will, nevertheless, be retired in the lower grade unless he be ordered up for examination for promotion to the higher grade. In all cases it is requisite that the officer be ordered up for examination for promotion to entitle him to be retired in the next higher grade. File 26253-200:1, J. A. G., Feb. 17, 1912.

158. **Same**—An opinion of the Judge Advocate General stated in substance that an officer found morally (or professionally) disqualified for promotion can not be retired, but that the only alternative would be that he be ordered before another board after disapproving the finding of the first board. File 26260-1392, 26260-697, J. A. G., June 29, 1911, p. 2; 15 J. A. G. 311.

159. **Retiring boards**—Marine examining board resolving itself into a retiring board. *See* PROMOTION, 27, 85, 86, 165.

160. **Revised Statutes, Section 1493**—"No officer shall be promoted to a higher grade on the active list of the Navy, except in the case provided in the next section, until he has been examined by a board of naval surgeons and pronounced physically qualified to perform all his duties at sea." (R. S. 1493.)

161. **Revised Statutes, Section 1494**—"The provisions of the preceding section shall not exclude from the promotion to which he would otherwise be regularly entitled any officer in whose case such medical board may report that his physical disqualification was occasioned by wounds received in the line of his duty, and that such wounds do not incapacitate him for other duties in the grade to which he shall be promoted." (R. S. 1494.)

162. **Same**—The expression "wounds received in the line of his duty," found in section 1494 of the Revised Statutes, which provides for the promotion of officers of the Navy (and Marine Corps by act of Aug. 29, 1916) whose physical disqualifications do not incapacitate them for other duties, means precisely what it says, namely, "wounds

Digitized by Google

received in the line of his duty," and is not restricted to any particular part of that duty, as to wounds received in battle or in some hazardous enterprise. (23 Op. Atty. Gen. 324.) File 26260-950, Sec. Navy, July 29, 1910. *See also* File 26260-3432:3; Sec. Navy, December 13, 1916.

The words "other duties" in section 1494 of the Revised Statutes refer to duties other than duties at sea. (23 Op. Atty. Gen. 324.) File 26260-950, Sec. Navy, July 29, 1910. *See also* File 26260-3432:3, Sec. Navy, December 13, 1916; 26260-2424, Sec. Navy, April 4, 1914.

163. **Same**—Officers of the Navy have been promoted under the provisions of this section. File 26260-950, Sec. Navy, July 29, 1910 (loss of leg); 9346-08, Sec. Navy, Feb. 14, 1908 (loss of leg).

164. **Same**—Where an officer of the Navy claimed that a physical disqualification for which he was eventually retired would entitle him to promotion under R. S. 1494, the Secretary of the Navy held in part: "The department concurs in the opinion of the Judge Advocate General and of the Surgeon General, that Captain ——'s present ear trouble can not be attributed entirely, if at all, to the injury from gun fire said to have been received in 1891 or 1892, and that even if the contrary were true, such injury would not be a "wound" within the meaning of section 1494, R. S." File 26260-2424, Sec. Navy, April 2, 1914. *See also* File 26253-460, March 2, 1916; PROMOTION, 165.

165. **Revised Statutes, 1493, 1494**—A second lieutenant appeared before a Marine examining board for promotion. The medical officers reported that he was not physically qualified for promotion. The board thereupon resolved itself into a retiring board and recorded the following opinion: "The board having deliberated upon the evidence before it, decided that —— is at present incapacitated for active service by reason of deafness * * * and that his incapacity is a result of an incident of the service and recommends that he be sent to the Naval Hospital, Mare Island, Calif., for observation and treatment." With the authority of the Secretary of the Navy, the professional examination was proceeded with. The board recorded the following opinion: "The board is of the opinion that —— has, the general efficiency, and the professional qualifications, but not at present the physical qualifications to perform the duties of the next grade to which he will be eligible, and does not, therefore, recommend his promotion thereto." The candidate was thereupon ordered to the before-mentioned hospital for observation and treatment, "then to be reexamined physically to establish his fitness for further active service." At a later date he appeared before a second Marine examining board, which, after receiving the report of the medical members that the candidate was not physically qualified, resolved itself into a Marine retiring board. This board reported that the candidate was still incapacitated for active service but recommended that owing to the fact that the deafness might not be permanent and that he can and does perform some duties satisfactorily, that he be continued on duty and be reexamined physically at a later date. He was accordingly ordered to the Naval Hospital, Washington, D. C., for special expert observation and treatment. A third Marine examining board was convened. The precept stated that if the board finds that the "physical disqualification was occasioned by wounds received in the line of his duty," the medical members of the aforesaid board will convene as a board of naval surgeons as contemplated by sections 1493 and 1494, R. S., which were made applicable to Marine Corps by the act of August 29, 1916. (39 Stat. 611.) File 26260-3432:3, Sec. Navy, Dec. 13, 1916.

166. **Same**—The medical members of a marine examining board recommended that a first lieutenant be promoted in accordance with the provisions of section 1494 of the Revised Statutes, "wounds received in the line of his duty." The record was returned, with the information that section 1494 of the Revised Statutes did not apply to the Marine Corps. File 26260-3462, Sec. Navy, May 10, 1916. *But see* The act of August 29, 1916 (39 Stat. 611), which provides that "the provisions of sections 1493 and 1494 of the Revised Statutes of the United States shall apply to the Marine Corps." File 28687-14, J. A. G., Dec. 14, 1916, p. 2.

167. **Revision of proceedings**—The record of proceedings of an examining board may be returned for revision. File 26260-3188:1, Sec. Navy, February 10, 1916.

168. **Rules of evidence.** *See* PROMOTION, 24.

169. **Satisfactory mark**—"A mark of 2.5 in a subject of an examination is considered as satisfactory" for promotion of officers of the Navy. File 26260-3938:1, November 28, 1916.

170. **Secretary of the Navy**—Action upon marine examining boards. *See* PROMOTION, 134.

Digitized by Google

171. **Same**—Action upon naval examining boards. *See* PROMOTION, 5.

172. **Seniority**—"From time immemorial the advancement of naval officers to higher offices has been made by seniority. This rule was not established by Congress, but by the executive branch of the Government, although since its inception statutes have been enacted by Congress in recognition of the rule and even purporting to make same obligatory." File 28687-4:1, J. A. G., Sept. 12, 1916, p. 2.

"In consequence of the statutory enactments above quoted [act of August 3, 1861, sec. 22, 12 Stat. 291, R. S. 1458; act of Feb. 27, 1877, 19 Stat. 244, R. S. 1480); act of August 29, 1916 modifying R. S. 1458], promotions by seniority in the Navy have come to be regarded as made pursuant to statute, although section 1458 shows upon its face affirmative evidence, that this system of promotion in the Navy owes its origin to a practice antedating statutes on the subject. It cannot therefore be said that the President has been making promotions in the Navy by seniority in compliance with statutes enacted by Congress, but instead the fact is more correctly stated that the President in the exercise of his discretion adopted the seniority rule of promotion in the Navy and continued to apply this rule unaffected by the fact that Congress had at a later date legislated to the same effect." File 28687-4:1, J. A. G., Sept. 12, 1916, pp. 2-3.

"The question has repeatedly been raised as to the power of Congress to control the President's power of appointment which, under the Constitution, is subject only to the concurrence of the Senate. The authorities upon this question establish the following rules: 1st. That Congress has not the power to designate an appointee by name; 2d. That Congress has not the power to require the appointment of an individual who stands highest upon a competitive examination; and 3d. That Congress can not require the President to appoint to a vacancy in the military service, the senior officer in the next lower grade." (*See in this connection* 18 Op. Atty. Gen. 15; U. S. *v.* Ferreira, 13 How, 40; 13 Op. Atty. Gen. 516; 30 Op. Atty. Gen. 177; 9 Op. Atty. Gen. 462; 18 Op. Atty. Gen. 27; 13 Op. Atty. Gen. 516; 4 Op. Atty. Gen. 164; 26 Op. Atty. Gen. 502). File 28687-4:1, J. A. G., Sept. 12, 1916. *See also* Ray *v.* Garrison, 42 App. D. C. 34; C. M. O. 3, 1917, 6. *But see* CONSTITUTIONAL LAW, 4; "OFFICES," 16.

See PROMOTION, 182 (2d par.), 183, 184, holding that Congress may regulate advancements in rank without change in office by seniority.

173. **Same**—"From an exhaustive review of the laws and regulations pertaining to appointments and promotions in the military service, contained in 14 Opinions of the Attorney General, page 164, it is seen that promotions in the Army from the earliest times have been by seniority, except in extradordinary cases." File 14816-4, J. A. G., 1909, p. 10.

174. **Same**—Seniority alone gives no right to promotion. To it must be added physical, mental, and moral fitness. (Steinmetz *v.* U. S., 33 Ct. Cls. 404, 410.) File 26253-200:1, J. A. G., Feb. 17, 1912.

175. **Sentence**—Loss of numbers mitigated owing to effect on promotion. *See* PROMOTION, 82.

176. **Service records of officers.** *See* NAVAL EXAMINING BOARDS, 11.

177. **Sicard Board.** File 22724-18, J. A. G., Dec. 4, 1911, p. 5.

178. **Sick leave.** *See* RETIREMENT OF OFFICERS, 33.

179. **Sick list.** *See* RETIREMENT OF OFFICERS, 33.

180. **Staff Corps of the Marine Corps**—The words "promotions to all grades below that brigadier general," appearing in section 24 of the act of June 3, 1916 (39 Satt. 183), includes the promotion of staff officers of the Marine Corps of the rank of major and lieutenant colonel to higher ranks in the Marine Corps below that of brigadier general whether such promotion involves a change of grade or not. The act of June 3, 1916, section 24 (Public No. 85) requires examination of officers of staff departments prior to advancement in rank without promotion in grade. File 26521-144:1, Sec. Navy, July 10, 1916.

181. **Same**—Officers of staff departments of the Marine Corps with the rank of major and lieutenant colonel are not "in the grades of major and lieutenant colonel," and therefore their professional examinations are not restricted by section 24 of the act of June 3, 1916 (39 Stat. 183), to problems involving the higher functions of staff duties and command. File 26521-144:1, Sec. Navy, July 10, 1916, p. 4, affirming File 26521-144, Sec. Navy, June 24, 1916.

182. **Staff Corps of Navy**—"In the various staff corps of the Navy, two or more ranks are commonly attached to a single office or 'grade.' In such cases, the advancement of an officer from one rank to another rank in the same office or grade does not involve a change of office nor require that an exercise of the appointing power be invoked (*See* 20 Op. Atty. Gen. 358.)

Digitized by Google

"It is undoubtedly within the constitutional power of Congress to provide how such advancement in rank without change of office shall be made (Wood v. United States, 15 Ct. Cls. 151, affirmed, 107 U. S. 414) and where Congress has enacted statutes regulating such advancement in rank, its enactments on the subject are conclusive." File 28687-4:1, J. A. G., Sept. 12, 1916.

Prior to August 29, 1916, such advancements in rank in the staff corps of the Navy were not regulated by any statute, but were left entirely to the discretion of the President (*see* unpublished opinion of Attorney General Bonaparte to Secretary of the Navy March 2, 1909, Department of Justice No. C-M, Navy Department file 26289-5a). File 28687-4:1, J. A. G., Sept. 12, 1916.

183. **Same**—"The advancement of staff officers in rank without change in office may be regulated by Congress, but * * * it has not enacted any statutory regulations on the subject other than as applicable to the lower ranks in said corps; and accordingly, * * * the President may in his discretion select any staff officer with the rank of captain for advancement to the rank of rear admiral in the same office, or may prescribe general rules governing such advancements in rank, the rank of rear admiral in the staff corps having been established by the recent law (act of August 29, 1916), without making any provision as to how advancements thereto shall be effected." File 28687-4:1, J. A. G., Sept. 12, 1916, pp. 6-7.

184. **Same**—"The advancement of staff officers to higher offices with or without advancement in rank is a matter resting entirely within the constitutional power of the President, subject to such regulations by Congress as may not deprive him of the right to exercise his individual judgment and will; * * * the attempted regulations of Congress have gone beyond this point and are, therefore, void as binding regulations; and * * * the President may make such advancements by selection should he, as a matter of policy, deem such action expedient." File 28687-4:1, J. A. G., Sept. 12, 1916, p. 7.

185. **Statement of candidates**—Sworn to. (Forms of Procedure, 1910, p. 231.) File 26260-3342:2, Sec. Navy, June 2, 1916.

186. **Statutes governing the examination of officers of the Marine Corps for promotion**—"Hereafter promotions to every grade of commissioned officers in the Marine Corps below the grade of commandant shall be made in the same manner and under the same conditions as now are or may hereafter be prescribed in pursuance of law for commissioned officers of the Army.

"*Provided*, That examining boards which may be organized under the provisions of this act to determine the fitness of officers of the Marine Corps for promotion shall in all cases consist of not less than five officers, three of whom shall, if practicable, be officers of the Marine Corps, senior to the officer to be examined, and two of whom shall be medical officers of the Navy:

"*Provided further*, That when not practicable to detail officers of the Marine Corps as members of such examining boards, officers of the line in the Navy shall be so detailed." (Act of July 28, 1892, 27 Stat. 321.) *See* File 26260-3314, Jan. 5, 1915.

"SEC. 20 * * * officers of the Marine Corps above the grade of captain, except major general, shall, before being promoted, be subject to such physical, mental, and moral examination as is now or may hereafter be prescribed by law for other officers of the Marine Corps." (Act of March 3, 1899 (30 Stat. 1009), as amended by act of May 13, 1908. (35 Stat. 155.))

"SEC. 3. That the President be, and he is hereby, authorized to prescribe a system of examination of all officers of the Army below the rank of major to determine their fitness for promotion, such an examination to be conducted at such times anterior to the accruing of the right to promotion as may be best for the interests of the service * * * *Provided*, That if any officer fails to pass a satisfactory examination and is reported unfit for promotion the officer next below him in rank having passed said examination shall receive the promotion: *And provided*, That should the officer fail in his physical examination and be found incapacitated for service by reason of physical disability contracted in line of duty he shall be retired with the rank to which his seniority entitled him to be promoted; but if he should fail for any other reason he shall be suspended from promotion for one year, when he shall be reexamined, and in case of failure on such reexamination he shall be honorably discharged with one year's pay from the Army * * *." (Act of October 1, 1890, 26 Stat. 562.) [*See* File 26260-3314:5, J. A. G., July 21, 1916. [*See in this connection* PROMOTION, 194–196.]

Digitized by Google

"*Provided further*, That the provisions of existing law requiring examinations to determine fitness for promotion of officers of the Army are hereby extended to include promotions to all grades below that of brigadier general: *Provided further*, That examinations of officers in the grades of major and lieutenant colonel shall be confined to problems involving the higher functions of staff duties and command. (Act of June 3, 1916, section 24, 39 Stat. 183.) This act "applies to the examination for promotion of officers of the Marine Corps of the ranks of major and lieutenant colonel, by virtue of the act of July 28, 1892. (27 Stat. 321). File 26521-144, June 24, 1916.

That for the purpose of advancement in rank to and including the grade of colonel, all commissioned officers of the line and staff of the Marine Corps shall be placed on a common list in the order of seniority each would hold had he remained continuously in the line. All advancements in rank to captain, major, lieutenant colonel, and colonel shall, subject to the usual examinations, be made from officers with the next junior respective rank, whether of the line or staff, in the order in which their names appear on said list. (Act of Aug. 29, 1916, 39 Stat. 610.) *See* File 11130-33, Sec. Navy, Sept. 20, 1916.

Sections 1493 and 1494 apply to the Marine Corps. *See* PROMOTION, 165, 166.

The act of July 28, 1892 [27 Stat. 321], not having been repealed either expressly or impliedly by the act of August 29, 1916 (providing that R. S. 1493 and 1494 apply to Marine Corps) is still in full force and effect. File 28687-14, J. A. G., Dec. 14, 1916, p. 3.

187. **Statutory boards**—For promotion of officers of the Navy. *See* PROMOTION, 190-192.

188. **Statutory construction**—The department instructed a Naval Examining Board as follows: "In construing laws relating to the naval service the board will be guided by the construction placed upon them by the Navy Department and will in the future refrain from qualifying its recommendation by any proviso concerning the legality of the department's decisions." File 26260-3362, Sec. Navy, March 21, 1916, p. 4.

189. **Summary proceedings.** *See* PROMOTION, 64.

190. **Supervisory boards**—Every officer of the Navy whose eligibility to promotion is to be acted upon by an examining board under the provisions of sections 1496, 1498-1505, Revised Statutes, has the right to be present at his examination. He must be duly notified of the time and place of his examination, and unless he waives his right or expresses a lack of desire to be present, he must be given leave of absence or permission to attend. No finding of the board adverse to his qualifications for promotion can be made without a personal examination of such officer unless he fails to appear after having been duly notified to do so. *Held:* That the proceedings and findings of a naval examining board are fatally irregular and defective in that—(1) Said officer, being at the time in the discharge of his duty on shipboard, and under orders of his superior officer, was not notified of the time and place of his examination for promotion, and was not given and did not have an opportunity or permission to exercise his right to appear and be heard at such examination; and (2) said board of examiners rejected said officer and his application for promotion without any examination of himself, although he had not failed "to appear, after being duly notified, before said board." (27 Op. Atty. Gen. 251, April 2, 1909.) *See* File 26260-3193:1, Sec. Navy, March 23, 1916.

191. **Same**—Officers of the Navy failing before a supervisory board allowed to appear before a statutory board for personal examination. File 26260-2744, Sec. Navy, May 22, 1916; 26260-2593:10, J. A. G., Aug. 28, 1916; 26260-3193:1, Sec. Navy, March 23, 1916; 26260-3321:3, Sec. Navy, Oct. 13, 1916.

The candidate (failed professionally before a supervisory board) having reserved the right to appear in person before a Naval Examining Board (statutory board) in conformity with the provisions of sections 1503 and 1505 of the Revised Statutes, the department directed, in accordance with the opinion of the Attorney General of April 2, 1909 (27 Op. Atty. Gen. 251), that he be duly notified of the time and place that his case is to be examined by a Naval Examining Board, and be given permission to appear before said board if he so desires. File 26260-2850:4, Sec. Navy, Dec. 16, 1916.

The department decided, in view of the Attorney General's opinion of April 2, 1909 (27 Op. Atty. Gen. 251), and in view of the candidate having waived his right to appear in person before the Naval Examining Board (statutory board), that it would be legal to suspend him from promotion for six months in conformity with the provisions of R. S. 1505 as amended by the act of March 11, 1912 (37 Stat. 73), for having failed professionally for promotion (before a supervisory board), but as a matter of expediency he will be allowed to appear before a statutory board for personal examination. File 26260-2744, Sec. Navy, Dec. 16, 1916.

Digitized by Google

192. **Same**—A warrant officer failed before a supervisory board in his examination for appointment as ensign. No action was taken on the record and he "will be directed to appear in person before a statutory board for examination, preliminary to appointment as an ensign in the Navy." File 26829–41, Sec. Navy, Dec. 12, 1916. *See also* APPOINTMENTS, 18.

193. **Surgeon general.** *See* NAVAL EXAMINING BOARDS, 24.

194. **Suspension from promotion of Marine officers**—An officer having failed to pass professionally a few days prior to the approval of the act of August 29, 1916 (39 Stat. 611), was not suspended from promotion for a period of one year in accordance with the act of October 1, 1890 (26 Stat, 526), made applicable to the Marine Corps by the act of July 28, 1892 (27 Stat. 321), but was placed under the provisions of the first cited act, which provides:

"In lieu of suspension from promotion of any officer of the Marine Corps who hereafter fails to pass a satisfactory professional examination for promotion, or who is now under suspension from promotion by reason of such failure, such officer shall suffer loss of numbers, upon approval of the recommendation of the examining board, in the respective ranks, as follows: Lieutenant colonel, one; major, two; captain, three; first lieutenant, five; second lieutenant, eight; *Provided*, That any such officer shall be reexamined as soon as may be expedient after the expiration of six months if he in the meantime again becomes due for promotion, and if he does not in the mean time again become due for promotion he shall be reexamined at such time anterior to again becoming due for promotion as may be for the best interests of the service: *Provided further*, That if any such officer fails to pass a satisfactory professional reexamination he shall be honorably discharged with one year's pay from the Marine Corps. File 36260–3624, Sec. Navy, Aug. 29, 1916. *See also* File 26260–3758, October, 1916.

195. **Same**—A major having been examined for promotion subsequent to August 29, 1916, failed *both morally and professionally*. *Held:* That "as it is not thought that the law intends to impose a double penalty where the failures are concurrent, * * * his suspension from promotion should be only for a period of one year, with corresponding loss of date, in accordance with the law relating to failures other than professional." File 26260–3624:2, Sec. Navy, Sept. 29, 1916.

196. **Same**—A second lieutenant was examined for promotion when he was No. 2 on the list of second lieutenants and failed professionally. He was suspended from promotion for one year, with corresponding loss of date in accordance with the act of October 1, 1890 (26 Stat. 526), and the act of July 28, 1892 (27 Stat. 321). The year of suspension having expired on August 18, 1916, he was reexamined and found qualified. *Held:* That this officer "was not under suspension from promotion on August 29, 1916, the date of approval of the naval appropriation act (39 Stat. 611), the provisions contained therein, limiting the loss of numbers to eight in the case of a second lieutenant *now* under suspension, can not be held to apply in his case." File 26260–3149:3, Sept. 22, 1916.

197. **Same**—Reexamination to avoid suspension from promotion is illegal. *See* PROMOTION, 68.

198. **Same**—Refusal to have a surgical operation performed. *See* SURGICAL OPERATIONS.

199. **Suspension from promotion of officers of the Navy**—In interpreting section 1505 R. S. as amended by the act of March 11, 1912 (37 Stat. 73), the following conclusions were reached: (a) An officer due for promotion after a specified period of service, who is suspended from promotion for a period of six months, should, if afterwards promoted, be given rank from a date six months later than that on which he first became due for promotion; (b) An officer due for promotion by reason of seniority who is suspended from promotion for a period of six months, should, if afterwards promoted, be given rank from the date on which the vacancy occurred which he is promoted to fill, provided such vacancy did not occur during the six months' period of suspension; (c) An officer due for promotion by reason of seniority, who is suspended from promotion for a period of six months, should, if afterwards promoted, be given rank from the date that the period of suspension expired where the vacancy which he is promoted to fill occurred during the six months' period of suspension. File 26260–2605:2 J. A. G., Aug. 17, 1915; C. M. O. 29, 1915, 9–10.

200. **Same**—An assistant surgeon having completed three years' service as such on May 4, 1915, was suspended from promotion, because of professional failure on examination, for six months from July 19, 1915, with the loss of nine numbers in accordance with Revised Statutes 1505, as amended by act March 11, 1912 (37 Stat. 73). This loss of numbers operated to place him below other officers who will not be promoted until

Digitized by Google

April 10, 1917, although his period of suspension will expire on January 18, 1916. *Held*, There is no legal obstacle to issuing this officer his commission as soon as he qualifies, to rank from November 4, 1915, this being six months later than the date from which he first became due for promotion (*see* C. M. O. 29, 1915, p. 9). He should then be carried at the foot of the grade of passed assistant surgeon until the officers who are eventually to rank him in consequence of his loss of numbers have been advanced over him in that grade.

The practice of executing loss of numbers by immediately reducing the officer in his grade when his period of suspension takes effect should be modified in all cases, whether the officer is due for promotion by length of service or to fill a vacancy; the officer should mark time during his period of suspension while his juniors are advanced over him, as was the practice under section 1505, Revised Statutes, prior to its amendment; and when his period of suspension expires, if he has not lost the required numbers, he should nevertheless be promoted and continue to mark time until his loss of numbers has been fully executed. In such case the loss of numbers should be determined as at present by the condition of the Navy Register on the date that the suspension becomes effective, the suspended officer profiting by any casualties which may occur in the same manner as though he had been reduced in grade. (In this connection, *see* C. M. O. 14, 1915; *see also* File 26521–40, J. A. G., June 11, 1912.)

The opinions of the Judge Advocate General of May 14, 1915 (file 26266–475), and August 17, 1915 (file 26260–2605: 2), published in Court-Martial Order No. 29, 1915, pp. 9–10, were rendered with reference to the practice of executing the loss of numbers by reducing the officer in his grade, and the question of having the officer mark time while his juniors were advanced over him until his loss of numbers had been executed, was not then presented nor considered; nevertheless the conclusions expressed in said opinions would apply equally to the change in such practice now suggested, although different results will be produced.

Inasmuch as the law does not provide in what manner the loss of numbers shall be executed—that is, whether the officer shall be reduced in his grade or mark time while his juniors are advanced over him, but on the contrary, permits of either practice, thereby leaving the determination of this question to the administrative officers—it is held that the action heretofore taken was legal and should not be disturbed where the officers concerned have already been promoted and commissioned; but that the method now suggested of having the officer mark time while his juniors are advanced over him until he has lost the required numbers, should be applied to all cases now pending or which may hereafter arise. File 26260–3091: 1, J. A. G., Nov. 9, 1915; C. M. O. 42, 1915, 11–12.

201. **Same**—Officer due for promotion after a specified period of service, suspended from promotion for six months. C. M. O. 29, 1915, 9–10; 42, 1915, 11–12. *See also* PROMOTION, 199, 200.

202. **Same**—Officer due for promotion by reason of seniority, suspended from promotion for six months. C. M. O. 29, 1915, 9–10; 42, 1915, 11–12. *See also* PROMOTION, 199, 200.

203. **Same**—Suspended from promotion because of alleged irregularities. File 26260–823:7, J. A. G., April 5, 1912.

204. **Same**—Promotion delayed until officer changed his manner in handling enlisted men. *See* PROMOTION, 56. *See also* PROMOTION, 57–59.

205. **Same**—Suspension of final action where officer has qualified—A machinist was examined, found qualified, and recommended for promotion to the grade of chief machinist. An inspection of the reports on fitness, attached to the record of proceedings of the Naval Examining Board, disclosed various unfavorable entries relative to this officer's professional qualifications, particularly with reference to handling men. The department recommended to the President that: "As a very high order of ability to handle men is an essential qualification for a chief machinist in the naval service, I recommend that final action upon the finding of the board in this case be suspended for a period of one year, in order that an opportunity may be afforded Machinist * * * to further establish his fitness for promotion which, considering the evidence above referred to, I regard as open to question." File 26260–2044, Sec. Navy, April 28, 1913.

206. **Same**—A boatswain, after six years' service in his grade, was examined for promotion to chief boatswain, found not professionally qualified, and suspended for one year. After the expiration of his period of suspension he was reexamined, and again found not qualified professionally. Under these circumstances, *advised*, that the record may be returned to the board for further examination of the candidate; or it may be dis-

Digitized by Google

approved, and a new examination ordered; but action upon the record can not be indefinitely withheld and the officer continued in his present grade. File 26260-684, J. A. G., Jan. 8, 1910. *See also* CUSTOMS, 8.

It was held that an officer due for promotion could be held in his present rank to see whether or not he kept sober. File 3849-02, J. A. G., June 6, 1902; 20 J. A. G. 290.

207. **Same**—R. S. 1505 was amended by the act of March 11, 1912 (37 Stat., 73), to read as follows: "Any officer of the Navy on the active list below the rank of commander who, upon examination for promotion, is found not professionally qualified, shall be suspended from promotion for a period of six months from the date of approval of said examination, and shall suffer a loss of numbers equal to the average six months' rate of promotion to the grade for which said officer is undergoing examination during the five fiscal years next preceding the date of approval of said examination, and upon the termination of said suspension from promotion he shall be reexamined, and in cases of his failure upon such reexamination he shall be dropped from the service with not more than one year's pay; *Provided*, That the provisions of this act shall be effective from and after January first, nineteen hundred and eleven." File 26260-3193:1, Sec. Navy, April 22, 1916. *See also* File 26260-3026:2, Sec. Navy, April 18, 1916.

208. **Vacancy**—Examination of a Marine officer before the existence of a vacancy. *See* PROMOTION, 131.

209. **Same**—Examination of an officer of the Navy before the existence of a vacancy. *See* PROMOTION, 132.

210. **Vacancy must exist before promotion of a Marine officer.** *See* PROMOTION, 109.

211. **Vacancy must exist before promotion of an officer of the Navy**—In the absence of special legislation to the contrary an officer of the Navy can be promoted only to fill a vacancy actually existing. File 26255-83:4, J. A. G., Aug. 4, 1911, p. 5. *See also* PROMOTION, 109.

212. **Venereal disease**—An officer who is suffering from a venereal disease should be suspended from promotion. File 26260-153b. *See also* PROMOTION, 194-198.

213. **Vested right of promotion**—Promotion is a vested right, and an officer is entitled to rank from date of vacancy. File 14818-4. *See also* APPOINTMENTS, 10; PROMOTION, 142.

"There is now (August 29, 1916) absolutely no ground for the contention that any officer has a vested right to promotion to the grade of commander, captain, or rear admiral, merely because he happens to stand at the head of his existing grade."

214. **Waiver**—A candidate may waive his right to appear before a statutory board. *See* PROMOTION, 190.

215. **Same**—Failure of an acting assistant surgeon to pass may be waived by the Secretary of the Navy. *See* ACTING ASSISTANT SURGEONS, 2; PROMOTION, 3.

216. **Warrant officers**—The law (Act of March 3, 1901, 31 Stat. 1129, and Act of April 28, 1904, 33 Stat., 346) provides that no warrant officer shall be appointed as an ensign thereunder "until he shall have passed such competitive examination as may be prescribed by the Navy Department." File 28026-1209:4, J. A. G., Oct. 25, 1915. *See also* APPOINTMENTS, 18; PROMOTION, 192.

217. **Same**—Promotion to commissioned warrant officers. *See* PROMOTION, 205, 206.

218. **Withholding action upon.** File 26260-1294, J. A. G., June 10, 1911. *See also* COMMISSIONS, 40-43; PROMOTION, 56-59.

219. **Witness**—Candidate as a witness. *See* NAVAL EXAMINING BOARDS, 25-26.

PROMOTION BY SELECTION.

1. **Act of August 29, 1916 (39 Stat. 556).** *See* PROMOTION BY SELECTION, 4.

2. **General Order No. 231, August 31, 1916**—Publishes act of August 29, 1916. *See* PROMOTION BY SELECTION, 4.

3. **Inherent right to promotion**—By the act of August 29, 1916, "the principle of the inherent right of any officer to promotion was definitely abandoned." File 26521-169, J. A. G., Nov. 28, 1916, p. 4.

4. **Law**—"Hereafter all promotions to the grades of commander, captain, and rear admiral of the line of the Navy, including the promotion of those captains, commanders, and lieutenant commanders who are, or may be, carried on the Navy list as additional to the numbers of such grades, shall be by selection only from the next lower respective grade upon the recommendation of a board of naval officers as herein provided.

"The board shall consist of nine rear admirals on the active list of the line of the Navy not restricted by law to the performance of shore duty only, and shall be appointed by the Secretary of the Navy, and convened during the month of December of each year and as soon after the first day of the month as practicable.

Digitized by Google

"Each member of said board shall swear, or affirm, that he will, without prejudice or partiality, and having in view solely the special fitness of officers and the efficiency of the naval service, perform the duties imposed upon him as herein provided.

"The board shall be furnished by the Secretary of the Navy with the number of vacancies in the grades of rear admiral, captain, and commander to be filled during the following calendar year, including the vacancies existing at the time of the convening of the board and those that will occur by operation of law from the date of convening until the end of the next calendar year, and with the names of all officers who are eligible for consideration for selection as herein authorized, together with the record of each officer: *Provided*, That any officer eligible for consideration for selection shall have the right to forward through official channels at any time not later than ten days after the convening of said board a written communication inviting attention to any matter of record in the Navy Department concerning himself which he deems important in the consideration of his case: *Provided*, That such communication shall not contain any reflection upon the character, conduct, or motives of or criticism of any officer: *Provided further*, That no captains, commanders, or lieutenant commanders who shall have had less than four years' service in the grade in which he is serving on November the thirtieth of the year of the convening of the board shall be eligible for consideration by the board: *Provided further*, That the recommendation of the board in the case of officers of the former Engineer Corps who are restricted by law to the performance of shore duty only and in that of officers who may hereafter be assigned to engineering duty only shall be based upon their comparative fitness for the duties prescribed for them by law. Upon promotion they shall be carried as additional numbers in grade.

"The board shall recommend for promotion a number of officers in each grade equal to the number of vacancies to be filled in the next higher grade during the following calendar year: *Provided*, That no officer shall be recommended for promotion unless he shall have received the recommendation of not less than six members of said board: *Provided further*, That the increase in the number of captains herein authorized shall be made at the rate of not more than ten captains in any one year.

"The report of the board shall be in writing signed by all of the members and shall certify that the board has carefully considered the case of every officer eligible for consideration under the provisions of this law, and that in the opinion of at least six of the members, the officers therein recommended are the best fitted of all those under consideration to assume the duties of the next higher grade, except that the recommendation of the board in the case of officers of the former Engineer Corps who are restricted by law to the performance of shore duty only, and in that of officers who may hereafter be assigned to engineering duty only, shall be based upon their comparative fitness for the duties prescribed for them by law.

"The report of the board shall be submitted to the President for approval or disapproval. In case any officer or officers recommended by the board are not acceptable to the President, the board shall be informed of the name of such officer or officers, and shall recommend a number of officers equal to the number of those found not acceptable to the President, and if necessary shall be reconvened for this purpose. When the report of the board shall have been approved by the President, the officers recommended therein shall be deemed eligible for selection, and if promoted shall take rank with one another in accordance with their seniority in the grade from which promoted: *Provided*, That any officers so selected shall prior to promotion be subject in all respects to the examinations prescribed by law for officers promoted by seniority, and in case of failure to pass the required professional examination such officer shall thereafter be ineligible for selection and promotion. And should any such officer fail to pass the required physical examination he shall not be considered, in the event of retirement, entitled to the rank of the next higher grade.

"On and after June thirtieth, nineteen hundred and twenty, no captain, commander, or lieutenant commander shall be promoted unless he has had not less than two years' actual sea service on sea-going ships in the grade in which serving or who is more than fifty-six, fifty, or forty-five years of age, respectively: *Provided*, That the qualification of sea service shall not apply to officers restricted to the performance of engineering duty only: *Provided further*, That captains, commanders, and lieutenant commanders who become ineligible for promotion on account of age shall be retired on a percentage of pay equal to two and one-half per centum of their shore-duty pay for each year of service: *Provided further*, That the total retired pay shall not exceed

Digitized by Google

seventy-five per centum of the shore-duty pay they were entitled to receive while on the active list." (Act of August 29, 1916 (39 Stat. 578), G. O. 231, August 31, 1916, pp. 9–11.) *See* C. M. O. 3, 1914.

5. **Object of selection.**—The object of the board on selection is not at all to determine definitely whether or not the officers recommended by it are in fact qualified to perform the duties of the next higher grade at sea. That is still the function of the examining board which under the present act examines the officers who have been recommended by the board and selected by the President. The object of the selection board is carefully to consider the cases of all officers who are, under the law, eligible for promotion and to form their opinions from any means which may be available as to those among the eligibles who are *best* qualified for promotion. File 26521–169, J. A. G., Nov. 28, 1916, p. 5.
6. **"Plucking board."** *See* COMMISSIONS, 42; PROMOTION, 123; RETIREMENT OF OFFICERS, 41.
7. **Policy of Government changed regarding promotion.**—On August 29, 1916, the naval appropriation bill (39 Stat. 578) was approved containing a provision for promotion by selection to the grades of commander, captain, and rear admiral. In the adoption of the system of promotion by selection for the aforementioned grades Congress completely altered its policy in regard to promotion in the Navy which had been pursued practically since the beginning of this Republic. File 26521–169, J. A. G., Nov. 28, 1916, p. 4.
8. **Records of officers.**—Question as to whether the provisions of the act of June 18, 1878 (20 Stat. 165), apply. *Held*, That the board shall be furnished with the entire "record of each officer" eligible for consideration. File 26521–169, J. A. G., Nov. 28, 1916; C. M. O. 3, 1917, 7.

Same.—"Every officer concerned has a right to submit, through official channels, at any time not later than ten days after the convening of the board, a written communication inviting attention to any matter of record in the Navy Department concerning matters which he deems important in the consideration of his case. This written communication should be in the hands of the board by December 12, 1916." File 28026–1484, J. A. G., Nov. 14, 1916.

10. **Staff Corps.** File 26687–4:4, J. A. G., Oct. 30 and 31, 1916. *See also* PROMOTION, 182–184; C. M. O. 3, 1917, 7–9.
11. **"Together with the record of each officer."**—To what "record" do these words contained in the act of August 29, 1916, refer. *See* PROMOTION BY SELECTION, 8; C. M. O. 3, 1917, 7.

PROPERTY.

1. **Public property.** *See* PUBLIC PROPERTY.
2. **Taxation.**—Persons in the Government service. *See* POLL TAXES.

PROPERTY OF THE UNITED STATES. *See* PUBLIC PROPERTY.

PROPHYLACTIC TREATMENT.

1. **Court-martial.**—For refusal to take G. C. M. Rec. 21477.
2. **Small-pox.** *See* SMALLPOX.
3. **Typhoid.** *See* TYPHOID PROPHYLACTIC.
4. **Venereal.** *See* VENEREAL PROPHYLACTIC.

PROSECUTING A CLAIM AGAINST THE UNITED STATES. *See* CLAIMS; CLAIMS AGAINST THE UNITED STATES.

PROSECUTING WITNESSES. *See* COUNSEL, 45.

PROTECTION OF THE UNIFORM. *See* DISCRIMINATION AGAINST UNIFORM; UNIFORM.

PROTESTS.

1. **Record of proceedings.**—not allowed on. *See* EXCEPTIONS, 2; BILLS OF EXCEPTIONS, 1.
2. **Reports on fitness.**—Summary courts-martial members' protest against entry as to manner of performing duty. *See* CRITICISM OF COURTS-MARTIAL, 36; REPORTS ON FITNESS, 3.

PROTOCOLS.

1. **Spain.**—The "Protocol of agreement between the United States and Spain" was signed August 12, 1898. File 26516–47, J. A. G., May 18, 1911, p. 2. *See also* File 24368–11, J. A. G., Mar. 14, 1914.

Digitized by Google

PROVED BUT WITHOUT CRIMINALITY. *See* ACQUITTAL, 25.

PROVED BUT WITHOUT CULPABILITY. *See* FINDINGS, 44, 70.

PROVISIONS AND CLOTHING, BUREAU OF.
1. **Name**—The name of the Bureau of Provisions and Clothing was changed to Supplies and Accounts by the act of July 19 ,1892 (27 Stat. 243, 245). File 22724-16:1, J. A. G. Feb. 13, 1911, p. 2.

PROVOCATION.
1. **Clemency**—Provocation as grounds for. *See* CLEMENCY, 45.

PROVOST.
1. **Haiti**—Authority of commander in chief of cruiser squadron to try political (military prisoners by military commission or provost. *See* MILITARY COMMISSIONS.

PROVOST COURT. File 5526-39:20.

PROVOST MARSHAL.
1. **Witness**—The provost marshal must be present while witnesses testify ,even though he himself may later be called as a witness. G. C. M. Rec. 31355, p. 2.

PRUSSIAN LIFE-SAVING MEDAL. *See* DECORATIONS, 5.

PUBLIC.
1. **Definition**—"All the authorities agree that 'public' is a relative term used in contradistinction to the word 'private' (e. g., State *v.* Sowers, 52 Ind. 311, 312.)" File 26251-2993, J. A. G., Mar. 10, 1910, p. 5. *See* pages 6-8 of the foregoing letter for a general discussion of various definitions of the words "public" and "private."

PUBLIC ADMINISTRATOR. *See* DISPOSITION OF EFFECTS, 2.

PUBLIC LANDS.
1. **Leasing**—Of public lands by Executive action. *See* 13, J. A. G., 449, Apr. 28 ,1905 *See also* File 1266-1162-01.

PUBLIC MONEY.
1. **Ships' stores**—The profits from sales made by ships' stores in the Navy, as authorized by the act of June 24, 1910 (36 Stat. 619), are not public money within the meaning of section 3648, R. S. (Compt. Dec. Aug. 11, 1914 ,file 26254-1571:2). *See also* File 26254-1759, Apr. 20, 1915.

PUBLIC OFFICES. *See* "OFFICE."

PUBLIC OPINION AS TO DRUNKENNESS. *See* DRUNKENNESS, 73.

PUBLIC POLICY. *See* C. M. O. 31, 1911; 21, 1910, 15; EVIDENCE ,82 ,83; SALVAGE, 2.

PUBLIC PRESS.
1. **Good name of naval service**—Dragged into notoriety through. C. M. O. 14 ,1915 ,1-2.
2. **Newspapers.** *See* NEWSPAPERS; PUBLICATION.

PUBLIC PROPERTY.
1. **Clothing, useless**—Disposition of. *See* File 26288-394, Sec. Navy, Apr. 24, 1913.
2. **Defense of**—By sentinel using firearms. *See* FIREARMS, 2.
3. **Loss of**—Responsibility of officer for. File 18140-10 J. A. G. Apr. 24, 1911. *See also* PUBLIC PROPERTY, 5.
4. **Loss or damage of**—Checkage of pay for. *See* PAY, 17, 18.
5. **Marine Corps**—Responsibility for loss of, fixed. *See* File 18140-37, Sec. Navy, Aug. 31, 1916; 18140-10, J. A. G., Apr. 24, 1911; 18140-32, Sec. Navy, Aug. 26, 1915.
6. **Prisoners' useless clothing**—Disposition of. File 26288-394, Sec. Navy, Apr. 24, 1913.
7. **Recovery of pawned or stolen property**—The law is well settled that no pawnbroker may legally retain property of the United States which has been stolen and pawned. It is the duty of any such broker having such property in his possession to return the same to the United States on demand, and, in the event of his refusal to do so, legal proceedings against him may be instituted by the Department of Justice. Also the United States, through any of its officers or representatives detailed for the purpose,

Digitized by Google

may retake said property if this can be done without a breach of the peace. In any event the United States can not be required, nor is it authorized, to refund the amount loaned on its property by a pawnbroker to persons by whom said property has been stolen. File 26804-8, J. A. G., Aug. 28, 1916; C. M. O. 30, 1916, 8.

PUBLIC REPRIMAND.

1. **Courts-martial**—May be reprimanded for leniency. *See* ADEQUATE SENTENCES; CRITICISM OF COURTS-MARTIAL.
2. **Court-Martial, Orders**—Should show that public reprimand involved in a general court-martial sentence was administered. *But see* C. M. O. 7, 1912, 1; 9, 1913, 3.
3. **Same**—Record of officer—Published in a court-martial order as a part of a public reprimand. *See* PUBLIC REPRIMAND, 14.
4. **Definition of**—The mere fact that a letter of reprimand is exhibited to one or more persons before reaching the officer to whom addressed does not constitute such a letter a "public reprimand." The publication of such letter or contents thereof throughout the naval service is requisite to constitute it a "public reprimand." File 26251-2993, J. A. G., Mar. 10, 1910. *See also* REPRIMAND, 2.

   The unbroken chain of precedents of the department shows that the method of executing a sentence of public reprimand has been from the earliest days a publication of the reprimand to the service in a court-martial order.

   A private reprimand is executed by addressing a letter to the officer concerned through the usual official channels. File 26251-2993, J. A. G., Mar. 10, 1910, p. 8.
5. **Department does not favor as part of a general court-martial sentence**—In regard to that part of the sentence imposed which adjudges a public reprimand, the attention of the court is invited to the fact that sentences involving public reprimand are not regarded with favor by the department. (C. M. O. 7, 1912, 3; 31, 1912 32, 1912; 34, 1912; 35, 1912; 37, 1912; 23, 1914; 28, 1914, 4-5; 45, 1914; 46, 1914.) C. M. O. 25, 1915; 12, 1916, 2.
6. **Same**—In an officer's sentence which included loss of numbers and to be "publicly reprimanded" the department while approving sentence stated the reprimand will "be dispensed with." C. M. O. 12, 1904, 4. *See also* C. M. O. 104, 1896, 3-4.

   Where a public reprimand constituted the entire sentence the department disapproved in order that the well established policy of the department, which regards such a sentence as undesirable, might be emphasized. C. M. O. 38, 1916.
7. **Jeopardy, former**—A public reprimand which is not administered as a part of a court-martial sentence does not constitute former jeopardy or bar trial. *See* JEOPARDY, FORMER, 23, 30; PLEA IN BAR, 6.
8. **Letter of department is not necessarily a public reprimand**—Charges were preferred to the department by an officer of the Navy against another officer in the service, with recommendation that the latter be brought to trial by general court-martial. After consideration of the matter the officer against whom the charges were made was informed by the department, in a letter sent him through the usual official channels, that his conduct "receives the disapproval and censure of the department;" but that for reasons of public policy his trial by court-martial would not be ordered. *Held*, that the department's letter was not a public reprimand; and further *held*, that if such a letter could be regarded as a public reprimand, it would not constitute a "punishment" which could be pleaded by the recipient in bar of trial by court-martial. File 26251-2993, J. A. G., Mar. 10, 1910.
9. **Letter of public reprimand by Secretary of Navy**—Published in full in court-martial order. C. M. O. 11, 1908, 3; 1, 1909.

   In administering a sentence of public reprimand the convening authority stated in part: "The commander in chief is called upon by the sentence of the court-martial to administer a reprimand; this should be felt by a sensitive officer as much of a reprimand as could be gained by a reprimand administered; I leave it to be so considered; for I am led to infer that this officer's sensibilities are not in a blunted condition; therefore he may consider himself reprimanded." C. M. O. 20, 1894, 2.

   Although the convening authority stated that the publication of the court-martial order would constitute the public reprimand, he also added: "A casual reading, however, of the charges and specifications, with the findings thereon, will be sufficient to enable the service to form its own estimate of an officer who has been found guilty of the acts alleged in this case." C. M. O. 28, 1908, 4.

   Where accused was charged with "manslaughter" and another charge, and acquitted of the first charge but found guilty of the second, the Secretary of the Navy, in administering a public reprimand adjudged by the court as part of its sentence,

Digitized by Google

stated in part: "These offenses on your part have led to a calamity so clearly unforeseen by you and so distressing that no words of reproof can be needed to make you feel their gravity. Your disobedience to the law of your country, your forgetfulness of the full import of your oath, your yielding to fierce and angry passions when tempted by a sense of wrong have borne fruits so bitter that your worst punishment has been already suffered. The merciful sentence of the court which tried you leaves you a member of the honorable profession you have chosen. In that great school of self-sacrifice and obedience a life useful to your country will, it is hoped, atone for grave faults which have clouded the early years of your service." C. M. O. 12[3], 1905, 6.

10. **Members of courts-martial**—May be reprimanded for failure to properly perform court-martial duty. *See* CRITICISM OF COURTS-MARTIAL, 35.
11. **Nominal punishment**—A public reprimand is a nominal punishment. C. M. O. 8, 1915, 3.
12. **Not favored**—Public reprimand as a part of sentences is not favored by the department. *See* PUBLIC REPRIMAND, 5.
13. **President of the United States**—Remitted a mitigated sentence and directed that the accused (officer) be "reprimanded for neglect of duty." C. M. O. 48, 1904, 1.
14. **Record of officer**—Published in a court-martial order as a part of a public reprimand. C. M. O. 3, 1911, 2; 29, 1912, 1; 32, 1912, 2; 35, 1912, 1; 36, 1912, 2; 2, 1913, 1; 3, 1913, 2.
15. **Remitted**—By department. C. M. O. 12, 1904, 4.
16. **Same**—By commander in chief. C. M. O. 38, 1912.
17. **Right to**—"In the absence of express limitation or restriction it would seem that, whatever the propriety of so doing, the inherent right of a commander in chief to express approval or disapproval of the official conduct of subordinate officers under his command can not be denied. Such has been the uniform view of the department with reference to the right of the Secretary of the Navy to administer a reprimand. There is abundant precedent for the reprimand by the Secretary of the Navy of an officer for a breach of discipline or a failure in the performance of duty." (*See* G. O. 31, Mar. 22, 1864; G. O. 87, Sept. 7, 1868.) C. M. O. 9, 1893, 10.

"The practice is as old as the department itself. Cases have occurred where the department, without trial, has pronounced emphatic reprimand upon officers in General Orders. The publicity that is given either to its commendation or its reproof is a matter within its own discretion, in the exercise of which it consults only the public interest." C. M. O. 93, 1893, 10.

"Nothing can be better settled in military law and practice than the right of a commander in chief to reprimand or censure an officer by general order or by public letter, or in any other manner which he may deem for the best interests of the service. The mode adopted must lie, and ought always to lie within the discretion of the commander in chief; if it does not, it would be impossible to maintain military discipline. The practice and precedents in our own Navy are beyond question, as can be readily shown." C. M. O. 93, 1893, 10.

"The right of a superior officer to censure a subordinate, publicly or privately, for negligence in the performance of duty is an inherent attribute of command, and is presumed to exist unless taken away by express provision of law or other competent authority." C. M. O. 9, 1893, 9-10.

18. **Secretary of the Navy**—The Secretary of the Navy has the right to censure a subordinate, publicly or privately, for negligence or inefficiency in the performance of duty or for misconduct bringing discredit upon the service. Such rebuke may be published to the service in such manner as the department may, in its discretion, decide, and does not constitute a bar to subsequent trial for that offense by court-martial. It is the mere exercise of the Secretary's right of administration of discipline and is in no wise connected with his power of reviewing authority wherein he merely executes the sentence of public reprimand imposed by the court-martial. File 26251-2993, J. A. G., Mar. 10, 1910.
19. **Sentence**—While the proper sentence is "*public* reprimand," courts-martial have irregularly sentenced the accused "to be *reprimanded* by the Secretary of the Navy." C. M. O. 36, 1908, 2.
20. **Same**—Sentences in which "public reprimand" constituted the whole sentence: C. M. O. 15, 1909; 20, 1909; 30, 1909; 12, 1910; 19, 1910; 29, 1910; 9, 1911; 13, 1911; 28, 1911; 14, 1912; 4, 1913; 9, 1913; 39, 1913; 15, 1914; 23, 1914; 28, 1914; 45, 1914; 46, 1914; 38, 1916.

Digitized by Google

21. **Undesirable form of sentence**—It is inadvisable in cases where a substantial sentence is imposed by the court that an officer suffering such substantial sentence should in addition thereto be subject to a public reprimand. C. M. O. 104, 1896, 6. *See also* File 12821–83:34, Sec. Navy, Jan. 13, 1917; Bu. Nav. file N 5 F, 3711–64, Jan. 4, 1917; PUBLIC REPRIMAND, 5.
22. **Same**—A sentence consisting entirely of a public reprimand is not favored by the department. C. M. O. 38, 1916; G. C. M. Rec. 32728. *See also* PUBLIC REPRIMAND, 5.

PUBLIC STATUTES. *See* STATUTES; STATUTORY CONSTRUCTION AND INTERPRETATION.

PUBLIC TRIAL.
1. **Accused**—Requested findings and sentence be set aside, claiming trial was not a public trial. *See* APPEALS, 4.
2. **General courts-martial**—The sessions of a general court-martial shall be public. *See* COURT, 126, 127.

PUBLIC VESSELS. *See* COLLISIONS, 10.

PUBLIC WORKS.
1. **No objection**—Is perceived to the use of the expression "public works" for administrative purposes, grouping thereunder such objects as may be deemed proper, but the term must not be employed in such manner as to conflict with existing law. File 3980–621, J. A. G., May 31, 1911, p. 10.

PUBLICATION.
1. **Army and Navy Journal**—Officer tried by general court-martial for writing and furnishing for publication, in The Army and Navy Journal, an article which must necessarily reflect upon worthy officers of the Navy, and which was done in violation of a general order. G. O. 61, June 24, 1865.
2. **Books**—Permission granted to publish. *See* BOOKS, 5.
3. **Libel.** *See* LIBEL, 4.
4. **Newspapers**—Officers acting as correspondents for. *See* NEWSPAPERS, 5.
5. **Same**—A commissioned officer was severely reprimanded by the Secretary of the Navy for the "publication of a letter written by an [the] officer to his father concerning certain operations in which certain foreign governments were directly concerned" which "was a source of very great embarrassment to the Department of the Navy and the Department of State." File 26251–12159, Sec. Navy, Oct. 30, 1916, p. 6.
6. **Same**—A chief petty officer was severely reprimanded for writing a letter directed to a newspaper upon matters of an unneutral character. File 19585–857, Sec. Navy, Nov., 1916.

PUNISHMENT. *See also* SENTENCES.
1. **Certainty not degree**—It is the certainty of, and not the degree of, punishment which deters the wrongdoer.
2. **Commanding officers**—Punishments by commanding officers. *See* COMMANDING OFFICERS, 31–33.
3. **Object of**—The primary object of punishment is the deterrent effect upon others. G. C. M. Rec. 24607.

PUNITIVE.
1. **Prisoners awaiting trial**—Confinement should not be punitive. C. M. O. 27, 1915, 9. *See also* PRISONERS, 4.
2. **Proceedings.** C. M. O. 35, 1915, 8. *See also* CIVIL AUTHORITIES, 16.
3. **Sentences.** *See* PUNITIVE SENTENCES.

PUNITIVE SENTENCES. *See* C. M. O. 129, 1898, 8.

PURCHASE, DISCHARGE BY.
1. **Definition.** *See* ORDINARY DISCHARGES, 2.
2. **I-4893.** *See* NAVAL INSTRUCTIONS, 1913, I–4893.
3. **Poll taxes**—Payment of, by person who received a discharge by purchase from Navy. *See* POLL TAXES, 5.

"PURSER."
1. **Detective agency**—Arresting deserter. *See* CIVIL OFFICERS, 2.

QUALIFICATIONS FOR APPOINTMENT TO OFFICE. *See* APPOINTMENTS, 36.

Digitized by Google

QUALIFICATIONS OF MEMBERS OF COURTS-MARTIAL. *See* MEMBERS OF COURTS-MARTIAL, 39.

QUALIFICATIONS OF OFFICERS. *See* OFFICERS, 95, 96, 97.

QUARANTINE CHARGES. *See* CONSTITUTIONAL LAW, 7.

QUARTERS.

1. **Agreement of two officers concerning quarters**—Resulted in a general court-martial for both. File 26254-2052. *See also* OFFICERS, 3; PRIVILEGE, 3.
2. **Allowances**—And commutation for quarters for officers of the Navy. File 28479-141 J. A. G., Nov. 15, 1915. *See also* 153 S. & A. Memo. 2854.
3. **Drunk in quarters.** *See* DRUNKENNESS, 73, 75.
4. **Naval Academy**—Assignment of quarters at the Naval Academy. File 9886-18, Sec. Navy, Dec. 12, 1908, quoted with approval in File 28479-141, J. A. G., Nov. 15, 1915. *See also* File 26254-2120:1.
5. **Same**—"Married officers'" quarters. *See* File 9886-16, Sec. Navy, Oct. 15, 1908, cited in File 28479-141, J. A. G., Nov. 15, 1915.
6. **New York Navy Yard**—Assignment of quarters to unmarried junior officers. File 20032-4, Sec. Navy, Nov. 27, 1908, quoted approvingly in File 28479-14:1, J. A. G., Nov. 15, 1915.
7. **Pensacola, Fla., Aeronautic Station**—Assignment of quarters in building No. 34. File 28479-141, J. A. G., Nov. 15, 1915.
8. **Puget Sound Navy Yard.** File 26254-2134; 9886-26:1.
9. **Submarine**—Hire of quarters for officers of submarines while such vessels are undergoing repairs. File 26254-2131, Sec. Navy, Nov. 17, 1916.

QUARTERLY CLOTHING RETURNS.

1. **Evidence, as.** C. M. O. 52, 1910, 3.

QUESTIONS ASKED WITNESS BEFORE COURTS-MARTIAL.

1. **Numbered properly.** *See* RECORD OF PROCEEDINGS, 95.

QUESTIONS OF LAW.

1. **Comptroller of the Treasury**—Weight of decisions with reference to points of law. *See* COMPTROLLER OF THE TREASURY, 10.
2. **"Concerning the personnel."** *See* COAST GUARD, 1; JUDGE ADVOCATE GENERAL, 14, 17, 33.
3. **Courts-martial**—Where the only difficulty existing is one of law, decisions of the courts (civil), opinions of the law officers of the Navy (Attorney General and Judge Advocate General), or decisions of the department (Secretary of the Navy) based thereon, are not to be lightly disregarded by naval courts-martial without incurring the full measure of responsibility which must be ascribed to them for the resulting miscarriage of justice. File 26251-12159, Sec. Navy, Dec. 9, 1916. *See also* CRITICISM OF COURTS-MARTIAL, 14.
4. **Same**—"The action of the court in this case, in changing its finding to conform to the law, shows a proper appreciation on the part of the court of its true function, that of applying the law to the facts as it finds them. In determining the questions of fact the members of the court must arrive at their conclusions solely from the evidence that is adduced or comes before the court and not from any knowledge or information otherwise acquired. In exercising this part of its function a court is assisted by a knowledge and application of the rules of evidence, but no considerable knowledge of the law is required. It is to this duty of deducing the facts from a consideration of the evidence that the part of the oath administered to members requiring them to try a case 'according to their own consciences' refers. The facts having been found, it remains for the court to apply the law to them. The exercise of this function depends not on the consciences of the members but upon a knowledge of the law. A comprehensive knowledge of this subject is a profession in itself, and, while officers of the naval service are accountable for the information promulgated by court-martial orders and other official publications, it is to be expected that cases will arise in which naval courts will require assistance in applying the more intricate provisions of law. Therefore, if by reason of a lack of knowledge of the law a court arrives at an incorrect finding or unjustified sentence, there has been provided, in the interests of justice, a means of correcting such error. The department may return the record for further consideration, pointing out what the law is and how it should be applied. In such event

Digitized by Google

the court is not justified in disregarding the law because an application of the same may reach a result at variance with the individual beliefs of a majority of its members. It is only right and just for the court to accept the law as laid down to it by proper authority and then to come to its findings and sentence anew accordingly, as was done in this case." C. M. O. 25, 1916, 4, quoted approvingly in file 26251-12159, Sec. Navy, Dec. 9, 1916.

5. **Same**—Weight of decisions of the Secretary of the Navy regarding questions of law. *See* PROMOTION, 188; QUESTIONS OF LAW, 3, 4; SECRETARY OF THE NAVY, 39.
6. **Same**—Questions of law arising before courts-martial forwarded to Judge Advocate General. *See* RECORDS OF PROCEEDINGS, 59; SECRETARY OF THE NAVY, 39.
7. **Examining boards**—Questions of law arising before examining boards. *See* MARINE EXAMINING BOARDS, 12; PROMOTION, 188.
8. **Judge Advocate General**—All questions involving points of law "concerning the personnel" shall be examined and reported upon by the Judge Advocate General. *See* COAST GUARD, 1; JUDGE ADVOCATE GENERAL, 14, 17, 33.
9. **Marine Examining Boards**—Questions of law arising before Marine Examining Boards. *See* MARINE EXAMINING BOARDS, 12; PROMOTION, 188.
10. **Naval Examining Boards**—Questions of law arising before Naval Examining Boards. *See* MARINE EXAMINING BOARDS, 12; PROMOTION, 188.
11. **Personnel**—Questions involving points of law "concerning the personnel" of the naval service. *See* COAST GUARD, 1; GENERAL ORDERS, 3; JUDGE ADVOCATE GENERAL, 14, 17, 33.
12. **Secretary of the Navy**—Weight of decisions regarding points of law. *See* PROMOTION, 188; SECRETARY OF THE NAVY, 39.
13. **Settlement of accounts**—Weight of decisions of Comptroller of the Treasury. *See* COMPTROLLER OF THE TREASURY, 10.

QUIBBLES.

1. **Officer's defense**—Consisting of. *See* OFFICERS, 116.

QUORUM.

1. **Nolle prosequi**—Not necessary to have a quorum present in a trial by general court-martial to enter a *nolle prosequi*. *See* COURT, 140; NOLLE PROSEQUI, 12.
2. **Procedure**—Should the membership of a general court-martial be reduced below the legal number, the court shall be adjourned and a report made to the convening authority. (R-769 (7). *See* CHALLENGES, 22; COURT, 141.
3. **Reconvening of a general court-martial**—Not practicable for the court to be reconvened as it was reduced below the legal minimum. *See* COURT, 142, 143.
4. **Same**—Revision was not practicable for the reason that one of the original members who sat during the trial of the accused had since been relieved, leaving only four—less than a quorum—qualified to take part in revision. File 6401-02, J. A. G., July 22, 1902; 20 J. A. G., 563.

RAFT, TARGET. *See* TARGET RAFTS.

RAILROAD TICKETS.

1. **Procured**—With fraudulent intent, knowingly and willfully appropriating. C. M. O. 17, 1910, 3-5.
2. **Refund for unused tickets**—Court-martial prisoners, not having used the full amount of the transportation furnished by the Government, are not entitled to the cash value of the unused portions thereof but refund should be made to the Government. File 9160-6157, Sec. Navy, May 29, 1916.

RANGE FINDER.

1. **Willful destruction of**—By a paymaster's clerk who was tried by general court-martial. C. M. O. 37, 1912.

RANK. *See also* PRECEDENCE; TITLES.

1. **Accused**—Rank of accused should be included in sentence. C. M. O. 14, 1915, 2. *See also* DESIGNATION OF ACCUSED, 2-4; SENTENCES, 33.
2. **Advancement in rank only.** *See* COMMISSIONS, 9.
3. **Chiefs of bureaus.** *See* BUREAU CHIEFS, 8-13.
4. **Civil War service.** *See* CIVIL WAR SERVICE, 5, 6.
5. **Date of**—Officer an additional number in his grade. *See* ADDITIONAL NUMBERS, 1.
6. **Deck court officers**—Rank a legal requirement. *See* DECK COURTS, 10, 46.

Digitized by Google

7. **Dental surgeons.** *See* DENTAL SURGEONS, 9.
8. **Examining boards.** *See* MARINE EXAMINING BOARDS, 16; NAVAL EXAMINING BOARDS, 17.
9. **Marine examining boards.** *See* MARINE EXAMINING BOARDS, 16.
10. **Marine retiring boards.** *See* MARINE RETIRING BOARDS, 2.
11. **Naval examining boards.** *See* NAVAL EXAMINING BOARDS, 17.
12. **Naval retiring boards.** *See* NAVAL RETIRING BOARDS, 2.
13. **Navy Register**—Officer's rank is not affected by his position on the Navy Register. *See* NAVY REGISTER, 2.
14. **Precept**—Error in stating rank, title, or relative position in precept will not affect the validity of precept. *See* CHALLENGES, 15.
15. **Rear admirals**—Rank of rear admirals of the senior and lower nines. *See* REAR ADMIRALS, 3.
16. **Retiring boards.** *See* MARINE RETIRING BOARDS, 2; NAVAL RETIRING BOARDS, 2.
17. **Title**—Only line officers have the *title as well as the rank*, while staff officers have the title of the grade to which they belong in their own corps, and have assimilated rank in order to compare them with line officers. File 22724–16 : 1, J. A. G., Apr. 24, 1911, p. 4. *See also* TITLES, 1.

RANK AND GRADE DISTINGUISHED. *See* GRADE AND RANK.

RAPE.

1. **"Assault with intent to commit rape"**—Paymaster's clerk tried by general court-martial. C. M. O. 35, 1913.
2. **Enlisted man**—Charged with. G. C. M. Rec. 29178.
3. **Insanity**—Defense of insanity in the offense of rape. C. M. O. 24, 1914. *See also* INSANITY, 33.
4. **Intent.** *See* INTENT, 49.

RATE OF ACCUSED.

1. **Sentence**—Should be included in. C. M. O. 14, 1915, 2. *See also* DESIGNATION OF ACCUSED, 2–4; SENTENCES, 33.

RATE OF PAY.

1. **Deck court records**—Should indicate rate of pay. C. M. O. 12, 1915, 7.

RATIFICATION.

1. **Fraudulent enlistment.** *See* FRAUDULENT ENLISTMENT, 75, 76.

RATING.

1. **Landsman**—Rating of landsman abolished for seaman branch. *See* LANDSMAN.
2. **New**—Congressional action necessary to establish new rating—Concerning the establishment of the rating of chief printer in the Navy, it was said by the Judge Advocate General: "It is my opinion that 'it is necessary to secure congressional action to establish a new rate in the Navy with a new rate of pay.' In this connection there is quoted the following extract from the naval appropriation act approved may 13, 1908 (35 Stat. 127): 'The pay of all active and retired enlisted men of the Navy is hereby increased ten per centum * * * and all pay herein provided shall remain in force *until changed by act of Congress.*'" File 26509–106, J. A. G., Oct. 17, 1913.
3. **Reduction in rating**—By court-martial sentence. *See* REDUCTION IN RATING.

RATIONS.

1. **Components of, etc.** *See* File 21177 : 3, J. A. G., Jan. 25, 1911.

REAPPOINTMENT OF DISMISSED OFFICERS. *See* DISMISSAL, 23; LEGISLATION, 5; OFFICERS, 39.

REAPPOINTMENT OF MIDSHIPMEN. *See* MIDSHIPMEN, 70–73.

REAR ADMIRALS.

1. **Lower nine**—Pay of. *See* REAR ADMIRALS, 2.
2. **Pay**—A rear admiral carried as No. 11 on the list of rear admirals of the Navy is not entitled to be credited with pay as a rear admiral of the first nine in consequence of three rear admirals of the first nine having been designated by the President for the rank and pay of admirals in the Navy, pursuant to provisions of the naval appropriation act of March 3, 1915. Since an officer designated under the provisions of the above act keeps his place on the list of rear admirals all the time no vacancy is created, and the law also expressly provides that no vacancy will thereby be created. File 26254–1738, Sec. Navy, Mar. 20, 1915; C M. O. 12, 1915, 12–13.

Digitized by Google

3. **Rank of upper and lower nines**—Rear admirals for pay purposes are divided into two classes, namely, rear admiral of the senior nine and rear admiral of the lower nine. However, there is no difference in the rank of such officers other than as among themselves, the same as in other grades of line officers, this being regulated by date of commission. Accordingly, a captain on the active list retired with the rank of the next higher grade is entitled to retirement merely as rear admiral; and the question whether or not he is a rear admiral of the senior nine or of the lower nine is one which relates merely to the rate of pay to which he may be entitled. File 26253-460 : 1, May 13, 1916.
4. **Retired rear admiral**—Tried by general court-martial. C. M. O. 41, 1915.
5. **Senior nine**—Pay. *See* REAR ADMIRALS, 2, 3.
6. **Upper nine**—Pay. *See* REAR ADMIRALS, 2, 3.

REASON BEHIND THE RULE OF ADMISSIBILITY OF CONFESSION. *See* CONFESSIONS, 21.

REASONABLE DOUBT.

1. **Definition**—It has been held that "attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury" (Miles *v.* U. S., 103 U. S. 312). Nevertheless, the Federal courts have given several clear and comprehensive definitions which may properly be adopted and applied by naval courts-martial.

The definition of reasonable doubt, as published in Forms of Procedure, 1910, p. 137, is as follows:

"By reasonable doubt is intended not fanciful or ingenious doubt or conjecture, but substantial, honest, conscientious doubt, not removed by material evidence in the case."

At the same place Forms of Procedure quotes the following definition of a Federal court (U. S. *v.* Newton, 52 Fed. Rep. 290):

"It is an honest, substantial misgiving, generated by insufficiency of proof. It is not a captious doubt, nor a doubt suggested by the ingenuity of counsel or jury, and unwarranted by the testimony; nor is it a doubt born of a merciful inclination to permit the defendant to escape conviction, nor prompted by sympathy for him of those connected with him." *See also* File 26251-11281, Sec. Navy, Dec. 9, 1915.

The following definitions have been sustained by the Supreme Court:

"A reasonable doubt is not an unreasonable doubt—that is to say, by a reasonable doubt you are not to understand that all doubt is to be excluded; it is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the strong probabilities of the case, and the probabilities must be so strong as not to exclude all doubt or possibility of error, but as to exclude reasonable doubt." (Dunbar *v.* U. S. 156 U. S. 199.)

"The court charges you that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt. That if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence you should do so, and in that case find him not guilty. You are further instructed that you can not find the defendant guilty unless on all the evidence you believe him guilty beyond a reasonable doubt.

"The court further charges you that a reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt." (Hopt *v.* Utah, 120 U. S. 439.)

It will be noted that the definition here given provides that if the evidence can be reconciled upon any "*reasonable*" hypothesis consistent with the defendant's innocence he should be acquitted. In the same case the Supreme Court made the following comment with reference to the general subject:

"Out of the domain of the exact sciences and actual observation there is no absolute certainty. The guilt of the accused, in the majority of criminal cases, must necessarily be deduced from a variety of circumstances leading to proof of the fact. Persons of speculative minds may in almost every such case suggest possibilities of the truth being different from that established by the most convincing proof. The jurors are not to be led away by speculative notions as to such possibilities."

Digitized by Google

A definition which is believed to be very satisfactory, and which was quoted to the court in a recent case, is the following:

"A reasonable doubt of guilt is a doubt growing reasonably out of the evidence or the lack of it. It is not a captious doubt; not a doubt engendered merely by sympathy for the unfortunate position of the defendant, or a dislike to accept the responsibility of convincing a fellow man. If, having weighed the evidence on both sides you reach the conclusion that the defendant is guilty to that degree of certainty that would lead you to act on the faith of it in the most important and critical affairs of your life, you may properly convict him. Proof beyond a reasonable doubt is not proof to a mathematical demonstration. It is not proof beyond the possibility of mistake. If such were the standard of evidence required, most criminals would go unwhipped of justice." (U. S. *v.* Youtsey, 91 Fed. Rep. 868.) C. M. O. 19, 1915, 6–7. *See also* G. C. M. Rec. 30485, pp. 693, 696, 831–832. *Compare obiter dictum* in Fid. Mut. Life Assn. *v.* Mettler (185 U. S. 317).

2. **Fraudulent enlistment.** *See* FRAUDULENT ENLISTMENT, 81.
3. **Promotion**—The burden of proving fitness for promotion beyond a reasonable doubt is upon the candidate. *See* PROMOTION, 19–21.
4. **Same**—Theory of Government proving beyond a reasonable doubt the unfitness of the candidate. *See* PROMOTION, 19.

RECEIPTS.

1. **Pay receipts**—Destroyed by a paymaster's clerk, who was tried by general court-martial. C. M. O. 26, 1915.
2. **Records of proceedings**—Judge advocate should secure receipt or waiver of copy of record of proceedings from accused. *See* RECORDS OF PROCEEDINGS, 32.

RECEIVING SHIPS.

1. **Cavite, P. I.**—Service on, is not sea service. *See* PAY CLERKS and CHIEF PAY CLERKS, 3.
2. **Prisoners**—Status of prisoners on board receiving ships awaiting trial. *See* PRISONERS, 4.

RECESS.

1. **Appointments.** *See* COMMISSIONS, 29; PAY, 82.
2. **Record of proceedings**—Shall show that court reconvened after recess as well as fact that court took a recess. C. M. O. 15, 1910, 5.
3. **Witness**—On stand at beginning of recess cautioned that oath is still binding at end of recess. C. M. O. 47, 1910, 5.
4. **Same**—Numbering of questions. *See* RECORD OF PROCEEDINGS, 95.

RECESS APPOINTMENTS. *See* COMMISSIONS, 29; PAY, 82.

RECOIL CYLINDERS.

1. **Ordnance officer**—Tried by general court-martial for not properly inspecting recoil cylinders to insure that they were filled. *See* ORDNANCE OFFICERS, 1.

RECOMMENDATIONS TO CLEMENCY. *See* CLEMENCY.

RECONSIDERATION.

1. **Comptroller of the Treasury's decision.**—*See* COMPTROLLER OF THE TREASURY, 11.

RECONVENING.

1. **Boards, examining**—Reconvening on own initiative. *See* NAVAL EXAMINING BOARDS, 18.
2. **Boards of Inquest.** *See* BOARDS OF INQUEST, 7.
3. **Boards of investigation.** *See* BOARDS OF INVESTIGATION, 16.
4. **Court reconvening of itself.** *See* COURT, 147–149.
5. **Courts of inquiry.** *See* COURTS OF INQUIRY, 47.
6. **Dissolved court.** *See* CONVENING AUTHORITY, 52; COURT, 69–71, 144.
7. **Error in name of accused**—Reconvening of court after trial has been finished, for the purpose of re-forming its finding and sentence, on account of error in name of accused in specification and in the evidence; and permitting a witness to give additional testimony after having pronounced it correct and to recorrect it, are irregularities in procedure. File 26287–494.
8. **Exigencies of the service**—Prevented reconvening. *See* COURT, 142, 146.
9. **General court-martial**—Could not be reconvened owing to exigencies of service. *See* CONVENING AUTHORITY, 51; COURT, 146.

Digitized by Google

10. **Same**—Reconvening of itself. *See* COURT, 147-149.
11. **Same**—Reduced below legal minimum. *See* COURT, 143.
12. **Naval Examining Boards**—On own motion. *See* NAVAL EXAMINING BOARDS, 18.
13. **Quorum**—Reconvening of court impracticable as membership was reduced below legal minimum. *See* COURT, 142.
14. **Sentence**—Adjusted prior to dissolution may be approved. *See* COURT, 68-71, 144.
15. **Summary courts-martial**—Reconvening by commander in chief. C. M. O. 20, 1915, 10. *See also* RECONVENING, 16.
16. **Same**—By senior officer present—where the commander in chief of a fleet or squadron, in reviewing the records of summary courts-martial, is of the opinion that the sentence is entirely inadequate, he has the power to refer the record back to the convening authority with directions to reconvene the court for reconsideration of the sentence. File 2214-13, Sec. Navy, March 22, 1906; C. M. O. 29, 1915, 11. *See also* File 26287-2100-1/2:1, Sec. Navy, Oct. 7, 1914.
17. **Same**—Reconvening of itself. *See* COURT, 149.

RECORD OF A "COURT-MARTIAL" CONVENED AT NAVAL ACADEMY.

1. **Copy**—Supplied Court of Claims on proper call. File 4051-3, J. A. G., July 1, 1909, p. 3.

RECORD OF ACCUSED.

1. **Clemency.** *See* CLEMENCY, 48-52.

RECORDS OF COURTS OF INQUIRY. *See* COURTS OF INQUIRY, 20.

RECORDS OF GENERAL COURTS-MARTIAL. *See* RECORD OF PROCEEDINGS.

RECORD OF PROCEEDINGS.

1. **Accused**—Record of proceedings should show affirmatively that accused was present during his trial (*See* ACCUSED, 1-9); that he had opportunity to cross-examine witnesses of prosecution (*See* CONSTITUTIONAL RIGHTS OF ACCUSED, 16); that he was warned as to the effects of his plea of "guilty" (*See* ACCUSED, 64; ARRAIGNMENT, 33); that he did not desire to offer any evidence, if such be the case (C. M. O. 14, 1910, 8; 15, 1910, 9); that he was not warned or withdrew after being a witness (*See* ACCUSED, 63); that if he desires to be a witness in his own behalf he goes on the stand at his *own request* (C. M. O. 37, 1909, 8); that he was afforded an opportunity to challenge (C. M. O. 37, 1909, 8; CHALLENGES, 18); that he was ready for trial (C. M. O. 37, 1909, 8); that he was present when precept and modifications thereof were read (*See* ACCUSED, 1-9); that he was asked if he desired counsel and, if so, that counsel entered (*See* COUNSEL, 2, 47); that when he pleads "guilty" he does not desire to offer any evidence in extenuation, as to character or of a strictly palliative nature (C. M. O. 14, 1910, 8. *See also* C. M. O. 15, 1910, 9).
2. **Same**—Entitled to a copy of record of proceedings. *See* RECORD OF PROCEEDINGS, 32-37.
3. **Aloud**—When record states a document was read, it is understood that it was read aloud. *See* ALOUD, 1.
4. **Amendments.** *See* CORRECTIONS, 4, 5.
5. **Arguments**—Admissibility of evidence and upon interlocutory proceedings. *See* ARGUMENTS, 4.
6. **Same**—Judge advocate and counsel in closing. *See* ARGUMENTS, 1-4.
   If the judge advocate and accused do not wish to make a closing argument it should be so stated in the record. G. C. M. Rec. 29934.
   Copy of argument appended to record of proceedings. *See* ARGUMENTS, 5.
7. **Army trial**—Record as evidence. *See* ARMY, 13.
8. **Arraignment.** *See* ARRAIGNMENT, 31.
9. **Arrest**—In proper cases record should show accused was released from arrest and restored to duty. *See* ARREST, 27; CONVENING AUTHORITY, 4.
10. **Authentication**—Courts of inquiry record. *See* COURT OF INQUIRY, 4, 43.
11. **Same**—Deck courts—Signed by deck-court officer only. (Forms of Procedure, 1910, 180).
12. **Same**—General courts-martial. *See* AUTHENTICATOIN OF SENTENCES; COURT, 175; MEMBERS OF COURTS-MARTIAL, 1, 12, 48.
13. **Same**—Each member of the court and judge advocate signed after the recording of the sentence and again after recording an additional finding and recommendation. The department held that one set of signatures would have been sufficient. C. M. O. 78, 1905.

Digitized by Google

14. **Same**—The sentence having been recorded, the proceedings in each separate case tried by the same court are required by law to be signed by all the members present when the judgment is pronounced, and also by the judge advocate. (R-810.)

In a certain case it was noted that at the close of the second day's proceedings the record was authenticated by all the members of the court and the judge advocate.

The third day the witnesses who had previously testified were called before the court to verify their testimony; the record of proceedings of the previous day was read, an amendment made therein and then approved; but the record of the third day's proceedings, which also completed the trial, shows that it was authenticated by only the president and the judge advocate.

When the sentence has been recorded, the proceedings in each separate case tried are required by law to be signed by all the members present when the judgment is pronounced, also by the judge advocate. C. M. O. 14, 1910, 10.

The judge advocate having neglected to sign the general court-martial record it was returned for his signature. File 11137-02; 22 J. A. G. 72.

15. **Same**—Summary courts-martial. *See* SUMMARY COURTS-MARTIAL, 4.
16. **Same**—A member of a summary court-martial may be ordered to sign the record. *See* MEMBERS OF COURTS-MARTIAL, 48.
17. **Bad-conduct discharge**—Brief synopsis of service and offenses of accused to be spread on record. *See* BAD-CONDUCT DISCHARGE, 10, 11.
18. **"Behind record"**—Department declined to go behind the record. C. M. O. 6, 1915, 6. *See also* JEOPARDY, FORMER, 38 (p.302); JUDGE ADVOCATE, 105.
19. **Binding.** *See* BINDING OF COURT-MARTIAL RECORDS.
20. **Certificate of medical officer.** *See* CONFINEMENT, 5.
21. **Challenges.** *See* CHALLENGES, 18.
22. **Charges and specifications**—Original charges and specifications should be prefixed, not appended, to the record. *See* CHARGES AND SPECIFICATIONS, 85.
23. **Same**—Date accused received copy should be entered on record. *See* CHARGES AND SPECIFICATIONS, 86.
24. **Civil courts**—Requesting copies of. *See* CIVIL COURTS, 2; COURTS OF INQUIRY, 12; GENERAL ORDER No. 121, Sept. 17, 1914, 23.
25. **Clemency, recommendations to.** *See* CLEMENCY, 47.
26. **Clerical errors**—Clerical errors may be amended by the court without the presence of the accused, but they are not to be corrected in an informal manner by erasure or interlineation. The legal procedure is for the proper officer to reconvene the court, calling its attention in the order for reassembling to the error requiring correction, and for the court, on reassembling, to continue the record by a report of the proceedings of the additional session in which the amendment is made. (R-838 (3).) C. M. O. 5, 1912, 14. *See also* ACCUSED, 8.
27. **Clerical omissions**—Of important steps in the proceedings. C. M. O. 55, 1910, 9; 15, 1910, 9.
28. **Clerks or reporters.** *See* CLERKS OR REPORTERS OF GENERAL COURTS-MARTIAL.
29. **"Clips"**—Should not be used in binding records. *See* "CLIPS," 1.
30. **Complete in itself**—The record of proceedings of each case must be complete in itself, without dependance on or reference to any other. C. M. O. 15, 1910, 5-6; 17, 1910, 10.
31. **Contents of general court-martial record**—The record of proceedings in each case tried shall show that at least a quorum of five members of the court was present during the trial; that the accused was furnished a copy of the charges and specifications indicting him; that the orders detailing the members were read aloud in the presence of the accused; that he was afforded an opportunity to challenge members; and that the members, judge advocate, reporter or clerk, and witnesses were duly sworn. It shall further show the arraignment, pleas, motions, objections made and grounds, therefor, all testimony taken and documentary evidence received, decisions and orders of the court, adjournments, closing arguments, findings, and sentence or acquittal; in short, the entire proceedings of the court which are necessary to a complete understanding by the reviewing authority of the whole case and every incident material thereto. (R-827.)

It is most necessary that the record show every part and feature of the proceedings material to a complete history of the trial, in order that the reviewing officer may have a correct understanding as to the justice of the finding and sentence, and this involves a correct understanding both of the circumstances of the case and the questions of law arising in the course of the investigation. C. M. O. 6, 1909, 3; 55, 1910, 9.

Digitized by Google

32. **Copy of**—Right of accused to—On November 24, 1908, the department issued the following order:

"Owing to the great demand made on the department by persons tried by general court-martial or their authorized representatives, for copies of the record of proceedings of their trial, which, owing to the lack of sufficient clerical force, it is difficult to supply, it is directed that hereafter, in each case tried, the judge advocate secure from the accused a waiver of his right to a copy of the proceedings, or, if the accused desires a copy, the record of proceedings be made in duplicate, and a copy furnished to the accused at the time of his trial. The finding, sentence, and action of the convening authority not to be furnished him until after the publication of the sentence, or, in trials ordered by the department, it will be furnished by the department upon application of the accused.

"The waiver of the right to a copy of the proceedings, or, when a copy is furnished, a receipt therefor, will in each case be attached to the record when forwarded to the department." C. M. O. 21, 1909, 2–3. *See also* C. M. O. 47, 1910, 9; 21, 1910, 11; 8, 1911, 7; 1, 1912, 4; 1, 1913, 5; 23, 1916, 2; File 26836–7: 4, J. A. G., Mar. 3, 1910.

33. **Same**—The waiver or receipt for the copy of the record furnished the accused should be appended, not prefixed, and should be the *last* document *appended* to the record. C. M. O. 19, 1911, 4. *See also* File 26251–11604, Sec. Navy, Feb. 18, 1916; C. M. O. 25, 1916.

34. **Same**—Furnished to civil courts. *See* CIVIL COURTS, 2; COURTS OF INQUIRY, 12; GENERAL ORDER No. 121, Sept. 17, 1914, 23.

35. **Same**—In a case where an accused (paymaster's clerk) had received his copy and later his attorney made a request for another the department refused to grant such request but informed attorney that he could have a copy made at his own expense. File 26251–4858: 22, Sec. Navy, Apr. 19, 1916.

36. **Same**—Copy of record of proceedings should not be furnished an accused where, during the course of the trial, the charge is withdrawn. File 26504–118, Sec. Navy, Dec. 22, 1911.

37. **Same**—Copy was furnished accused, the records proving this fact. Later, the accused claimed he had not received a copy, and requested that he be furnished same. Department stated that it was "willing that he have an additional copy provided he pay for copying same," etc. File 26251–314:1, Sec. Navy, Oct. 9, 1916.

38. **Corrections.** *See* CORRECTIONS, 4, 5.

39. **Counsel.** *See* COUNSEL, 2, 47.

40. **Court cleared**—When the court is cleared for the purpose of examining the written statement of the accused, it should be stated in the record that the court was cleared for *such purpose*, and not merely that the "court was closed," or that the "court was cleared." C. M. O. 28, 1910, 6. *See also* COURT, 16, 20.

41. **Court must be legally constituted**—The record must show on its face that the court is legally constituted. *See* COURT, 43.

42. **Court of inquiry**—Record of proceedings. *See* COURT OF INQUIRY, 12, 17, 18, 43.

43. **Cover page of record.** *See* COVER PAGE OF RECORDS.

44. **Date**—Accused received charges and specifications should be entered on record. C. M. O. 17, 1910, 5.

45. **Same**—Date on cover sheet should be correct. C. M. O. 27, 1913, 12. *See also* COVER PAGE OF RECORDS, 2.

46. **Death of member**—Of a summary court-martial before signing. C. M. O. 12, 1915, 8. *See also* MEMBERS OF COURTS-MARTIAL, 24.

47. **Deck courts.** *See* DECK COURTS, 17, 24, 31, 47.

48. **Department**—Declined to go behind the record. C. M. O. 6, 1915, 6. *See also* JUDGE ADVOCATE, 105.

49. **Documents**—Original or certified copies of documents introduced in evidence must be appended even if accused is acquitted. C. M. O. 16, 1908; 41, 1914, 4, 5.

Record must show accused had opportunity to object to introduction of documentary evidence. *See* EVIDENCE, DOCUMENTARY, 45.

50. **Same**—When the record states that a paper, document, or testimony was read, it is understood that it was read *aloud*. *See* ALOUD.

51. **Same**—Not to be appended unless offered in evidence. *See* EVIDENCE, DOCUMENTARY, 45.

52. **Same**—Used in evidence, original or certified copy should be appended and notation made in record to this effect. *See* EVIDENCE, DOCUMENTARY, 45; SERVICE RECORDS, 23.

Digitized by Google

53. **Errors in record**—President, members, and judge advocate responsible for errors in general court-martial record (*see* RECORD OF PROCEEDINGS, 54); misspelled words (C. M. O. 27, 1913, 11; 28, 1915); judge advocate should make correct entries (*see* JUDGE ADVOCATE, 13); letter of transmittal and charges and specifications read "originally pre*ferred*" instead of "original prefixed" (C. M. O. 27, 1913, 11); clerical omissions important steps in the proceedings (C. M. O. 55, 1910, 9; 15, 1910, 9); clerical errors (C. M. O. 47, 1910, 5; 28, 1910, 7); previous conviction introduced but omitted inadvertently from record may be entered on record in revision, as it was a clerical error (*see* PREVIOUS CONVICTIONS, 5); errors in (C. M. O. 74, 1899, 36, 1905, 3); court, being already cleared, was still further cleared for deliberation three separate times (C. M. O. 78, 1905, 1); "negligently made and kept up" (C. M. O. 74, 1899). *See also* RECORD OF PROCEEDINGS, 65, 66, 77, 78, 80, 102.
54. **Same**—The members of the court, as well as the judge advocate, are responsible for errors appearing in the record of proceedings. C. M. O. 55, 1910, pp. 9–10; 14, 1913, p. 5; 27, 1913, p. 12; 17, 1915, 2; 6, 1916; 10, 1916.
55. **Evidence**—A record of proceedings is not competent evidence in another trial. *See* EVIDENCE, DOCUMENTARY, 43, 44; FALSE SWEARINGS, 5; WITNESSES, 52 (p. 651).
56. **Same**—Army record of proceedings. *See* ARMY, 13; EVIDENCE, DOCUMENTARY, 43.
57. **Evidence in extenuation**—The accused went on the stand at his own request as a witness in extenuation of his acts, but the entry on the record does not indicate that he was on the stand in extenuation, as required by the Forms of Procedure, 1910, p. 36 (*see also* C. M. O. 8, 1911, 4–6). C. M. O. 17, 1915, 2.
58. **Exceptions or protests**—Not to be entered on record. *See* BILLS OF EXCEPTIONS, 1; EXCEPTIONS, 2.
59. **Final disposition of records**—The records of proceedings of all courts-martial shall be forwarded direct to the Judge Advocate General by the reviewing authority after acting thereon, or in the case of general courts-martial convened by the Secretary of the Navy, by the presiding officers of such courts. All communications pertaining to questions of law arising before courts-martial, or to the proceedings thereof, which may require the action of the department, shall likewise be forwarded direct by such presiding officers. (R–850.)

    After the proceedings and sentence, with the recommendation to clemency, if any, have been signed, the action of the court, whether an adjournment or the taking up of a new case, shall be recorded, and this entry having been authenticated by the signatures of the president and the judge advocate, the record shall be forwarded by the judge advocate to the convening authority, or, in the United States, where the court is convened by order of the department, direct to the Judge Advocate General. (R–812.)
60. **Same**—Deck courts. *See* DECK COURTS, 47.
61. **Same**—Summary courts-martial. *See* COURT, 149; SUMMARY COURTS-MARTIAL, 64–66.
62. **Findings.** *See* FINDINGS.
63. **"First day"**—Entry on record of proceedings. C. M. O. 38, 1914, 2. *See also* RECORD OF PROCEEDINGS, 89.
64. **Indexes.** *See* INDEX.
65. **Infirmities of record**—The department stated in part, there are certain infirmities of record, but it is not thought necessary to comment upon them, as none is of such character as to make it proper that any essential part of the proceedings be set aside or that the sentence be reduced. C. M. O. 173, 1902.
66. **Irregularities.** C. M. O. 37, 1909, 7–8; 55, 1910, 9; 28, 1910, 7.
67. **Judge advocate**—Responsible for errors in. *See* JUDGE ADVOCATE, 110.

    Permitted to enter his opinion on record if court does not follow his advice. *See* JUDGE ADVOCATE, 97.
68. **Length of record**—The department recorded a criticism upon the "wholly needless length of the record." G. O. M. Rec. 13370.
69. **Letter of transmittal**—Letter transmitting copy of charges and specifications to commanding officer for delivery to accused, not to be read in court or appended to record. *See* LETTERS, 31.
70. **Lost record**—Sentence may be carried into effect if approved before being lost. File 27201–48, July 21, 1909; 26287–205; 26262–990, 991, 992, 993, 994 (lost G. C. M. Records); 26287–1839, 1839:1; 26287–1955:1; 26287–1996 (lost S. C. M. Records).
71. **Marking documents.** *See* CHARGES AND SPECIFICATIONS, 59.
72. **Medical officer's certificate**—In cases of confinement exceeding ten days on reduced rations. *See* CONFINEMENT, 5.

Digitized by Google

73. **Members**—Responsibility of members for errors in record. *See* RECORD OF PROCEEDINGS, 54.
74. **Same**—May be ordered to sign record. *See* MEMBERS OF COURTS-MARTIAL, 48.
75. **Same**—Responsibility of members that record is bound properly. *See* BINDING OF COURTS-MARTIAL RECORDS.
76. **Same**—Death of before signing record. *See* MEMBERS OF COURTS-MARTIAL, 24.
77. **Minor errors**—A critical examination of the entire record shows that technical errors of a minor nature were occasionally committed by the court in dealing with the many objections interposed by counsel for the accused; but none of these errors were of a substantial character, nor are any of them, of such importance as to require special comment. C. M. O. 117, 1902, 8.

    The department stated, "numerous errors and irregularities are observed therein, relating chiefly to methods of examination of witnesses and preparation of the record itself, which, in view of the department's recent action in calling the attention of this same court to faults of a similar character, are not deemed sufficiently important to require enumeration or comment." C. M. O. 29, 1902. *See also* CRITICISM OF COURTS-MARTIAL, 28.
78. **Minor irregularities.** C. M. O. 28, 1915.
79. **Misspelled words.** *See* CRITICISM OF COURTS-MARTIAL, 40.
80. **Name of member omitted from record**—The name of one of the members who authenticated the record was omitted from among those recorded as present at the beginning of the trial. This irregularity was not considered so serious, however, as to invalidate the proceedings, the judge advocate having furnished a certificate that the officer who signed the record and was not entered in the record as present during the proceedings was in fact present, and that the omission of his name was a clerical error. C. M. O. 23, 1910, 7.
81. **Nolle prosequi**—Copy of record of proceedings should not be furnished accused where during the course of the trial the charge is withdrawn. *See* RECORD OF PROCEEDINGS, 36.
82. **Opinion**—Of judge advocate allowed on record. *See* JUDGE ADVOCATE, 97.
83. **Orders or copies of orders of president and members**—Should not be appended to record. C. M. O. 35, 1900.
84. **Original**—The department is reluctant to send out original records—"The record of the court's proceedings in this case is on file in the office of the Judge Advocate General of the Navy and is bound in a permanent volume containing the original of 43 other trials by general courts-martial. The department is reluctant to send out original records of this character, which, in case of possible loss or injury, could never be replaced. File 26261-246, Sec. Navy, Dec. 1, 1913. *See* File 26251-10780, J. A. G., Aug. 16, 1915, where department transmitted to a U. S. attorney an original record of a general court-martial; File 26251-11340:6, Sec. Navy, Jan. 13, 1916, where department offered an original general court-martial record to the Governor of a State; File 8360-109:2, 1916, where department sent an original court of inquiry record to Congress. *See also* RECORD OF PROCEEDINGS, 85.
85. **Same**—The Secretary of the Navy is by law responsible for the safekeeping of the department's records, and can not furnish same for use in civil courts. *See* Maurice *v.* Worden, 54 Md., 233.

    The department is reluctant to send out original records of general court-martial cases, which, in case of possible loss or injury, could never be replaced. File 26251-246, Sec. Navy, Dec. 1, 1913.

    While the department will not furnish in the case of legal controversies, at the request of the parties litigant, copies of such records, it will, in proper cases, do so upon call of the court before which the litigation is pending. C. M. O. 6, 1915, p. 8; 20, 1915, p. 6.

    If the court calls for copies of such records the request should be addressed to the Secretary of the Navy and should state that the copies are to be made at the expense of the party for whom furnished, and should also state very clearly for what purpose the records are desired and what is the nature of the litigation in which they are to be used, as this information will be necessary for the consideration of the Secretary of the Navy in deciding whether or not copies of these records should be furnished. *See* File 12475-64, J. A. G., Aug. 9, 1915. *See also* 11 Op. Atty. Gen., 137; RECORD OF PROCEEDINGS, 84.

Digitized by Google

86. **Pay**—Notation must be made on record that checkage of pay has been made pursuan to the sentence. C. M. O. 34, 1913, 5. Pay officer must sign such notation. C. M. O. 34, 1913, 5. The *amount* of such checkage should be shown. C. M. O. 24, 1909, 3. Rate of pay should appear on record. C. M. O. 34, 1913, 6. *See also* DECK COURTS, 35-41.
87. **Pay account status**—Made a part of summary but not general court-martial record. *See* ACCUSED, 54.
88. **Pay officer's notation**—When loss of pay adjudged by court and remitted under conditions specified in I-4893. C. M. O. 36, 1914, 5.
89. **Preceding day's proceedings**—Proceedings of preceding day shall be read and approved the following day. C. M. O. 55, 1910, 9.
90. **Precept**—Certified copy should be appended, not prefixed. C. M. O. 36, 1914, 6; 41, 1914, 5. *See also* PRECEPTS, 6.
91. **Same**—Original precepts of a general court-martial should never be appended to record. C. M. O. 42:3. *See also* PRECEPTS, 6.
92. **Same**—Marking of. C. M. O. 27, 1913, 12. *See also* CHARGES AND SPECIFICATIONS, 59: PRECEPTS, 14.
93. **Previous convictions**—Certified copy of should be appended. *See* PREVIOUS CONVICTIONS, 4.
94. **Protests**—Not allowed on record. *See* EXCEPTIONS.
95. **Questions**—Should be numbered properly—The questions asked each witness shall be numbered consecutively throughout his examination. If the examination is interrupted by recess or adjournment and is resumed when the court reassembles or reconvenes, the numbering shall be continued. If, however, the first examination of the witness is completed and, later in the trial, he is recalled, the numbering of the questions asked on this later examination shall begin anew. C. M. O. 38, 1914, 2. *See also* C. M. O. 74, 1899, 1; 10, 1915, 6; G. C. M. Rec., 30084.
96. **Receipt of accused**—For copy of record. *See* RECORD OF PROCEEDINGS, 32, 33.
97. **Revision.** *See* CORRECTIONS, 4; REVISION, 30-32.
98. **Secretary of the Navy responsible for.** *See* RECORD OF PROCEEDINGS, 85.
99. **Senior officer present.** *See* SENIOR OFFICER PRESENT.
100. **Setting aside.** *See* SETTING ASIDE.
101. **Summary court-martial.** *See* SUMMARY COURT-MARTIAL, 64-69.
102. **Termination of trial**—From several records of proceedings of general courts-martial received in the department it has been noticed that, when the accused and the judge advocate had laid their respective cases before the court, there was no entry made on the record indicating the termination of the trial. This circumstance should invariably be recorded. C. M. O. 14, 1910, 9.
103. **Waiver**—Of accused to copy of record of proceedings. *See* COVER PAGE OF RECORDS; RECORD OF PROCEEDINGS, 32.
104. **Witnesses**—Record should show that court had an opportunity to question witnesses. C. M. O. 36, 1914, 6.
105. **Same**—When the court has finished with a witness he shall be directed to retire, and a minute entered on the record to the effect that the witness withdraws to show that two witnesses are not in court at same time. C. M. O. 51, 1914, 8-9.

RECORDS OF THE DEPARTMENT.

1. **Alteration**—It has been repeatedly stated to be against the policy of the department to alter official records, which should be kept inviolate; and, indeed, no alteration of the records could serve actually to change the facts as they existed. File 26510-225:1, J. A. G., June 10, 1911.
2. **Amending or changing**—The official records of the Navy Department should remain inviolate, and should not be changed a hundred years after the events they purport to record. Where it is alleged that the record of an officer is in error, the evidence in support of such claim may be filed with his record, thus showing just what is claimed and just what authority there is for such claim. File 24413-5, J. A. G., July 12, 1913.
3. **Same**—If the Bureau considers that an *injustice* has been done in this case, due to an omission in the Navy Regulations on the subject of discharges, this may afford sufficient reason for amending the regulations so as to provide for future cases, but *can not authorize the department to alter its record, which must show the true facts of the case.* File 7657-214, J. A. G., Feb. 17, 1914.

Digitized by Google

4. **Same—*Advised:*** It is contrary to the policy of the department to alter official records, but that there would be no objection to placing papers embodying an officer's claim with other papers relating to his case in the files of the department. File 26510-225:1, J. A. G., June 10, 1911. *See also* CIVIL WAR SERVICE, 4.
5. **Same**—Question of changing the record of midshipman dismissed by Secretary of the Navy so as to show resignation. File 5252-60, J. A. G., Feb. 2, 1914.
6. **Attorneys**—The department does not grant permission to attorneys to make preliminary and informal examination of records, but will promptly furnish copies of papers or records upon call of the court before which the indictments are pending. File 5467-8, Mar. 27, 1907. *See also* RECORDS OF OFFICERS, 9.
7. **Same**—The department is unable to comply with the request of attorneys that original correspondence be furnished them from the department's files, notwithstanding their offer to give any reasonable security for its custody and return. The law requires that the records shall be safely kept in the department, and the Secretary of the Navy is made personally the custodian. (Secretary of the Navy's letter published in Maurice *v.* Worden, 54 Md. 237.) *See also* File 12475-64, Aug. 9, 1915.
8. **Change of birthplace and citizenship**—Of Chinese. *See* CITIZENSHIP, 11.
9. **Civil courts**—Department promptly furnishes copies of records on proper call of civil courts. *See* CIVIL COURTS, 2; GENERAL ORDER No. 121, Sept. 17, 1914, 23.
10. **Copies**—Where copies of the department's records on file in the Office of the Judge Advocate General were requested. *Held:* It is not the practice of this office and it has not the means therefor to furnish copies of records on file. File 3333-02, J. A. G., April 18, 1902; 20 J. A. G., 59.
11. **Date of birth**—Of an officer—Change of. *See* AGE, 4.
12. **History**—The records of the Navy Department are an important part of the Nation's history. *See* NAME, CHANGE OF, 5.
13. **Mark of desertion.** *See* MARK OF DESERTION.
14. **Names, change of.** *See* NAME, CHANGE OF.

RECORDS OF OFFICERS. *See also* REPORTS ON FITNESS.

1. **Admissions**—By judge advocates of contents. *See* REPORTS OF FITNESS, 5.
2. **Clemency**—Good record as a cause for clemency in a court-martial trial. *See* CLEMENCY, 48-52.
3. **Copies**—A Member of Congress requested a copy of the report containing a tabulation of the unfitness, etc. File 26260-2076:6, Sec. Navy, Feb. 16, 1916.
4. **Same**—If the accused (officer) should desire a copy of his service record, the original may be inspected by him, or his duly appointed representative, and a copy made. C. M. O. 29, 1915, 8.
   "The limited clerical force of the office of the Judge Advocate General will not admit of making copies of officer's records. Such records as you refer to are on file in this office and are open to the officer's personal inspection, or that of his duly appointed attorney, either of whom may copy or have copied the records in question." File 26260-2488:2, J. A. G., May 4, 1916. *See also* File 26260-3314:4.
5. **Courts-martial**—Evidence before. *See* REPORTS ON FITNESS, 5-8.
6. **Court-martial order**—Record of officers printed in court-martial orders. C. M. O. 3, 1911, 2; 29, 1912, 1; 32, 1912, 2; 35, 1912, 1; 36, 1912, 2; 2, 1913, 1; 3, 1913, 2.
7. **Evidence.** *See* REPORTS ON FITNESS, 5-8.
8. **Examining boards**—Duty of. *See* NAVAL EXAMINING BOARDS, 11.
9. **Former officer**—"The record of the alleged former officer is available only for his personal inspection, or may be examined by some other person who has a power of attorney from the 'person whose record is desired'; or this department will furnish information therefrom to the same persons; provided that the statement as to the 'purpose for which such information is desired,' is 'deemed satisfactory to the department.'" File 26261-315:1, J. A. G., Sept. 21, 1916.
10. **Original records not sent out**—"It is contrary to the policy of the Navy Department to send documents forming a part of official records to any individual on request." File 26260-2488:2, May 4, 1916.
11. **Removal of papers**—Removal of papers from existing records of officers is not approved. File 4435-5, Sec. Navy, May 13, 1908.

RECORDER OF A DECK COURT. *See* DECK COURTS, 48, 58.

RECORDER OF A SUMMARY COURT-MARTIAL. *See* SUMMARY COURTS-MARTIAL, 70-74.

Digitized by Google

RECRUITING.

1. **Accountability**—Of recruiting officers for accepting or enlisting unfit or undesirable men. *See* File 7657-103.
2. **Army.** *See* File 7657-103; 2, J. A. G., July 18, 1911.
3. **Assumed names**—Recruiting officer properly refused to enlist an applicant under an assumed name. *See* NAME, CHANGE OF, 5.
4. **Civilian interference**—With recruiting. *See* RECRUITING, 14.
5. **Destruction of posters**—By civilians in. *See* RECRUITING, 14.
6. **Fraudulent enlistment**—Accused tells recruiting office of prior service, enlists and claims this as a defense. *See* FRAUDULENT ENLISTMENT, 23.
7. **Fugitive from justice**—Should not be enlisted. File 26524-207, J. A. G., Nov. 20, 1915, and Nov. 22, 1915. *See also* CONVICTS, 2, 3; FUGITIVE FROM JUSTICE.
8. **General court-martial**—Marine recruiting officer tried by general court-martial. C. M. O. 19, 1915.
9. **Hospital apprentice**—Recruiting officer of the Marine Corps enlisting a hospital apprentice for the Navy. File 1096-1, J. A. G., 1908.
10. **Marine Corps.** *See* MARINE CORPS, 74; RECRUITING, 15.
11. **Navy**—Reports regarding. *See* File 7657-103:2, J. A. G., July 18, 1911, p. 6.
12. **Oaths**—Administration of oaths by recruiting officers. *See* OATHS, 39, 48.
13. **Officers**—Should explain law to applicants. *See* FRAUDULENT ENLISTMENT, 78. RECRUITING, 17.
14. **Posters and other literature**—Mutilated in sections of city inhabited by the socialistic element. File 26254-1988:2, July, 1916. *See also* File 24694-3, Sec. Navy, July 27, 1916.
15. **Recruiting officers of Marine Corps**—Duties defined. G. C. M. Rec., 30485, pp. 77-89, 471, 517, 564.
16. **Stragglers**—Recruiting stations are not authorized to accept the surrender or delivery of stragglers or deserters, nor to furnish them with transportation or subsistence, but will direct such men to report at their own expense to the nearest navy yard or naval station. G. O. 110 (Revised, July, 1916), p. 5.
17. **Warning**—Section 11 of Instructions for Recruiting Officers of the United States Navy, provides that "each recruit * * * shall be informed that if he has had previous service the fact will be known as soon as the papers in his case reach the Navy Department and that he will be tried by general court-martial for fraudulent enlistment * * *. The recruit will also be informed that men who have been discharged for * * * *disability* or *other* reasons are not necessarily forever barred from reentering the service, but that an official request to be permitted to reenlist * * * will receive consideration" and that "if it is deemed advisable to reenlist him it will be *authorized*." Article 756, (3) United States Navy Regulations, provides that "no one who has already been in the naval or military service of the United States shall be enlisted without showing his discharge therefrom * * *." C. M. O. 12, 1911, 4.

REDUCTION IN RATING.

1. **Absence over leave.** *See* REDUCTION IN RATING, 18.
2. **Absence without leave.** *See* REDUCTION IN RATING, 18.
3. **Attempting to smuggle liquors.** *See* REDUCTION IN RATING, 18.
4. **Classification tables**—For disrating. *See* REDUCTION IN RATING, 42.
5. **Confinement**—Reduction in rating and confinement not both to be included in same sentence of deck court or summary court-martial. *See* DECK COURTS, 49.
6. **Deck Courts**—Article 781(1), Navy Regulations, 1909, must be construed as supplementary to, but not in conflict with the statute defining powers of deck courts. File 27217-787, J. A. G., May 18, 1912.
7. **Disrating.** *See* REDUCTION IN RATING, 42.
8. **Enlistment expired**—A petty officer convicted of desertion and fraudulent enlistment was properly sentenced to reduction in rating, although his valid enlistment from which he deserted had expired prior to his trial. File 26251-6039.
9. **Failure to reduce petty or noncommissioned officer does not invalidate sentence**—Failure to include reduction in rating in the sentence of a petty or noncommissioned officer involving confinement is a violation of the Navy Regulations, and is a serious omission, but does not adversely affect the interests of the accused nor invalidate the sentence. C. M. O. 28, 1910, 5.
10. **Forfeiture of pay**—Based on pay of reduced rating. *See* REDUCTION IN RATING, 30.
11. **Same**—Reduction in rating is not to be considered as loss of pay within the meaning of A. G. N. 32. *See* PAY, 84; REDUCTION IN RATING, 31.

Digitized by Google

12. **Fraudulent enlistment of a petty officer**—A petty officer, having deserted, fraudulently enlisted and convicted of both offenses, the sentence should provide for reduction in rating as of the original or legitimate enlistment since the department will cancel the fraudulent enlistment and require him to serve his sentence under the first enlistment as petty officer. C. M. O. 15, 1910, 7.
13. **Grade**—Reduction in *rating* (or rank) is proper phraseology but the following phraseology has been approved: "To be reduced to the *grade* of private, United States Marine Corps." C. M. O. 12, 1879: 28, 1881, 2.
14. **Improper rating**—The accused was sentenced to be reduced to the rating of seaman (from electrician third class), whereas the rating below petty officer in the branch to which he belongs is landsman. The department held that the sentence was irregular. C. M. O. 49, 1910, 14.
15. **Same**—Accused was reduced to seaman gunner when he did not hold a certificate as such. *See* SEAMAN GUNNERS, 4.
16. **Same**—The accused was promoted to water tender from the rating of oiler, to which rating he should be reduced. While his current enlistment record does not show this promotion it does show that the accused held a continuous-service certificate. This certificate shows that the previous rating held by the accused was that of oiler, and it should have been consulted by the court before sentence was adjudged.
In view of the wording of the sentence the department holds that it was the intention of the court that the accused should be reduced to the next inferior rating to which the court could legally reduce him, and further holds that the words "that of fireman first class" are mere surplusage. (*See* 90 S. and A. memo., 831.)
Subject to the foregoing remarks, the department approved the proceedings and sentence in this case, and directed that the "next inferior rating" to which the accused be reduced under the sentence of the court be that of oiler, as required by article 1693, United States Navy Regulations. [Navy Regulations, 1913, R-619.] C. M. O. 1, 1913, 8; File 26287-1392, Sec. Navy, Dec. 4, 1912. *See also* File 26287-2841, Mar. 19, 1915.
17. **Same**—A water tender was tried by summary court-martial on December 23, 1914. He was found guilty and sentenced "to be reduced to the next inferior rating, that of fireman first class" and to lose pay. The records of the Bureau of Navigation show that the accused was reenlisted in the rating of oiler October 28, 1908, and received a permanent appointment as water tender July 19, 1910, having been advanced to that rating from the rating of oiler. In view of the provisions of Navy Regulations, 1913, R-619(7), this man should have been reduced to the rating of oiler and not to the rating of fireman first class. The department remitted that portion of the sentence that related to reduction in rating. File 26287-2841, Mar. 19, 1915.
18. **Inappropriate**—The sentence of "reduction to the next inferior rating" is deemed inappropriate to such offenses as "overstaying liberty," "absence without permission," "attempting to smuggle liquor," "liquor in possession," etc., unless committed by a petty or noncommissioned officer; and even then it is appropriate only when in the opinion of the court, the commission of the offense and the conduct record of the accused indicate that he can not be relied upon properly to perform all the duties of the rating in which he is serving. (R-619 (3).) *See* Op. J. A. G., July 19, 1916.
19. **Incompetency**—In the case of a person found guilty of incompetency, the sentence of disrating is mandatory, and such sentence is the only authorized punishment therefor. (R. 618 (6).)
20. **Invalidate**—Failure of a court to reduce a petty or noncommissioned officer when confinement is also adjudged does not invalidate. *See* REDUCTION IN RATING, 9.
21. **Liquor in possession.** *See* REDUCTION IN RATING, 18.
22. **Mandatory.** *See* REDUCTION IN RATING, 19.
23. **Noncommissioned officers.** *See* REDUCTION IN RATING, 32, 33.
24. **Officers**—Any officer who absents himself from his command without leave, may, by the sentence of a court-martial, be reduced to the rating of an ordinary seaman. (A. G. N. 9.) G. O. 37, May 17, 1864.
25. **Same**—An acting third assistant engineer was convicted of "Desertion" and sentenced to be "reduced to the rating of a fireman first class, to serve for the term of two years, and to forfeit all pay now due him." G. O. No. 39, July 16, 1864.
An Acting Master's Mate was sentenced "to be reduced to the rate of ordinary seaman for fifteen (15) months," etc. G. O. 44, Dec. 7, 1864.
26. **Same**—The sentence of disrating officers is provided as the penalty in cases of "Absence from station and duty without leave," and should be imposed in no other cases. G. O. 61, June 24, 1865.

Digitized by Google

27. **Same**—In returning the case of a warrant officer (boatswain) for a revision of the sentence the attention of the court was called to the fact that it might adjudge a sentence involving a substantial loss of pay, but if, in its opinion, such punishment were not adequate, attention was called to article 9 of the Articles for the Government of the Navy, which provides that, "Any officer who absents himself from his command without leave may, by the sentence of a court-martial, be reduced to the rating of an ordinary seaman."

The court in revision decided to revoke its former sentence in this case and substituted therefor the following sentence:

"The court, therefore, sentences him, Boatswain ——— ———, United States Navy, to be reduced to the rating of ordinary seaman."

Inasmuch as the sentence adjudged in the case of this officer provided that he be reduced to an ordinary seaman, which deprives him of his position as a warrant officer in the United States Navy, and as article 53 of the Articles for the Government of the Navy (sec. 1624, Rev. Stat.) provides that no sentence extending to the loss of life or to the dismissal of a commissioned or warrant officer shall be carried into execution until confirmed by the President, it was deemed advisable as a matter of policy, although not specifically required by the statute, to submit the record of the general court-martial in this case to the President of the United States, who, on April 3, 1916, confirmed the sentence of the court. C. M. O. 11, 1916, 2.

The court sentenced a boatswain "to be reduced to the rate of Mate in the U. S. Navy." Having adjourned, it reconvened of itself, upon the advice of the judge advocate, to reconsider the sentence, revoked its former sentence, and adjudged one involving dismissal. G. C. M. Rec. 9427 (1901).

28. **Others than petty and noncommissioned officers**—*Prior to* July 15, 1915, if the general court-martial sentence of an enlisted man, who was not a petty or noncommissioned officer, involved both imprisonment and discharge, it has been held by the department that to add to this sentence a reduction in rating caused the punishment thus inflicted to exceed the limitation of punishment as prescribed by the President of the United States. For this reason, when the sentence of an enlisted man, not a petty or noncommissioned officer, involved discharge, the court could not, in addition, without exceeding the limitation of punishment, reduce the man in rating for the same offense. This amounted to a holding that only petty or noncommissioned officers should be reduced in rating by sentence of general court-martial, except in cases where the general court-martial adjudged a summary court-martial sentence. C. M. O. 21, 1902, 2; 29, 1902, 1; 52, 1902; 146, 1902, 2; 46, 1903, 1; 26, 1910, 5; 20, 1913, 3; 34, 1913, 8. *But* on July 15, 1915, in C. N. R. No. 5, the following was added to the limitations (R–900):

"(7) In the case of an enlisted man reduction to any inferior rating or rank in the branch to which he belongs may be added to any of the following limitations." *See also* REDUCTION IN RATING, 35.

29. **Same**—A fireman, second class, was sentenced to confinement at hard labor, with corresponding loss of pay, reduction in rating to coal passer, and dishonorable discharge; the department remitted a part of the confinement and loss of pay, and also the reduction in rating, and then approved.

The department stated that it was "at least doubtful whether a court is authorized to include reduction in rating in its sentence except in the" case of petty and noncommissioned officers.

While the sentence as adjudged did not apparently exceed the limitations, "the punishment of reduction in rating is so different in character from that of confinement that it is difficult to compare it with the latter, and thus to determine whether or not the limitation of punishment authorized has been exceeded." C. M. O. 21, 1902, 2. *But see* R–900 (7) and REDUCTION IN RATING, 28.

30. **Pay**—"The department considers that the intent of article 30, Articles for the Government of the Navy, which limits the loss of pay that a summary court-martial may adjudge to the loss of three months' pay, is to limit the loss to three months' pay based on the pay of the accused in the rating to which he has been reduced. In cases where the loss of pay was based on the higher rating the department reduced the loss of pay to conform with the above. C. M. O. 94, 1903, 1; 1, 1913, 7; File 26287-1372: 1, File 26287-2746, Sec. Navy, Apr. 29, 1915." C. M. O. 16, 1915, 4; File 26254-1334: 1, Sec. Navy, Sept. 15, 1915. *See also* O. M. O. 97, 1897. *But see* R–900 (7): REDUCTION IN RATING, 28.

Digitized by Google

31. **Same—"Disrating" alone is not, within the** meaning of A. G. N. 32, to be regarded as involving a loss of pay, but as a reduction of rating only. *See* PAY, 84.
32. **Petty and noncommissioned officers**—In all cases in which the sentence imposed on a petty officer involves confinement it should include reduction to one of the ratings below petty officer in the branch to which he belongs, and, in the case of a noncommissioned officer of the Marine Corps, to private. (R–816 (3).) C. M. O. 48, 1895; 60, 1895; 139, 1897, 2; 154, 1900; 21, 1902, 2; 42, 1909, 6; 49, 1910, 14; 15, 1910, 7; 28, 1910, 5; 1, 1912, 4; 23, 1912, 4; 6, 1913, 3; 25, 1914, 5; 49, 1914, 6; file 26251–10529, Sec. Navy, May 15, 1915; G. C. M. Rec., 28481, 28489, 28582.
33. **Same**—Petty officer properly sentenced by general court-martial to confinement and reduction in rating. Convening authority (fleet) remitted reduction in rating, but allowed confinement to remain as part of the sentence. Department disapproved of such procedure. C M O 92, 1897
34. **President**—Confirmed sentence of a warrant officer involving reduction in rating to ordinary seaman. *See* REDUCTION IN RATING, 27.
35. **Prior to July 15, 1915**—General courts-martial not to adjudge unless (*a*) accused is petty or noncommissioned officer and sentence involved confinement; or (*b*) discharge is not adjudged, although included in limitation of punishment; or (*c*) sentence adjudged is one authorized for summary courts-martial. But on July 15, 1915, in C. N. R. No. 5, the limitations were amended, so that reduction in rating or rank might be adjudged in the case of any rated man. *See* R–900 quoted in REDUCTION IN RATING, 28.
36. **Purpose of reducing petty and noncommissioned officers**—"The purpose of the direction" contained in Navy Regulations, 1900, article 1911 (3) [Navy Regulations, 1913, R–816 (3)] "being to prevent the confinement in naval prisons of men wearing rating badges, chevrons, or other marks indicating their status as such petty or noncommissioned officers, in order that the same may not be degraded in the eyes of the other men with whom they come in contact." C. M. O. 21, 1902, 2.
37. **Same**—The department is of the opinion that it is prejudicial to the best interests of in the naval service for petty and noncommissioned officers to be confined as prisoners in a naval prison, and that particularly in view of the fact that imprisonment is accompanied by loss of pay, except certain allowances, wherefore reduction in rating would not, in fact, in cases which included dishonorable discharge, increase the punishment awarded. The sentence should include reduction to the rating of landsman or private. C. M. O. 48, 1895. *See also* C. M. O. 60, 1895. REDUCTION IN RATING, 28, 35.
38. **Rating from which last advanced.** *See* REDUCTION IN RATING, 14–17, 42.
39. **Seamen gunners.** *See* SEAMEN GUNNERS, 3, 4.
40. **Summary courts-martial.** *See* REDUCTION IN RATING, 17, 18, 19, 30, 35, 36, 37, 42.
41. **Surplusage.** *See* REDUCTION IN RATING, 16.
42. **Tables for disrating**—It is noted that summary courts-martial in sentencing men to reduction in rating who were promoted to their present ratings from some inferior ratings other than ratings indicated by the classification table following Navy Regulations, 1913, R–619 (7), frequently fail to state this fact in the record.

    In order to secure uniformity in the reduction in rating of enlisted persons by sentence of summary courts-martial, the classification following Navy Regulations, 1913, R–619 (7), arranged to show in each case their "next inferior rating," shall be followed, unless the man's current enlistment record shows that he was promoted to his present rate from some inferior rating other than the one indicated by the table, in which case his reduction shall be to the inferior rating from which he was last advanced, *and it shall be so stated in the record of the court* (Navy Regulations, 1913, R–619 (7); Forms of Procedure, 1910, p. 162). C. M. O. 29, 1914, 4.
43. **Uniformity in reduction.** *See* REDUCTION IN RATING, 42.
44. **Warrant officers**—Reducing to rating of ordinary seaman by sentence of court-martial. *See* REDUCTION IN RATING, 27.

REENLISTMENTS.

1. **Acting warrant officers.** *See* ACTING WARRANT OFFICERS, 4.
2. **Deserters**—Prior to act of August 22, 1912 (37 Stat., 356). *See* DESERTERS, 13; DESERTION, 23–27, 117.
3. **Same**—Subsequent to act of August 22, 1912 (37 Stat., 356). *See* DESERTERS, 14; DESERTION, 28, 29; 114.
4. **Same**—Deserter from Marine Corps who served subsequent excellent enlistment. *See* DESERTION, 114.

Digitized by Google

5. **Discharge for disability or other reason**—Does not bar reenlistment if authorized. C. M. O. 12, 1911, 4. *See also* RECRUITING, 17.
6. **Minor**—Pay. *See* PAY, 86.
7. **Retired enlisted men.** *See* RETIRED ENLISTED MEN, 11.

REEXAMINATION.

1. **Recommendation**—Of examining board of no effect. *See* NAVAL EXAMINING BOARDS, 13.

REFRESHING MEMORY OF WITNESSES. *See* COUNSEL, 56; JUDGE ADVOCATE, 129; WITNESSES, 95–99.

REFUSING TO OBEY THE LAWFUL ORDER OF HIS SUPERIOR OFFICER.

1. **Drunkenness**—As a defense to. *See* DRUNKENNESS, 36, 52.
2. **Enlisted men**—Charged with. C. M. O. 92, 1905, 3; 37, 1909, 3.
3. **Malingering**—The charge of "Refusing to obey the lawful order of his superior officer" is not of the same character or nature as the offense "Malingering," and therefore the latter is not a lesser degree of the former offense. *See* GUILTY IN A LESS DEGREE THAN CHARGED, 30, 40.
4. **Officers**—Charged with. C. M. O. 35, 1905; G. C. M. Rec., 14462.
5. **Proof of**—The accused was to be confined in the fireroom of a torpedo boat pending further action for a misdemeanor, that being the usual place for such confinement in the torpedo boat flotilla, and owing to the construction of the boats it was necessary for him to go into it without being forced to do so.

   The evidence for the prosecution fully sustained all the allegations of the specification, and no testimony was adduced on the part of the defense to offset this proof.

   The defense, however, by means of expert and other testimony endeavored to show that the accused was so much under the influence of liquor, having returned from liberty a few hours before the offense was committed, as to be incapable of understanding an order or having sufficient use of his mental faculties to intelligently obey or willfully disobey it.

   It appears that when the accused first refused to obey the order given him he said he would go down below but would not remain there and added that the fireroom was not a fit place to confine a man. When the serious nature of his offense was explained to him he said he knew what he was doing and repeated his former statements and stated that he understood what he was being told and persisted in his refusal to obey the order, and he also stated that if sufficient men were brought he could be forced into the fireroom.

   From the foregoing it would appear that while the accused was so much under the influence of intoxicants as to be unfit for duty—and one who is under the influence of liquor in any degree, however slight it may be, is unfit to be intrusted with the important duties incident to the naval service—he was still able to reason in an intelligent manner and was accountable for his actions. It is a well-known principle of law that a man who voluntarily puts himself in a condition to have no control of his actions must be held to intend the consequences.

   Held That a finding of guilty would have been justified in this case, and the court might then have recommended the accused to the clemency of the department. C. M. O. 92, 1905, 3.
6. **Typhoid**—Enlisted man tried by general court-martial for refusing to obey a lawful order to submit to an antityphoid vaccination. G. C. M. Rec. 24893.
7. **Warrant officer**—Charged with. C. M. O. 33, 1905.

REGIMENTS.

1. **Deck courts**—Convening of by regimental commanders. *See* DECK COURTS, 10, 14; SUMMARY COURTS-MARTIAL, 22.
2. **Summary courts-martial**—Convening of by regimental commanders. *See* SUMMARY COURTS-MARTIAL, 22.

REGULAR NAVY.

1. **Naval militia**—Status in relation to the regular Navy while on board naval vessels or on vessels loaned to States. *See* NAVAL MILITIA, 35–41.

Digitized by Google

REGULATIONS, NAVY.

1. **Accounting officers**—"The accounting officers in the performance of their duties are bound by rules prescribed by Congress, the same as are all other officers of the Government, and it has been decided that they are bound by Executive regulations. (U. S. *v.* Freeman, 3 How., 576; *See also* 16 Op. Atty. Gen., 619)." File 26254-1451:11, Apr. 12, 1915, p. 13.
2. **Alterations in.** *See* REGULATIONS, NAVY, 16, 17.
3. **Annulling by Congress**—Congress has not hesitated to annul Navy Regulations of which it did not approve as, for example, Executive order of November 12, 1908, limiting the duty of the Marine Corps to shore stations. File 27109. *See also* Act Mar. 3, 1909 (35 Stat., 773); 27 Op. Atty. Gen., 259; MARINE CORPS, 84.
4. **Same**—"A regulation which has been in force for many years will be sustained unless Congress has annulled it by positive enactment." (16 Op. Atty. Gen., 621.) File 26254-1451:11, J. A. G., Apr. 12, 1915, p. 8. *See* REGULATIONS, NAVY, 10, for annulment and revocation of regulations by the Secretary of the Navy.
5. **Approval of regulations by Congress**—"It is well settled that Army Regulations when directly approved by Congress have the absolute force of law equally with other legislative acts. * * * On the other hand, it is just as well settled that regulations not so approved have the force of law only when founded upon the President's constitutional powers as Commander in Chief of the Army, or are 'consistent with and supplementary to the statutes which have been enacted by Congress in reference to the Army.'" (Smith Case, 23 Ct. Cls., 452.) File 26254-1451:11, Apr. 12, 1915, p. 4.
6. **Same**—Regulations which are specifically approved by Congress have the force and effect of law, as much so as though they formed a part of a statute covering the subject. File 3980-452:2, J. A. G., Dec. 8, 1909, p. 4.
7. **Same**—Inaction by Congress is equivalent to legislative sanction of regulations and should be so regarded in testing the validity of a regulation or construing a statute on the same subject. *See* File 5252-36, May 5, 1910, pp. 2, 9.
8. **Same**—"Where a regulation has been in force and effect for many years, the ratification of Congress will be implied." Filed 26254-1451:11, J. A. G., Apr. 12, 1915, p. 8.
9. **Same**—"When Congress permits regulations to be formulated and published and carried into effect year after year, the legislative ratification must be implied." (Maddux *v.* U. S., 20 Ct. Cls., 198.) File 26254-1451:11, J. A. G., Apr. 12, 1915, p. 5.
10. **Attorney General**—Considered the question of the validity of a Navy regulation "unusually important" to such an extent that he felt justified in rendering an opinion, although the question pertained to matters under the jurisdiction of the Comptroller of the Treasury. (25 Op. Atty. Gen., 271.) File 26254-1451:11, J. A. G., Apr. 12, 1915, p. 21. *See also* ATTORNEY GENERAL, 13.
    Jurisdiction of the Attorney General to interpret regulations and to consider legality of. *See* ATTORNEY GENERAL, 15.
11. **Bulletin in court-martial orders**—Digests in bulletin have not force of regulations. *See* BULLETIN IN COURT-MARTIAL ORDERS, 3.
12. **"Catch-all" clause.** *See* "CATCHALL" CLAUSE, 1.
13. **Classes of Army Regulations**—1. "Those which have received the sanction of Congress." With reference to such regulations the author says: "These can not be altered nor can exceptions to them be made by the Executive authority, unless the regulations themselves provide for it. In reality, the approval of Congress makes them legislative regulations, and they might therefore be more strictly classified with other statutory regulations with reference to subjects of military administration." 2. "Those that are made pursuant to, or in execution of, a statute. * * * These, if it be not prohibited by the statute, may be modified by the Executive authority, but until this is done they are binding as well on the authority that made them as on others." 3. "Those emanating from, and depending on, the constitutional authority of the President as Commander in Chief of the Army and as Executive, and not made in supplement to particular statutes. These constitute the greater part of the Army Regulations [and Navy Regulations]. They are not only modified at will by the President, but exceptions from particular regulations are given in exceptional cases, the exercise of this power with reference to them being necessary. 'The authority which makes them [regulations] can modify or suspend them as to any case, or class of cases, or generally.'" (Lieber on Regulations, War Dept. Doc. 1898, No. 63.)

Digitized by Google

14. **Classes of regulations**—There are two general classes of regulations issued by the Secretary of the Navy, namely: (1) Those which are expressly approved by the President in accordance with an order issued by Secretary Moody, June 22, 1904, known as Navy Regulations, and are specifically stated to be issued by authority of section 1547, R. S.; and (2) those which are not expressly approved by the President, such as Naval Instructions, Forms of Procedure, Uniform Regulations, Signal Books and Drill Books, General Orders, Court-Martial Orders, Manual for Recruiting Officers, Manual Governing the Transportation of Enlisted Men, Manual for the Medical Department, Rules for Target Practice and Engineering Competitions. These publications have full force and effect as regulations for the guidance of all persons in the Naval Establishment (Navy Regulations, 1913 (R-901 (3)), and have been regarded as authorized by section 161, R. S. (File 3980-942), which has never been held to require the President's approval. C. M. O. 12, 1915, 11.

15. **Same**—Regulations of the Navy consist of four classes: (1) General orders promulgated by the President under his constitutional prerogative as Commander in Chief; (2) departmental regulations prescribed by the Secretary of the Navy under section 161, R. S.; regulations not approved by Congress but made by the President in the exercise of legislative authority conferred by Congress under R. S., 1547; and (4) regulations expressly approved by Congress. (In re Smith, 23 Ct. Cls., 452.) File 3980-1044, Mar. 19, 1915.

16. **Changes in**—Necessity of approval of the President—An opinion rendered by Mr. * * * as Attorney General, November 8, 1904 (25 Op. Atty. Gen. 275, 276), has been regarded as requiring that all regulations and alterations therein issued under section 1547, R. S., must be expressly approved by the President. This opinion was subsequently disregarded by the Assistant Attorney General who represented the United States in the Court of Claims in the case of Adams *v.* U. S. (42 Ct. Cls. 191), and in the same case the court decided that "orders, regulations, and instructions issued by the Secretary of the Navy" under section 1547, R. S., "as well as alterations thereof," do not require personal approval of the President, but "are presumed to have been issued 'with the approval of the President,' though they do not bear his signature." In support of this decision the Court of Claims quoted previous decisions rendered by it and by the Supreme Court holding that the President acts through the heads of the executive departments and can not be required to perform ministerial acts in person.

This decision of the Court of Claims, which is the latest authoritative expression on the subject, plainly modifies the opinion of Attorney General * * * (25 Op. Atty. Gen. 275, 276) with which it is in conflict, and which had already been practically repudiated by authorized representatives of the Department of Justice while acting as counsel for the United States in the Court of Claims.

The department accordingly decides that Navy Regulations and alterations therein may be issued by the Secretary of the Navy by authority of section 1547, R. S., without express approval of the President being required, and such was the uniform practice prior to Secretary * * *'s order of 1904, above mentioned. Nevertheless, the practice of submitting to the President for approval, regulations and changes therein issued pursuant to section 1547, R. S., will be continued as a general policy subject to modification in special cases if deemed advisable. File 3980-1044:1, Sec. Navy, Mar. 19, 1915. *See also* File 3980-1044, J. A. G., Jan. 11, 1915; 5599-04, J. A. G., June 22, 1904; 3980-200, Sec. Navy, June 22, 1904; 5460-60, J. A. G., Jan. 22, 1913; C. M. O. 12, 1915, 11-12.

17. **Same**—**"If the question were a new one my opinion would be that section 1547, R. S., contemplated and required express approval by the President of all regulations and alterations therein issued by the Secretary of the Navy under said section, and that decisions of the courts holding that the President is not required to perform ministerial acts in person, do not apply to regulations issued under said section of the Revised Statutes which specifically makes the President's approval essential in order to give validity to the acts of the Secretary of the Navy performed thereunder, thus distinguishing the case from section 161, R. S., and other laws in which heads of departments are authorized to issue regulations without any mention being made of the President's approval. However, in the face of the Court of Claims' decision above quoted [Adams *v.* U. S., 42 Ct. Cls., 191] I am constrained to hold that express approval of the President is not required by section 1547, R. S." File 3980-1044, J. A. G., Jan. 11, 1915.**

Digitized by Google

18. **Same**—It has been held that alterations made by authority of Congress in regulations which it had already approved "undoubtedly" likewise have "the sanction of Congress" so far at least as they are not "in conflict with the provisions of any *later statute*." (14 Op. Atty. Gen. 172.) File 26254–1451:11, J. A. G., Apr. 12, 1915, p. 3.
19. **Same**—"Alterations made pursuant to law in regulations which have been approved by Congress have the same force and effect as the original regulations if not in conflict with any later statute." File 26254–1451:11, Apr. 12, 1915, p. 8.
20. **Congress**—Annulling. *See* REGULATIONS, NAVY, 3, 4.
    Approval of regulations by Congress. *See* REGULATIONS, NAVY, 5–9, 18, 19.
21. **Construction and interpretation of regulations.** *See* REGULATIONS, NAVY, 87, 88.
22. **Contravene existing laws, must not**—If the regulations are in conflict with the existing law, the law will govern, and the regulations will accordingly be considered as inoperative. File 4579–8, Sec. Navy, June 19, 1906, quoted in File 26251–2993, J. A. G., Mar. 10, 1910, pp. 15, 16. *See also* REGULATIONS, NAVY, 42.
23. **Courts of inquiry**—Construction and interpretation of Navy Regulations concerning. *See* COURTS OF INQUIRY, 45.
24. **Courts-martial**—Should uphold regulations. *See* CRITICISM OF COURTS-MARTIAL, 53.
25. **Court-martial orders**—Have full force and effect as. *See* COURT-MARTIAL ORDERS, 33, 39. *See also* BULLETIN IN COURT-MARTIAL ORDERS, 3.
26. **Customs**—There can be no such thing as a legal custom to disregard a valid regulation. C. M. O. 43, 1906, 3. *See also* CUSTOMS, 3, 9.
27. **Same**—Merged in written regulations. *See* CUSTOMS OF THE SERVICE, 6.
28. **Definition.** *See* REGULATIONS, NAVY, 64, 94.
29. **Directory regulations.** C. M. O. 18, 1897, 3; 27, 1898, 1; 50, 1900; 51, 1914, 2; 6, 1915, 6; 41, 1915, 10; 49, 1915, 10, 12, 13–14. *See also* CONVENING AUTHORITY, 31; MANDATORY REGULATIONS AND LAWS.
30. **Doubt that regulation is authorized by law**—"A regulation which has been in force for many years will be sustained by the courts even though 'it may well be doubted' that such regulation is authorized by law." File 26254–1451:11, J. A. G., Apr. 12, 1915, p. 8.
31. **Equitable**—Regulations should be equitable.
32. **Force of law.** *See* REGULATIONS, NAVY, 38–47.
33. **Implied approval of Congress.** *See* REGULATIONS, NAVY, 7–9.
34. **Interpretation and construction of regulations.** *See* REGULATIONS, NAVY, 87, 88.
35. **Same.** *See* REGULATIONS, NAVY, 73, 87.
36. **Same**—By Judge Advocate General. *See* COAST GUARD, 1; JUDGE ADVOCATE GENERAL, 14, 17, 21, 33; QUESTIONS OF LAW, 2, 6, 8, 11; RECORDS OF PROCEEDINGS, 59.
37. **Judical notice**—Of regulations. *See* JUDICIAL NOTICE, 7.
38. **Law**—It is a well-recognized fact, supported by many authorities, that regulations have the force of law only when founded on the President's constitutional powers as Commander in Chief, or "are consistent with and supplementary to the statutes which have been enacted by Congress." (Symond Case, 120 U. S. 46; Reed Case, 100 U. S. 22; Smith *v.* Whitney, 116 U. S. 180; Kurtz *v.* Moffitt, 115 U. S. 503; U. S. *v.* Eliason, 16 Pet. 291.) File 3980–452:2, J. A. G., Dec. 8, 1909, p. 4.
39. **Same**—"The authority of the Secretary to issue orders, regulations, and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the Navy. He may, with the approval of the President, establish regulations in execution of or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others." (Symond Case, 120 U. S. 46.) File 3980–452:2, J. A. G., Dec. 8, 1909, p. 4.
40. **Same**—Regulations made in conformity with laws are of binding force. File 3980–452:2, J. A. G., Dec. 8, 1909, p. 9.
41. **Same**—Courts-martial are to be governed by the rules which Congress has prescribed and also by such regulations as may be made in pursuance thereof, such regulations having the force of law. File 26504–115, J. A. G., Jan. 24, 1911, p. 2.
42. **Same**—It is well recognized that regulations are valid only when they do not conflict with some provision of law; when they "are consistent with and supplementary to the statutes which have been enacted by Congress." (Symond Case, 120 U. S. 46; Reed Case, 100 U. S. 22; Smith *v.* Whitney, 116 U. S. 180; Kurtz *v.* Moffitt, 115 U. S. 503; U. S. *v.* Eliason, 16 Pet. 291.) File 5362–35, J. A. G., June 29, 1911, pp. 7–8.

Digitized by Google

43. **Same**—"Regulations expressly approved by Congress have the same force and effect as statute law." File 26254-1451:11, Apr. 12, 1915, p. 8.
44. **Same**—"Regulations not approved by Congress have the force of law when not in conflict with any statute." File 26254-1451:11, Apr. 12, 1915, p. 8.
45. **Same**—Regulations issued by the head of a department have the force and effect of law and are as binding as if incorporated in the statute law of the United States.
46. **Same**—The Navy Regulations have the force and effect of positive law. (23 Op. Atty. Gen. 27.)
47. **Same**—The opinion of the Attorney General, that when Congress expressly ratifies and adopts general orders issued by the Secretary of the Navy such orders were incorporated into statute law, would apparently be applicable to any regulation or order which had been specifically adopted by Congress, either expressly or by necessary implication, as, for example, executive orders fixing the pay of enlisted men in the Navy, which were adopted by Congress in the act of May 13, 1908 (35 Stat. 128). *See* File 26509-106.
48. **Legality of**—"The legality of a regulation must be presumed when * * * it has been in effect for nearly fifty years, and its validity was doubtless inquired into and determined prior to its adoption." File 7657-167, J. A. G., Jan. 17, 1913.
49. **Legislate**—Regulations should not legislate. *See* File 28573-46:2-2.
50. **Long acquiescence**—"Long acquiescence in an executive regulation is of itself evidence of its validity, the same as is long acquiescence in a statutory enactment, under the rule announced by the Supreme Court for determining the validity of executive regulations." File 26254-1451:11, J. A. G., Apr. 12, 1915, p. 9. *See also* REGULATIONS, NAVY, 88.
51. **Same**—The Court of Claims held that whether certain provisions of the Treasury Regulations were authorized by law "may well be doubted," but nevertheless "having been in force for a number of years, and in operation in every port of the United States except * * *, and having received the tacit, if not express, approval of Congress, this court does not feel at liberty to disregard them and hold that they are not authorized by law. * * * Whether the regulations have the force of law, whether they make the law of the case and fix the claimant's legal right, as was before said, may well be questioned; but this court, for the reasons before given, does not feel at liberty to disregard them. (Carlinger *v.* U. S., 30 Ct. Cls. 477; *see also* 22 Op. Atty. Gen. 183; U. S. *v.* Ala. R. R. Co., 142 U. S. 621.)" File 26254-1451:11, J. A. G., Apr. 12, 1915, p. 5.
52. **Loose leaf**—Criticism of. *See* File 3980-1228, J. A. G., Apr. 26, 1916.
53. **Mandatory**—C. M. O. 6, 1915, 6; 41, 1915, 10; 49, 1915, 10, 12, 13-14. *See also* MANDATORY REGULATIONS AND LAWS.
54. **Navy Regulations, 1841**—Article 580 quoted. *See* File 26254-1451:11, J. A. G., Apr. 12, 1915, p. 1. *See also* File 26510-225:1, J. A. G., June 10, 1911.
55. **Same**—Approved by act of Congress July 14, 1862 (12 Stat., 565). File 26254-1451:11, J. A. G., Apr. 12, 1915, p. 1.
56. **Navy Regulations, 1865**—Article 894 quoted. File 26254-1451:11, Apr. 12, 1915, p. 2.
57. **Navy Regulations, 1869**—Article 1343 cited. File 26254-1451:11, J. A. G., Apr. 12, 1915, p. 2.
58. **Navy Regulations, 1870**—Article 1218 quoted. File 26254-1451:11, J. A. G., Apr. 12, 1915, p. 2.
59. **Same**—Was expressly approved by Congress in the Revised Statutes approved June 30, 1874, section 1547. File 26254-1451:11, J. A. G., Apr. 12, 1915, p. 2.
60. **Navy Regulations of 1876**—"As stated in the Attorney General's opinion of October 27, 1909 (3980-530), the Navy Regulations of 1876 received the express sanction of Congress in the enactment of section 1547, R. S." File 7657-167, J. A. G., Jan. 17, 1913.
61. **Navy Regulations issued since Revised Statutes**—Seven editions of the Navy Regulations have been issued since the approval of the Revised Statutes, 1876, 1893, 1896, 1900, 1905, 1909, 1913. File 26254-1451:11, J. A. G., Apr. 12, 1915, p. 3.
62. **Offenses**—In violation of a regulation. *See* CHARGES AND SPECIFICATIONS, 48, 50, 94.
63. **Officers**—Are presumed to know the Navy Regulations. *See* OFFICERS, 79, 80.

"All officers of the Navy are bound by the regulations prescribed for their guidance by the Secretary of the Navy with the express approval of the President." File 26254-1451:1, Sec. Navy, Jan. 8, 1915, p. 5.

An officer's repeated violations of the Navy Regulations stamps him as untrustworthy and not a proper person to maintain discipline and exercise command over others. *See* OFFICERS, 81.

Digitized by Google

64. **Order**—A regulation is an order in cases in which it applies, as much so as a special command reiterated on each particular occasion. *See* File 26254-1451:11, J. A. G., Apr. 12, 1915.

65. **Pay**—Pay can not lawfully be taken away by executive officers, but requires the clearest indication of the legislative intent, and should not be done for administrative reasons merely through the medium of questionable implications in order to adopt a policy which may appear to be desirable but which is not provided for by law. File 5362-35, J. A. G., June 29, 1911, p. 9.

66. **Same**—The reduction in or deprivation of the pay of an officer is beyond the scope of a regulation, unless there is some plain statutory authority therefor. File 5362-35, J. A. G., June 29, 1911, p. 8.

67. **Pay officers**—A Navy regulation (Navy Regulations, 1913, R-3991), requiring pay officers to disburse money under certain contingencies, is an order of the Secretary of the Navy, and as such protects the pay officer from responsibility and is conclusive upon the accounting officers. (30 Op. Atty. Gen. —, reversing 21 Comp. Dec. 554, 357, 245.) *See* File 26254-1451:11, J. A. G., Apr. 12, 1915.

68. **Personal approval by President**—Of changes in Navy Regulations not required, but nevertheless the practice of submitting to the President for approval, regulations and changes therein issued pursuant to section 1547, R. S., will be continued as a general policy subject to modification in special cases if deemed advisable. *See* REGULATIONS, NAVY, 16-19.

69. **President**—As Commander in Chief may issue regulations. *See* REGULATIONS, NAVY, 13, 15.

70. **Pursuant to or in execution of a statute.** *See* REGULATIONS, NAVY, 13, 15.

71. **Regulations issued by head of a department and not expressly approved by Congress**—It is established by the authorities that a regulation not expressly approved by Congress may nevertheless have the force and effect of statute law where the approval of Congress may be implied. Thus, it has been held that it "can not for a moment be doubted that Congress in legislating with reference to the Naval Academy knows of the existence of regulations issued by the Secretary of the Navy relating to the same subject." (Benjamin *v.* U. S., 16 Ct. Cls. 484; *See also* 19 Op. Atty. Gen. 591.) File 26254-1451:11, J. A. G., Apr. 12, 1915, p. 5.

72. **R. S. 161**—"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." (R. S. 161.)

73. **Same**—"In determining whether the regulations promulgated by him are consistent with law, we must apply the rule of decision which controls when an act of Congress is assailed as not being within the powers conferred upon it by the Constitution; that is to say, a regulation adopted under section 161, R. S., should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with the law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress." File 26254-1451:11, J. A. G., Apr. 12, 1915, p. 4. *See also* 29 Op. Atty. Gen. 478.

74. **Same**—Regulations promulgated under section 161, R. S., have the force of law. (Gratiot *v.* U. S., 4 How. 80; Ex parte Reed, 100 U. S. 18) but they are not the law itself. Hence where rights, duties, and obligations are defined by statute they can not be taken away or abridged by the regulations of an executive department. (Campbell *v.* U. S., 107 U. S. 407, 410.)

The purpose of a regulation of an executive department is to carry into effect the law in respect to which it may be promulgated. (Laurey et al *v.* U. S., 32 Ct. Cls. 265, 266.) File 5362-25, J. A. G., June 29, 1911, pp. 5-6; 3930-452:2, J. A. G., Dec. 8. 1909, p. 6.

75. **R. S. 285**—"That the Secretary of the Navy is authorized with the approval of the President to make administrative regulations under the provisions of section 285, R. S., has never been questioned by the accounting officers. On the contrary, general regulations issued under that section have been repeatedly sustained and enforced by the Comptroller of the Treasury. (*See for example* 8 Comp. Dec. 756; 9 Comp. Dec. 545.)" File 26254-1451:11, J. A. G., Apr. 12, 1915, p. 7.

Digitized by Google

76. **R. S. 1547**—"The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner." (R. S. 1547.) File 5460-60, J. A. G., Jan. 22, 1913, p. 3; 26254-1451:11, J. A. G., Apr. 12, 1915, p. 2.
77. **Same**—"The Secretary of the Navy is authorized to establish 'Regulations of the Navy,' with the approval of the President. (12 Stat. 565; Rev. Stat. sec. 1547.) Such 'regulations for the administration of law and justice' were issued on the 15th of April, 1870 * * * *Such regulations have the force of law.*" (Gratiot *v.* U. S., 4 How. 80.) File 26254-1451:11, J. A. G., Apr. 12, 1915, p. 2.
78. **Same**—"With reference to Navy Regulations issued under section 1547, R. S., Attorney General Devens said that what Congress had conferred on the Secretary of the Navy was not any portion of its general power of legislation, but only the right to make appropriate regulations for the performance of their duties by those whom Congress had placed under his official control. But if it is true that the source from which the President derives his authority to make regulations is statutory, in the absence of statute he would have no authority, and this we know not to be so. There is no similar existing provision of law relating to the Army, but the power of the President to make regulations for the Army is unquestioned." (Lieber on Regulations, 49.)
79 **Same**—"By section 1547, R. S., passed since the adoption of the Navy Regulations 1870, 'the orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in same manner.' This legislative recognition of the Navy Regulations of 1870 'must,' as was said by Chief Justice Marshall of a similar recognition of the Army Regulations in the act of April 24, 1816, ch. 69, sec. 9 (3 Stat. 298), '*be understood* as giving to those regulations the sanction of the law.' (U. S. *v.* Maurice, 2 Brock. 96, 105; Ex parte Reed, 100 U. S. 13.)" (Smith *v.* Whitney, 116 U. S. 180, 181.) File 26254-1451:11, J. A. G., Apr. 12, 1915, p. 2.
80. **Revocation and annulment**—Of Navy regulation by the Secretary of the Navy. G. O. 120, Apr. 1, 1869.
81. **Source and authority for Navy Regulations.** *See* REGULATIONS, NAVY, 76-79.
82. **Subject**—Regulations must confine themselves to their subject. *See* File 26254-1451:11, Apr. 12, 1915.
83. **Suspension of regulations.** *See* REGULATIONS, NAVY, 13, 91.
84. **Uniform**—Regulations must be uniform.
85. **Usages of the service**—Merged in written regulations. *See* CUSTOMS OF THE SERVICE, 6.
86. **Validity of**—Whether a Navy regulation has binding force as law on the accounting officers of the Government is a question of law and not one of accounting and the Attorney General will render an opinion thereon upon request of the Secretary of the Navy. *See* ATTORNEY GENERAL, 13.
87. **Same**—The same rule of decision should be applied in determining whether an executive regulation is consistent with law as controls when the constitutionality of an act of Congress is brought into question. (Boske *v.* Comingore, 177 U. S. 459, 470.) File 26254-1451:11, J. A. G., Apr. 12, 1915, p. 7.
88. **Same**—In referring to a regulation which had been in force for three-quarters of a century without its validity ever having been questioned it was *held:* "Such long acquiescence is of itself sufficient to establish the regulation as a valid one, if the rule laid down by the Supreme Court is to be followed." File 26254-1451:11, J. A. G., Apr. 12, 1915, p. 8. *See also* REGULATIONS, NAVY, 50.
89. **Same**—"The validity of a regulation not expressly approved either by Congress or the President will be sustained by the Supreme Court unless 'it is plainly and palpably inconsistent with law,' and those who insist upon its invalidity succeed in making its invalidity 'so manifest that the court has no choice' except to sustain their contention." File 26254-1451:11, Apr. 12, 1915, p. 8.
90. **Waiving regulations**—If the Navy Regulations, issued under section 1547, R. S., be waived in any case, express personal authority of the President for such waiver is necessary, for the principle is recognized in the decisions that regulations can be waived only by the authority which made them, and the President and the Secretary of the Navy *both* act in issuing regulations under section 1547, R. S. File 5460-60, J. A. G., Jan. 22, 1913, p. 3. *See in this connection*, 6 Comp. Dec. 589. *But see* REGULATIONS, NAVY, 16, which holds that the Secretary of the Navy may change Navy Regulations.

Digitized by Google

91. **Same**—The records of the department show that for a great many years precedents have existed and been followed, amounting practically to a custom on the part of the Secretary of the Navy to waive provisions of the Navy Regulations in individual cases, where such action for any reason seemed advisable. The exercise of such power by the Secretary of the Navy was sustained by the Comptroller of the Treasury in a decision rendered January 8, 1900, in which it was said: "I know of no law or rule which forbids the head of a department from suspending the operation of any regulation similar to this in individual instances. The effect of such suspension is to cause a want of uniformity in the operation of these regulations, but if this be a fault it is chargeable to the administration of the regulations, and does not imply the want of power to so suspend the operation of a regulation in individual cases." In the case considered by the comptroller it appears from his decision that the *Secretary of the Navy* directed that the operation of the regulation in question be suspended; and the comptroller stated that such regulation "was waived by the power which made these regulations." This last statement was literally true, as at that time Navy Regulations and changes therein were not expressly approved by the President, but the entire matter of making, modifying, repealing, and suspending or waiving Navy Regulations was handled entirely by the Secretary of the Navy. Inasmuch as the Navy Regulations and changes therein are now personally approved by the President, it follows that a provision of such regulations in individual cases can be suspended, if at all, only by the personal action of the President. File 5460-60, J. A. G., Jan. 22, 1913, pp. 2-3.

REGULATIONS, NAVY, 16, holds that the Secretary of the Navy may create and amend regulations under R. S. 1547, and it follows that he may therefore waive such regulations.

92. **Same**—A Navy regulation issued under section 1547, R. S., may be waived by the Secretary of the Navy. File 3980-1044, Mar. 19, 1915. *See also* ACTING ASSISTANT SURGEONS, 2, holding that departmental circulars may be waived.

93. **Same**—Policy of the department—"The department is averse to waiving the provisions of the regulations except in cases of great necessity." File 17789-10, Sec. Navy, May 5, 1909, with reference to waiving age requirements for appointment of warrant officers.

94. **Same**—"A regulation is usually simply a method of administering a law. Such is the regulation in question. It was made to aid you in the administration of this appropriation and is binding upon your subordinates so long as you do not abrogate or waive it. You are at liberty, in my judgment, to change, modify, or waive it at your pleasure, always provided that you do not violate some law in your changed or modified regulation, or by making such change, modification, or waiver, you do not encroach upon or abrogate some contractual right fully vested before notice of such change, modification, or waiver." (9 Comp. Dec. 280.) File 5460-60, J. A. G., Jan. 22, 1913.

95. **Same**—"The provisions of I-4721 may be waived within the discretion of the department." File 26516-162, J. A. G., Dec. 8, 1914; C. M. O. 6, 1915, 9.

96. **Weight of regulations.** *See* REGULATIONS, NAVY, 38-47.

REGULATIONS FOR THE GOVERNMENT OF THE NAVAL DISTRICTS OF THE UNITED STATES. File 24514-39:10, J. A. G., Nov. 6, 1916.

REGULATIONS OF THE UNITED STATES NAVAL ACADEMY, 1911.

1. **R. S., 161.** *See* MIDSHIPMEN, 74; NAVAL ACADEMY, 21.

2. **R. S., 1547**—The Court of Claims in Weller *v.* U. S. (41 Ct. Cls., 324, 343) stated that these regulations are presumably issued by the Secretary of the Navy pursuant to section 1547, R. S.

These regulations, however, are not issued with the express approval of the President, as is the practice under section 1547, R. S.

REINSTATEMENT OF FORMER MARINE OFFICERS BY ACT OF AUG. 29, 1916. *See* MARINE CORPS, 4.

REINSTATEMENT OF MIDSHIPMEN. *See* MIDSHIPMEN, 75, 76.

REINSTATEMENT OF RESIGNED OFFICERS. *See* MIDSHIPMEN, 72; RESIGNATIONS, 6, 21, 22.

REJECTION OF ACCUSED'S PLEA OF GUILTY IN A LESS DEGREE THAN CHARGED. *See* COURT, 93; GUILTY IN A LESS DEGREE THAN CHARGED, 9-11; TRYING CASE OUT OF COURT.

Digitized by Google

"RELATIVE."
1. **Definition**—Within meaning of act of June 30, 1914 (38 Stat. 406). *See* FLAGS, 2.
2. **Same**—Within meaning of act of August 22, 1912 (37 Stat. 329), regarding death gratuities. *See* DEATH GRATUITY, 26.

RELEASES, DESERTERS'. *See* DESERTERS, 21, 23.

RELEVANCY OF EVIDENCE. *See* EVIDENCE, 102, 103.

RELIGION.
1. **Freedom of opinion**—In religion.
2. **Religious beliefs.** C. M. O. 16, 1916, 9. *See also* TYPHOID PROPHYLACTIC.

REMARKS BY JUDGE ADVOCATE AND COUNSEL. *See* ARGUMENTS.

REMEDIAL LAWS.
1. **Removal of charge of "Desertion."**—Laws providing for the removal of the charge of "Desertion" standing on the records of the Army or Navy against certain classes of persons who served in the Civil War are remedial statutes. File 26539–551, Mar. 17, 1913.

REMISSION.
1. **Pay**—Remission of unexecuted loss of pay by discharge. *See* BAD-CONDUCT DISCHARGE, 3.
2. **Pay adjudged forfeited by courts-martial**—Should in general be remitted only as an act of clemency toward accused. *See* ALLOTMENTS, 6, 7; CLEMENCY, 53.
3. **President**—Remitted sentence of an officer and directed that he be reprimanded. C. M. O. 48, 1904.
4. **Sentence**—Mitigation or remission by convening authority after final action is unauthorized. *See* CONVENING AUTHORITY, 62. *See also* SETTING ASIDE.
5. **Same**—Remitted to permit subsequent sentence to take effect—The accused was tried by court-martial and sentenced to be restricted to the limits of his ship for six months and to be publicly reprimanded. He was subsequently tried by general court-martial and sentenced to dismissal. The convening authority in his action on the first case approved the proceedings, findings, and sentence, but remitted the sentence in view of the fact that the sentence of dismissal adjudged by the general court-martial before which he was subsequently tried, was approved, confirmed, and executed. C. M. O. 17, 1912.
6. **Unexecuted part of sentence**—Remitted by discharge. C. M. O. 22, 1915, 5.

REMISSION BY CONVENING AUTHORITY AFTER FINAL ACTION. *See* CONVENING AUTHORITY, 62.

REMOVAL OF MARK OF DESERTION. *See* MARK OF DESERTION.

REMOVAL OF PAPERS FROM OFFICERS' RECORDS. *See* RECORDS OF OFFICERS, 10, 11.

RENDERING A FALSE AND FRAUDULENT RETURN, IN VIOLATION OF ARTICLE 14 OF THE ARTICLES FOR THE GOVERNMENT OF THE NAVY.
1. **Officer**—Charged with. C. M. O. 4, 1915; 7, 1913; 39, 1913. *See also* C. M. O. 7, 1894; 92, 1903; 18, 1907; 38, 1907; 7, 1894; 203, 1902; G. C. M. Rec. 16956.

RENOUNCING CITIZENSHIP. *See* CITIZENSHIP, 17, 18.

REPEAL OF STATUTES. *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 108, 109.

REPORTS OF DESERTERS RECEIVED ON BOARD.
1. **Collateral facts.** *See* REPORTS OF DESERTERS RECEIVED ON BOARD, 4.
2. **Definition**—The "Report of deserter received on board" is an official paper which is required to be made in the course of official duty and as the result of personal knowledge, and it would appear that the above-mentioned report should properly be admissible to prove the date and place of return from unauthorized absence. File 26504–142, J. A. G., May 18, 1912. *See also* G. C. M. Rec. 21180; 21198.

Digitized by Google

3. **Evidence to prove "Desertion"**—"The judge advocate introduced against objection by the accused the 'Report of deserter received,' although there was better evidence at hand, and the court overruled the objection. This was an error on the part of the court, as witnesses to prove all the facts that it was attempted to prove by the introduction of the above-mentioned report could have been and should have been summoned to testify as to those facts. (Par. XII of the department's instructions of May 14, 1908.) In permitting the judge advocate to decide for it that the witnesses in question could not be summoned without injury to the service the court permitted a usurpation of its own power by one who was not a member. It also appeared that the court, after due consideration, decided that its former ruling on the report was in error and that as evidence the contents of that report should be stricken from the record."

"It also appeared from the testimony of a chief yeoman of the receiving ship on which * * * was delivered, who was finally called as a witness, that the manner in which reports are made of deserters received on board that vessel is not such as to warrant their being received in evidence, even as to the return of a man to the service."

These irregularities, and the "vacillation of the court in its rulings as to the admission of the 'Report of deserters received' rendered the proceedings of such a character that it was considered to the best interests of the administration of justice that they be disapproved," and the accused discharged as "undesirable for the service" as an independent proceeding. C. M. O. 28, 1909, 3. Parts of above inconsistent with C. M. O. 31, 1915, 14–16, are overruled. *See* SERVICE RECORDS, 16.

The accused was tried for "Desertion." The judge advocate introduced in evidence the enlistment record of the accused and the "Report of deserter received on board." The department held that as the accused "had absented himself but a short time previously from and was delivered at the station where he was tried, it would appear that neither of these documents was the *best evidence* of the facts recorded therein, and being but *secondary* evidence, are not admissible." C. M. O. 47, 1910, 6. *Overruled* by C. M. O. 31, 1915, 14–16, contained in SERVICE RECORDS, 16.

4. **Same**—Accused was charged with "Desertion," and upon arraignment pleaded "Not guilty." "The only witness for the prosecution was the judge advocate, who read from two documents the 'Enlistment record of the accused' and a 'Report of deserter received,' neither of which had been offered in evidence. These documents, if unobjected to, * * * may be admitted as evidence, but only when better evidence is not obtainable. In any case, however, the most that can be shown by them is the date when and place from which the original absence began, and similarly as to its termination. Any other collateral facts contained therein, such as a statement made by the accused, clothing worn, etc., are inadmissible." In view of the foregoing and to the fact that the accused was not "accorded his constitutional right to cross-examine the only witness produced for the prosecution," the proceedings, findings, and sentence were disapproved. C. M. O. 37, 1909, 9. C. M. O. 31, 1915, 14–16 (SERVICE RECORDS, 16), overrules everything in above inconsistent with it.

5. **Same**—The judge advocate, while on the witness stand, introduced as evidence the "Report of a deserter received on board," signed by the commanding officer of the vessel on which the accused was received from desertion. The officer who signed the report was also a member of the court before which the accused was being tried. Therefore the report itself indicated the existence of higher evidence for which it was only a substitute, and the higher evidence being obtainable, the substitute was incompetent. The accused having been brought to trial at the navy yard where he was received from desertion, the *best evidence* of his delivery to the naval authorities would have been the oral testimony of those who witnessed such delivery; and since better evidence was obtainable there was no ground for the admission in evidence of this written report. C. M. O. 49, 1910, 10. C. M. O. 31, 1915, 14–16 (SERVICE RECORDS, 16), overrules everything in above inconsistent with it.

6. **Same**—Accused was charged with "Desertion" and the court accepted the plea of "Guilty in a less degree than charged," on the advice of the judge advocate, who stated that it was "impossible to summon witnesses for the prosecution."

The judge advocate was furnished with the "Service record" and "Report of deserter received on board." The latter paper showed that two officers, one who reported and another who witnessed the return of the accused, were available as witnesses.

Digitized by Google

The "Service record" could have been introduced by the judge advocate in his capacity of legal custodian of that document to prove that that accused was charged with "Desertion" from the place and date alleged in the specification, and the two witnesses above referred to could have testified as to the facts surrounding the return of the accused to the service. (Or according to the department's rulings if these witnesses were not available the "Report of deserter received on board" could have been introduced to prove the date of return of the accused.) Such having been accomplished, the burden would then have been shifted upon the accused to explain the lengthy unauthorized absence; otherwise the court would have been justified in reaching a finding of guilty of the charge of "Desertion."

However, the fact that the court accepted the plea of the accused can not be considered as having adversely affected his interests, but such improper procedure on the part of the court and the judge advocate thereof indicates a dereliction in the performance of their duties as such. C. M. O. 10, 1912, 7-8. C. M. O. 31, 1915, 14-16 (SERVICE RECORDS, 16), overrules everything in above inconsistent with it.

7. **Same**—For department's policy at the present date *see* SERVICE RECORDS, 16.

REPORTS ON FITNESS. *See also* RECORDS OF OFFICERS.

1. **Admissions by judge advocates**—Of contents of reports on fitness. *See* REPORTS ON FITNESS, 5.
2. **Appeals by officers to Secretary of Navy to have record of punishment removed**—An officer appealed to the Secretary of the Navy to have a "report of a punishment" suspension for 10 days imposed on him by the commanding officer of a naval station removed from his record. This officer was the convening authority of a summary court-martial and refused to obey the order of the commanding officer of the naval station (who was the senior officer present) to modify his action on a record. The department declined to sustain the appeal for two reasons: (1) The officer's deductions respecting the requirements of the Navy Regulations in the matter were erroneous; and (2) if they had been correct it would have been his duty in a matter of this character promptly to have obeyed the order of his superior officer, presenting to him afterwards his appeal. While the department could not under the circumstances intervene with respect to the punishment imposed, a copy of the department's letter was filed with the officer's record in order that the action taken upon review of the matter might fully appear. File 1192-1, Sec. Navy, Mar. 21, 1905. *See also* File 14818-3, Sec. Navy, Oct. 26, 1908; ORDERS, 67.
3. **Same**—An enlisted man being tried by summary court-martial pleaded guilty and was sentenced to the loss of one month's pay. The commanding officer, who was the convening authority, deeming the sentence inadequate, returned the record for revision, thus affording the court full opportunity to reconsider its action. The court adhered to its former sentence. After this, the commandant, as senior officer present in reviewing the case expressed his concurrence in the opinion of the convening authority, that the sentence adjudged was entirely inadequate to the seriousness of the offense to which the accused pleaded guilty; and made certain remarks which he intended to reflect on the individual professional character of the members of the court who had voted for the inadequate sentence. The senior officer present further directed that his remarks be brought to the attention of the members of the court, and that each member be given an opportunity to make such statement as he desired in reply thereto. All three members of the court in their reply indicated that they did not desire to make any statement at that time. The commanding officer subsequently entered a brief notation of the facts on the individual reports on fitness of the officers concerned, as it was his duty to do in any case where the professional fitness of the officer reported upon had been brought in question. Each of these officers individually requested of the Secretary of the Navy that this entry be removed from his report on fitness. *Held*, The Secretary of the Navy fully concurs in the action of the commandant, as senior officer present, on the summary court-martial case in question, and denies the requests of the three officers concerned to have the record thereof removed from their reports on fitness. Had any member voted for an adequate sentence he could have so stated. (*See* C. M. O. 42, 1915, p. 8.) (*See* File 7719-03, Sec. Navy, Nov. 18, 1903, 155-04, G. C. M. Rec. No. 12010.) File 25675-9-10-11, Sec. Navy Oct. 28, 1915; C. M. O. 49, 1915, 20-21. *See also* CRITICISM OF COURTS-MARTIAL, 36.

Digitized by Google

4. **Same**—An officer requested that the offense of neglect of duty be not entered on his record. C. M. O. 4, 1911, 1.
5. **Evidence, as**—A question was presented to the court in connection with a request made upon the judge advocate, out of court, by counsel for the accused that the judge advocate admit that the efficiency reports of the accused contained no entry with reference to intoxication; this in order to save the time of the court and the expense of making copies of the efficiency reports to be introduced in evidence. This request, however, was later withdrawn by counsel.

   It has been held by the department that it is not necessary for the court to append either the originals or certified copies of efficiency reports to the record of proceedings when introduced in evidence before a general court-martial, but that a simple notation in the record that they were admitted in evidence is sufficient, as the originals form a part of the officer's official record on file in the department, where they may readily be examined at any time in connection with the court-martial proceedings. (File 26251-7777, Sec. Navy, July 2, 1913.)

   The complete record of an officer, including his efficiency reports, is customarily furnished the judge advocate in the case of an officer to be tried by general court-martial. (C. M. O. 1, 1914, p. 7.) Where it is desired to put this record or any part thereof in evidence the original, where available, should be offered, and the action of a judge advocate in making admissions as to its contents would not in general meet with the approval of the department. C. M. O. 19, 1915, 9. *See also* C. M. O. 14, 1916, 2.
6. **Same**—Officers' service records are kept in the department's files, where they may be consulted in connection with the review of any court-martial case in which the same might have been received in evidence. It would be improper to attach an officer's service record to the record of proceedings of a court-martial as a permanent exhibit therewith. (In *this connection see* C. M. O. 1, 1914, p. 7; 19, 1915, p. 9.) C. M. O. 29, 1915, 8.
7. **Same**—A witness on the part of the defense was shown various reports on fitness and answers to interrogatories respecting the accused, "and was asked by counsel for the accused and permitted by the court to read in evidence extracts from such reports. Answers to interrogatories are made on oath; reports on fitness on honor; but they are not admissible as evidence in a case of this character." C. M. O. 104, 1896, 6. *But see* REPORTS ON FITNESS, 5.
8. **Same**—The record of an officer was introduced in evidence and then questions asked the witness concerning parts of it. G. C. M. Rec. 30562, pp. 61–64.

   Competency of reports on fitness as evidence to show general reputation, and character. File 3009–02, J. A. G., April 10, 1902; 20 J. A. G. 10.
9. **General court-martial member**—Appealed against criticism by convening authority. *See* CRITICISM OF COURTS-MARTIAL, 35.
10. **Summary court-martial members**—Protested against entry as to manner of performing duty. *See* REPORTS ON FITNESS, 3.

REPRESENTATIVE. (Member of Congress.)

1. **Witness**—Before a court of inquiry. *See* CONGRESS, 12.

REPRIMAND. *See also* PUBLIC REPRIMAND.

1. **Courts-martial**—May be reprimanded for leniency. *See* CRITICISM OF COURTS-MARTIAL, 55.
2. **Definition**—"The definition of the word 'reprimand,' as given in Webster's dictionary is 'severe or formal reproof; reprehension, public or private.' " " 'The terms of a reprimand are not prescribed * * * but are left to the discretion of the officer' administering the reprimand. (Harwood, p. 136.)" C. M. O. 9, 1893, 9. *See also* PUBLIC REPRIMAND, 4.
3. **Jeopardy, former.** *See* JEOPARDY, FORMER.
4. **Letters of**—Jurisdiction of office of Judge Advocate General and Bureau of Navigation. J. A. G., Feb. 2, 1916.
5. **Officers.** *See* OFFICERS, 101.
6. **President directed**—Accused who was sentenced to lose numbers by sentence of general court-martial appealed from such sentence—Case was carefully reviewed by Judge Advocate General and submitted to President, who directed that the sentence be mitigated and the accused "be reprimanded for neglect of duty." C. M. O. 48, 1904.

Digitized by Google

7. **Private reprimand.** *See* PRIVATE REPRIMAND.
8. **Public reprimand.** *See* PUBLIC REPRIMAND.
9. **Right of senior officers to reprimand subordinates.** *See* PUBLIC REPRIMAND, 17.
10. **Secretary of the Navy**—It is within the discretion of the Secretary of the Navy to express his approval or disapproval of the acts or omissions of any officer, enlisted man, or civil employee under the Navy Department. This action may be in accordance with, or even contrary to, the findings of a board of investigation or any other source of information or recommendation. File 26283, J. A. G., Feb. 12, 1913, *See also* COMMENDATORY LETTERS, 2; PUBLIC REPRIMAND, 17; SECRETARY OF THE NAVY, 63.
11. **Sentence of general court-martial**—Officer was sentenced "To be reprimanded by the Secretary of the Navy." C. M. O. 36, 1908, 2; 5, 1904. *But see* PUBLIC REPRIMAND, 19.
12. **Same**—"To be reprimanded in general orders by the honorable Secretary of the Navy." C. M. O. 7, 1879; 20, 1881; 16, 1882, 2; 41, 1883, 2; 43, 1884.

REPUTATION.

1. **Witnesses**—Reputation of witness. C. M. O. 16, 1916, 7. *See also* 16 Cyc. 1278; Spurr *v.* U. S. (87 Fed. Rep. 701); 1 Greene (16 ed.), 585; REPORTS ON FITNESS, 8.

REQUISITIONS.

1. **State civil authorities**—Requisitions of governors of States necessary in certain cases. *See* GENERAL ORDER No. 121, Sept. 17, 1914, 10.

REREVISION. *See* PREVIOUS CONNECTIONS, 23.

RES GESTAE.

1. **Definition**—"Things done, or, literally speaking, the facts of the transaction; the things done, the facts of a transaction; circumstances evidentiary of a litigated fact; the subject matter, or thing done; the transaction, thing done, the subject matter; the surrounding facts of a transaction, explanatory of an act or showing a motive for acting; matters incidental to a main fact and explanatory of it, including acts and words which are so closely connected with a main fact as will constitute a part of it, without a knowledge of which the main fact might not be properly understood; events speaking for themselves through the instinctive words and acts of participants, not the words and acts of participants when narrating the events; the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character, including everything which may fairly be construed an incident of the event under consideration; those circumstances which are the automatic and undesigned incidents of a particular litigated act, and are admissible when illustrative of such act." (34 Cyc. 1633–1644.) *See* C. M. O. 7, 1911, 8.
2. **Same**—Another form of declaration of a third person which is admissible is that which forms a part of what is legally known as the "*res gestae.*" By the term "*res gestae*" is meant "the circumstances and occurrences attending and contemporaneous with the principal fact at issue, or so nearly contemporaneous with it as to constitute a part of the same general transaction, which explain and elucidate such fact by indicating its nature, motive, etc." No rule can be laid down which will be a guide as to what is and what is not a part of the *res gestae.* It is a matter which must be left to the wise discretion of the court. A declaration made even a few seconds after the occurrence of a fact has been held not to be a part of the *res gestae,* while under other circumstances a declaration made a week or months after the fact has been held as part of the *res gestae.* Each and every case must stand on its own merits, and, as before stated, must be left to the sound discretion of the court, which of course is guided by the circumstances attending the case. (Forms of Procedure, 1910, pp. 140–141.) *See* C. M. O. 76, 1896, 8–9.
3. **Same**—"It may be added that the testimony of the master-at-arms in support of this charge concerning the accusations made by the crowd was not admissible as a part of the *res gestae,* as it does not appear that the statements that the accused had insulted a person unknown were in the nature of spontaneous outcries on the part of the crowd which were overheard by the master-at-arms." C. M. O. 7, 1911, 8.

RES JUDICATA.

1. **Advancement of officers**—Question of advancement of certain officers retired under act June 29, 1906 (34 Stat. 554)—The act, in providing that officers of the Navy under certain conditions might be retired with the rank and retired pay of the next higher grade, expressly stipulated that those benefits should be granted "in the discretion

Digitized by Google

of the President." The claims of the officers in question were settled by the decisions of the previous administration and must now be considered closed. File 27231-42:2, 3, Sec. Navy, Mar. 1, 1913.

2. **Civil War service of officers.** File 27231-42. *See also* File 27231-42:2, 3; 20971-19:1, Apr. 14, 1913; 26252-71:2, Aug. 29, 1913; 26836-15, Nov. 17, 1913.
3. **Commissions.** *See* COMMISSIONS, 14-16.
4. **Definition**—"It appears from the above that the question which you now present in your request of July 28, 1916, was settled and decided by the decision of a *previous administration*, and this more than thirteen years ago. Accordingly, it must now be considered as closed under the settled legal doctrine of *res judicata;* that is, that decided cases should not be disturbed. This doctrine, as applied to the decisions of executive departments, is well established by a long line of opinions rendered by eminent Attorneys General, as well as by many judicial decisions, and has been sustained and followed by the department in the past with reference to decisions of previous administrations. (File 20971-19:1, and authorities and cases therein cited; *see also* File 26283-327:24 and 25, Sept. 19, 1916)." File 11130-34, Sec. Navy, Sept. 20, 1916.
5. **Dismissal**—Bureau of Navigation recommended that the Navy Department reconsider the claim of a certain naval officer that his dismissal from the Navy, April 16, 1863, was the result of mistaken identity. *Held*, That all the evidence in the case having previously been fully considered, and it having been decided that the officer's naval service is considered "not creditable," and no new evidence having been adduced, the matter is *res judicata* as far as the Navy Department is concerned. The fact that it has been decided by another department of the Government that his record should be deemed creditable is not considered sufficient for the Navy Department to reopen the case. File 26256-111:2, Sec. Navy, Aug. 9, 1912.
6. **Exception**—The only recognized exception to the rule of *res judicata* is where the application for review is based upon "new facts, a new state of law, or some extraordinary circumstances." (15 Op. Atty. Gen. 315, 316.) File 11130-6, J. A. G., Dec. 28, 1909, p. 5. *See also* ADMINISTRATION, 6.
7. **General court-martial trial of a paymaster's clerk**—Tried and dismissed in 1911—Department held that the case was *res judicata*, and can not be reopened by the executive branch of the Government. File 26251-4858:22, Sec. Navy, Apr. 19, 1916.
8. **Midshipmen**—Legality of appointment of midshipmen to Naval Academy. File 5252-32; 28 Op. Atty. Gen. 180.
9. **Nature of**—It is well established by a long line of opinions rendered by eminent Attorneys General, as well as by many judicial decisions, that the head of an executive department is not empowered to disturb the decisions of his predecessors in cases which have once been finally determined, on the ground that his predecessor has erroneously construed the law. Aside from the nonexistence of this power, it was well stated by the Attorney General in a very early case that "it is but a decent degree of respect for each administration to entertain of its predecessor to suppose it as well qualified as itself to execute the laws according to the intention of their makers, and not to set an example of review and reversal, which, in its turn, may be brought to bear upon itself, and thus keep the acts of the Executive perpetually unsettled and afloat." File 11130-28, Sec. Navy, Feb. 5, 1916. *See also* File 27231-42:3 and 3, Sec. Navy, Mar. 1, 1913; 26287-2959, p. 2; 5252-68, J. A. G., May 15, 1915; 27231-77, Sec. Navy, Sept. 19, 1916; 27231-77:1, J. A. G., Oct. 6, 1916.

"The principle has been so frequently declared that the final decision of a matter before the head of a department is binding upon his successor in the same department, under certain well-defined exceptions, that it is now entitled to be regarded as a settled rule of administrative law." (13 Op. Atty. Gen. 457.) File 26521-169, J. A. G., Nov. 14, 1916, p. 4.

The established doctrine of *res judicata* has always been of general application in the administrative as well as the judicial department of our Government. File 26521-169, J. A. G., Nov. 14, 1916, p. 4.

10. **Same**—"It was decided by this department November 1, 1907, in the specific case of * * *, 'that there is no statute explicitly making citizenship a condition precedent to eligibility to appointment to the Naval Academy as a midshipman, but inasmuch as officers of the Navy must be citizens, *a midshipman can not be commissioned an ensign if he be an alien.* This question, which was thus decided by a previous administration, is now *res judicata* and, according to legal principles which in this country are as old as the Government itself, can not be reopened." File 26252-71:2, Sec. Navy, Aug. 29, 1913. *See also* File 5252-32, J. A. G., Jan. 26, 1910, p. 3; 20971-19:1, J. A. G., Apr. 14, 1913. *See also* MIDSHIPMEN, 8.

Digitized by Google

11. **Naval service of an officer.** File 26256-111:2.
12. **Promotion, failing in**—In a case where an officer failed professionally for promotion. *Held*, "It will be seen that Lieutenant * * * 's case has been carefully reviewed and considered by the department on several prior occasions, and that the merits thereof have been carefully examined and decided upon by the last administration. The questions in connection with Lieutenant * * * 's examination, are, therefore, *res judicata*, and, according to legal principles which, in this country, are as old as the Government itself, can not be reopened." File 26260-283:14, Sec. Navy, Nov. 24, 1913.
13. **Reconsideration of certain reports requested**—A rear admiral requested the department's reconsideration of certain reports made against him (then captain) by another officer senior to him. The matter was settled by a former administration. *Held*, "It is thus seen that the former administration clearly and categorically decided both the *legality* and the *propriety* of this matter, and, after mature consideration, decided to regard the incident as closed."

As to the necessity of having the matter passed upon by the President in order to bring it within the doctrine of *res judicata*, *Held*, That "as this is clearly a matter within the jurisdiction of the Secretary of the Navy, it was unnecessary that it should have been passed upon by the President in order to bring it within the doctrine of *res judicata*." File 26836-15, J. A. G., Nov. 17, 1913.

14. **Reprimand**—An officer requested further consideration of an action on the department's letter of reprimand. (File 20971-19, Sec. Navy, Aug. 20, 1909.) *Held*, As the case of this officer was settled by the decisions of the previous administration, it must now be considered as closed under the settled legal doctrine of *res judicata*; that is, that decided cases should not be disturbed. File 20971-19:1, J. A. G., Sec. Navy, Apr. 14, 1913. *See also* APPEALS, 13.

RESCUE.

1. **Collision between a naval vessel and merchant ship**—Duty of commanding officer. *See* COLLISION, 22.

RESIDENCE.

1. **Foreign country**—Effect on citizenship. *See* CITIZENSHIP, 17, 18.
2. **Official**—A naval officer requested authority for change of official residence to Hamilton, Canada. *Held*, That officers of the Navy, who are required to be citizens of the United States, are also required, in accordance with the customs of the service, considerations of policy, and the desirability of maintaining amicable relations with other nations, to have their legal residence in the United States or one of its possessions. File 17606-49, J. A. G., Dec. 17, 1912. *See also* File 9736-58, Aug. 11, 1915.
3. **Voting**—Retired officers. *See* VOTING, 12.

RESIGNATIONS.

1. **Acceptance necessary**—Under the law, as construed by this department (File 26505-21), the resignation of an officer of the Navy is not effective until it has been duly accepted by the President, who possesses the power of compelling the officer to remain in the service by declining to accept such resignation." File 28407-16, J. A. G., July 31, 1915.
2. **Acceptance not obligatory**—Although an officer agreed to tender his resignation in case his hearing grew worse, it is not obligatory that it be accepted if tendered. File 26253-167, J. A. G., Apr. 4, 1911, p. 6.
3. **Attempted withdrawal.** *See* RESIGNATIONS, 28.
4. **Communication of acceptance required.** File 26543-62:1, J. A. G., Aug. 28, 1911, pp. 1-2.
5. **Conditional**—An officer was recommended for trial by general court-martial because of "over-indulgence in intoxicants while on duty in Guam" to such an extent as to incapacitate him from the performance of duty for a period of about two weeks. The officer presented a conditional resignation, in which he pledged himself to "abstain from the use of all intoxicants during my future career as an officer" in the naval service, and "in case of my failure to faithfully carry out the above pledge, I have the honor to submit herewith my resignation as an officer" in the naval service. In view of the difficulty of convening a general court-martial in Guam for his trial, the department decided to accept his resignation, to become effective in case of his failure to fulfill his pledge to abstain from the use of all intoxicants during his future career as an officer in the naval service. File 26251-1989, Sec. Navy, May 14, 1909.

Digitized by Google

6. **Consent of parties to resignation can not be recalled**—Where an officer presents his resignation which is accepted by the Secretary of the Navy: *Held*, "The consent of the parties to the act of resignation could not be recalled except by the reappointment of the same person" in conformity with law. (Comp. Dec. Nov. 25, 1910, file 26254–578.) *See in this connection* Mimmack *v.* U. S., 97 U. S., 436–437; U. S. *v.* Corson, 114 U. S., 619.
7. **Courts-martial**—Jurisdiction of naval courts-martial over resigned officers. *See* JURISDICTION, 113.
8. **Declined**—Resignation may be declined by appointing power. *See* RESIGNATIONS, 16–19.
9. **Diplomatic service**—Acceptance of an appointment in the diplomatic or consular service considered as a resignation from naval service. *See* DIPLOMATIC OFFICERS, 1; RETIRED OFFICERS, 26.
10. **Future date**—"A resignation to take effect at a future date may, with the consent of the appointing power, provided no new rights have intervened, be withdrawn before the time when the resignation was to take effect, and the officer will continue to be an officer *de jure* thereafter." (1 Comp. Dec., 68.) *See* Comp. Dec., Nov. 25, 1910, File 26254–578.
11. **Good of service**—Resignations have been accepted by the President for the good of the service. G. C. M. Rec. 14462, 23453, 26375; File 26251–10701, Sec. Navy, Aug. 26, 1915. *See also* COMMISSIONS, 21; PARDONS, 44.
12. **"Immediate and unconditional"**—"A resignation in terms 'immediate and unconditional' means an entire severance of an officer's connection with the army." (Turnley v. U. S., 24 Ct. Cls., 318.) Comp. Dec., Nov. 25, 1910, File 26254–578.
13. **Insanity of an officer.** File 27231–51:1, J. A. G., Feb. 24, 1913.
14. **Letter of resignation**—"A letter of an officer requesting permission to resign which was regarded by both the Secretary of the Navy and the officer as a tender of resignation, and its acceptance by the Secretary as a resignation, operates to remove the officer from the service." (5 Comp. Dec., 419.) Comp. Dec., Nov. 25, 1910, File 26254–578.
15. **Midshipmen**—Physically disqualified. *See* MIDSHIPMEN, 22.
16. **Not necessary to accept**—In American and English Encyclopedia of Law (vol. 23, p. 422) it is stated: "In England it is the invariable rule that without the consent of competent authority no officer can divest himself of the performance of the duties of the office to which he was elected or appointed, and in the United States this doctrine has been adopted in some jurisdictions, but in other jurisdictions the common law on this subject has been held inapplicable to the incumbents of office under the American form of government." The Supreme Court of the United States in Edwards *v.* U. S. decided in 1880 (103 U. S., 471), that the common-law rule, "namely, that a resignation must be accepted before it can be regarded as complete," must prevail in this country, unless it can be shown that such rule has been plainly abrogated by legislation; and, referring to a statute of Michigan, which it was contended had the effect of changing the common-law rule, the Supreme Court further said: "To hold it [the common-law rule] to be abrogated would enable every officeholder to throw off his official character at will, and leave the community unprotected. We do not think that this was the intent of the law."

The United States Supreme Court also quoted with approval Hoke *v.* Henderson (4 Dev. L. 1) in which Mr. Justice Ruffin, speaking for the Supreme Court of North Carolina, said:

"An officer may certainly resign; but without acceptance his resignation is nothing, and he remains in office. It is not true that an office is held at the will of either party. It is held at the will of both. Generally resignations are accepted; and that has been so much a matter of course with respect to lucrative offices, as to have grown into a common notion that to resign is a matter of right. But it is otherwise. The public has a right to the services of all the citizens, and may demand them in all civil departments *as well as in the military*. Hence there are on our statute book several acts to compel men to serve in offices. Every man is obliged, upon a general principle, after entering upon his office, to discharge the duties of it while he continues in office, and he can not lay it down until the public, or those to whom the authority is confided, are satisfied that the office is in a proper state to be left, and the officer discharged."

Digitized by Google

The case of U. S. *v.* Wright (1 McLean, 509) was cited in the Edwards case as indicating a contrary doctrine, but was not concurred in by the Supreme Court. However, even in the Wright case, the doctrine laid down was merely "that a *civil officer* has a right to resign his office at pleasure and it is not in the power of the Executive to compel him to remain in office." It would hardly be contended that such a doctrine, even had it been sustained by the Supreme Court, would apply to officers in the military or naval service, for so to hold would threaten not only the efficiency and discipline of these branches of the public service, but would endanger their very existence; as, carried to its ultimate conclusion, it would enable military and naval officers to relieve themselves of the responsibilities of command at pleasure, and even in the face of the enemy. That this was not intended by Congress is made evident by article 10 of the Articles for the Government of the Navy (sec. 1624, R. S.) which provides that

"Any commissioned officer of the Navy or Marine Corps who, having tendered his resignation, quits his post or proper duties without leave, and with intent to remain permanently absent therefrom, prior to due notice of the acceptance of such resignation, *shall be deemed and punished as a deserter.*"

Furthermore, the commissions issued to officers of the Navy expressly provide: "This commission to continue in force *during the pleasure of the President of the United States* for the time being." When an officer of the Navy accepts his commission and executes the oath of office he does so with full knowledge of this clause contained in the commission, and of the law above quoted which makes him guilty of desertion if he quits his post after resigning, prior to the acceptance of his resignation.

In view of the foregoing: *Held*, That the resignation of an officer of the Navy is not effective until it has been duly accepted by the President, who possesses the power of compelling the officer to remain in the service by declining to accept such resignation. File 26505–21, J. A. G., Mar. 17, 1913. *See also* File 26262–2146; Mimmack *v.* U. S. (10 Ct. Cls. 600), concurring opinion of Nott, J.; Barger *v.* U. S. (6 Ct. Cls. 38, 39); Robertson *v.* Baldwin (165 U. S., 275) as bearing on involuntary servitude; Wales *v.* Whitney (114 U. S., 564) as bearing upon the right of a naval officer to a writ of habeas corpus. The above opinion of the Judge Advocate General was accepted by the Secretary of the Navy "as embodying the law on the subject." File 26505–21, Sec. Navy, June 28, 1915. *See also* File 26505–30:2, Sec. Navy, Jan. 3, 1917.

17. **President may decline to accept**—The President possesses the power of compelling an officer to remain in the naval service by declining to accept his resignation. *See* RESIGNATIONS, 16, 18–19.

18. **Same**—"The department has the right and has frequently exercised it, of refusing to accept an officer's resignation." File 26251–6149:4, June 24, 1912, p. 4. *See also* RESIGNATIONS, 16, 17, 19.

19. **Same**—The law is well settled that the President possesses the power of compelling an officer to remain in the naval service by declining to accept his resignation. (*See* File 26505–21; 26262–2146.) As this question has long since been judicially determined it would seem unnecessary in any case to request the opinion of the Attorney General thereupon inasmuch as the latter has himself repeatedly held that he is bound by the decisions of the United States courts of competent jurisdiction. Furthermore, the Attorney General has heretofore expressly held that "the resignation of a military officer does not take effect until accepted by the proper superior authority." And the Court of Claims, at an early date in a case where the acceptance of an officer's resignation was not communicated to him for more than a year after it was tendered, the officer in the meantime being required to perform duty, decided: "The claimant had no alternative but to do the duty to which he was commanded by his colonel. *He could not compel an acceptance of his resignation*, and until he was informed that it had been accepted he was as much a soldier as ever, and liable to punishment as a deserter had he abandoned his duty." File 26505–28, J. A. G., Nov. 17, 1915; C. M. O. 42, 1915, 12–13.

20. **Refusal to accept.** *See* RESIGNATIONS, 16–19.

21. **Restoration of resigned officers**—An officer who has resigned can not be restored to the naval service except by reappointment. (25 Op. Atty. Gen. 579; 20 A. and E. Enc. 636; Mimmack *v.* U. S., 97 U. S. 426.) File 5252–73, J. A. G., Oct. 1, 1915.

In Mimmack *v.* United States (97 U. S. 426) the officer's resignation was accepted by the President, who, later, revoked the acceptance. The Supreme Court decided "that the office became vacant when the incumbent was notified that his resignation had been accepted;" and "that the subsequent action of the President did not restore the petitioner to the military service." File 5252–73, J. A. G., Oct. 1, 1915.

Digitized by Google

22. **Same**—A man who is once legally out of the service assumes a civilian status and is subject in case of reappointment to the same rules as govern other civilians. File 28554–199:1, J. A. G., Nov. 2, 1915.

"In all cases the principle is the same. By which of several legal methods an officer goes out of the service by the act of the President, whether by his approval of a sentence by a court-martial, his acceptance of a voluntary resignation, or his approval of the finding of a retiring board, makes no particular difference. In each case the question is whether he is entirely and legally out; if so the Constitution takes hold of the case, and, regardless of how he got out, directs the only mode of return. * * *

"We go no farther than to hold that restoration is not accomplished through revocation. This is the plain rule prescribed in the Constitution, decided by the Supreme Court, declared by Congress, advised by the Attorney General, and recognized by the Judge Advocates General of the Army. It must be satisfactory to the President, because it relieves him from private importunity and possible imposition. It is satisfactory to the officers remaining in the service, because it relieves them from the constant apprehension and danger of being jostled out of their proper places by irregular or illegal intrusion." (Vanderslice *v.* U. S., 19 Ct. Cls. 484.) File 5252–73, J. A. G., Oct. 1, 1915.

"Where the connection of an officer with the service has been severed by his resignation, discharge, or dismissal, he can be reinstated only by a new appointment. * * * The mere revocation of the acceptance of his resignation or of the order terminating his connection with the service can not have this effect." (A. and E. Ency. Law, Vol. 20, pp. 636, *et seq.*). File 5252–73, J. A. G., Oct. 1, 1915.

23. **Revocation of acceptance.** *See* RESIGNATIONS, 21, 22.

24. **Secretary of the Navy**—Is the proper administrative officer to accept the resignation of a naval officer for the President. *See* ADMINISTRATION, 8; RESIGNATIONS, 28.

25. **Takes effect**—Resignations do not take effect until accepted by the proper superior authority. *See* RESIGNATIONS, 16–19.

26. **Unqualified resignation**—"If the resignation is unqualified it takes effect immediately upon its unqualified acceptance, or at least when the officer receives notice of the acceptance." (1 Comp. Dec. 70.) Comp. Dec., Nov. 25, 1910, File 26254–578.

27. **Withdrawal after acceptance**—"It follows, then, that the attempted consent of the Secretary of the Navy to the withdrawal of the cadet's resignation after acceptance thereof had no legal effect whatever." Comp. Dec. Nov. 25, 1910, File 26254–578.

28. **Withdrawal, attempted**—A naval officer, on duty in Samoa, under serious charges, formed the intention of relinquishing his office in the Navy, and manifested this intention by placing his resignation in the hands of his commanding officer, who was the proper officer to receive same in accordance with explicit provisions of the Navy Regulations, which have been judicially upheld. Said resignation was to take effect on a certain date, approximately seven weeks after it was presented to the commanding officer. The commanding officer cabled the officer's intention to resign to the Secretary of the Navy, recommending that it be accepted, and at the same time further recommending that "if department is willing to accept resignation" the officer be ordered home by merchant steamer, which was accordingly done by cablegram. The Secretary of the Navy expressly approved the recommendation of the Chief of the Bureau of Navigation that the resignation be immediately accepted for the good of the service, to take effect upon his arrival in the United States. Thereafter, while en route to the United States, this officer cabled the Secretary of the Navy, "resignation withdrawn." *Held*, That the resignation was legally accepted by the President, through the proper administrative officer, and the orders issued this officer to return home constituted a notification to that officer that his resignation was approved, although even without such notification the resignation was placed beyond his power to recall. Accordingly it was *advised* (*a*) that this officer's attempt to withdraw his resignation was ineffectual, said resignation theretofore having been accepted, and the accepting authority not having consented to its withdrawal; and (*b*) that the officer be notified to this effect. File 26262–2146:4, J. A. G., Oct. 30, 1915; C. M. O. 42, 1915, 13.

RESISTING AND STRIKING THE POLICE AUTHORITIES OF THE SHIP WHILE IN THE EXECUTION OF THEIR DUTIES.

1. **Enlisted man**—Charged with. C. M. O. 21, 1887.

Digitized by Google

RESISTING ARREST. *See also* ARREST.
1. **Civil authorities**—Resistance to arrest by a naval officer. *See* RESISTING ARREST, 5.
2. **Coal heaver**—Charged with. C. M. O. 36, 1886.
3. **Fireman, first class**—Charged with. C. M. O. 23, 1910, 5.
4. **Officer**—Charged with. C. M. O. 59, 1904, 2; 1, 1917.
5. **Same**—In administering a public reprimand adjudged as part of a sentence by a general court-martial, the Secretary of the Navy stated in part: "You are especially admonished that one of the first duties of a commissioned officer is to pay due respect at all times, and under all circumstances, to constituted authority, civil as well as military. Resistance to arrest by an officer of the law is a grave matter under any circumstances, and is particularly inexcusable on the part of officers of the military and naval service who should recognize in their conduct the propriety of yielding unhesitating obedience to law, regulation, and order, and protesting, if necessary, afterwards." C. M. O 59, 1904, 2.
6. **Landsman**—Charged with. C. M. O. 161, 1902.

RESISTING ARREST AND ASSAULTING A CHIEF PETTY OFFICER.
1. **Charge**—Criticized by department. *See* CHARGES AND SPECIFICATIONS, 53.

RESPECT.
1. **Essential**—Respectfulness, in language and attitude toward superiors, is essential to discipline and efficiency. C. M. O. 15, 1914. *See also* C. M. O. 38, 1914, 2.
2. **Officers**—Should cherish a respect for authority, law, regulations, and gentlemanly decorum. *See* OFFICERS, 102.

RESPONSIBILITY FOR CRIME.
1. **"Right and wrong" test should be applied**—The rule for determining criminal responsibility *in law* is the *capacity* of the accused to distinguish between right and wrong with reference to the particular act. C. M. O. 24, 1914, 8; 51, 1914, 4. *See also* INSANITY, 35, 36.

RESPONSIBILITY OF COMMANDING OFFICERS. *See* COLLISION, 6, 17. 19, 22; COMMANDING OFFICERS, 35–38.

RESTITUTION. *See* DEBTS, 23.

RESTORATION OF CITIZEN RIGHTS OF DESERTERS. *See* DESERTERS; DESERTION.

RESTORATION OF DISMISSED OFFICERS. *See* DISMISSAL, 23; LEGISLATION, 5.

RESTORATION OF NUMBERS LOST BY SUSPENSION FROM PROMOTION. *See* PROMOTION, 103, 155, 156.

RESTORATION OF RESIGNED OFFICERS. *See* RESIGNATIONS, 21, 22.

RESTORATION TO DUTY.
1. **Deserter**—Effect of. *See* DESERTERS, 24.
2. **Fraudulent enlistment**—Ratification of a fraudulent by restoration to duty. *See* FRAUDULENT ENLISTMENT, 75.
3. **Officer**—Court-martial order in proper cases should so state. *See* ARREST, 9, 27.
4. **Pardon**—Restoration to duty by the Secretary of the Navy is never a pardon. *See* PARDONS, 47.

RESTORATION TO DUTY OF DESERTERS.
1. **Citizenship**—Effect on. *See* DESERTERS, 24; JEOPARDY, FORMER, 32.

RESTRICTION.
1. **Close confinement**—Where restriction rather than close confinement by a general court-martial. *See* CONFINEMENT, 20.
2. **Definition.** *See* CONFINEMENT, 20.
3. **Jeopardy, former.** *See* JEOPARDY, FORMER, 33.
4. **Secretary of the Navy mitigated confinement to restriction**—Department mitigated a sentence involving confinement at hard labor to "restriction to the limits of the barracks or ship to which he may be attached—at present the marine barracks, navy yard, League Island, Pa.," etc. C. M. O. 167, 1902, 3. *See also* CONFINEMENT, 8.
5. **Sentence**—"To be restricted to the limits of the post, station, or ship," etc. *See* C. M. O. 95, 1893, 3; 12, 1899, 3; 236, 1902; 167, 1902, 3; 13, 1910; 7, 1912; 8, 1912; 24, 1913; 40, 1913; 21, 1914; 46, 1915; 21, 1916; 28, 1916; G. C. M. Rec. 29308, p. 3.

Digitized by Google

6. **Summary courts-martial**—A fireman first class, United States Navy, was tried by summary court-martial and sentenced among other things "to be restricted to the limits of the ship for a period of 30 days."
In view of the fact that "restriction to the limits of the ship" is not one of the punishments which a summary court-martial is authorized to adjudge, that part of the sentence involving restriction was set aside by the department. (*See* A. G. N. 30; C. M. O. 21, 1910, p. 17; 1, 1911, p. 3; 33, 1914, pp. 4–6; Index-Digest, 1914, p. 38.) File 26287–3315, Sec. Navy, Feb. 15, 1916; C. M. O. 5, 1916, 6.
7. **Same**—Convening authority of a summary court-martial may mitigate "confinement" to "restriction." *See* CONFINEMENT, 8.

RETENTION IN SERVICE AFTER EXPIRATION OF ENLISTMENT. *See* ENLISTMENTS, 8–11.

RETIRED ENLISTED MEN.

1. **Active duty, not subject to**—The Bureau of Navigation requested opinion as to whether or not retired enlisted men of the Navy could be ordered to duty at shore stations in case of an emergency. The following is the reply of the Judge Advocate General: "In the department's letter to the bureau, August 27, 1909 (File 7657–57), it was said 'An enlisted man in the Navy, when placed on the retired list, is no longer subject to orders for active duty.'" File 7657–186, J. A. G., May 20, 1913. *See also* File 10438–03, J. A. G.; 7657–123, Sec. Navy; 7657–57, Sec. Navy, Aug. 27, 1909; RETIRED ENLISTED MEN, 9. *But see* Act of March 3, 1915 (38 Stat. 941); Act of Aug. 29, 1916, modifying this.
2. **Alderman (councilman) of Annapolis, Md.**—There is no federal law to prevent a chief yeoman, retired, from holding the office of alderman, to which office he had been elected. File 7657–150, J. A. G., May 9, 1912; 27231–3, J. A. G., Nov. 1, 1909. NOTE.—It was reported that this retired enlisted man resigned as councilman owing to a doubt as to his qualifications under State law.
3. **Civil positions**—The employment of retired enlisted men of the Navy in civil positions under the United States is not contrary to any Federal law or Navy regulation. File 7657–123, J. A. G., Dec. 29, 1911; File 7657–57, Sec. Navy, Aug. 27, 1909.
4. **Court-martial**—Retired enlisted men tried by. *See* Army Digest, 1912, p. 1001.
5. **Deposits**—It is the practice of the department, when enlisted men are transferred from the active list to the retired list finally, to pay them as enlisted men and to give them their deposits with interest. File 28550–22, Sec. Navy, Nov. 24, 1916.
6. **Instructors**—At naval or military schools. *See* File 7657–361, J. A. G., May 6, 1916. *See also* RETIRED ENLISTED MEN, 10, 12.
7. **Naval Instructions, 1913, I–4893**—An enlisted man was retired before expiration of enlistment and had a certain amount of his pay "deducted" because of the operation of I–4893 upon court-martial sentences involving loss of pay: *Held*, Since, if the man's enlistment had expired on the date of his retirement, he would be entitled to only an "ordinary discharge," his accounts should be checked one-half the amount of pay "deducted" by reason of sentence. (*See* C. M. O. 12, 1915, p. 12; File 26806–131; 32.) File 27210–302, J. A. G., Oct. 25, 1915; Sec. Navy, Oct. 25, 1915; C. M. O. 35, 1915, 10.
8. **Naval or military schools.** *See* RETIRED ENLISTED MEN, 6, 10, 12.
9. **Not a part of Navy**—An enlisted man of the Navy, when placed on the retired list, is no longer subject to orders for active duty; his connection with the service is severed; and he can not thereafter be said to be a component part of the Navy. (Murphy *v.* U. S., 38 Ct. Cls., 511, 521.) File 7657–57, Sec. Navy, Aug. 27, 1909, quoted in File 7657–123, J. A. G., Dec. 29, 1911, p. 4. *See also* RETIRED ENLISTED MEN, 1. *But see* Act of March 3, 1915 (38 Stat. 941); Act of August 29, 1916, modifying this.
10. **Petty officers**—As instructors at naval and military schools. *See* File 7657–361, J. A. G., May 6, 1916. *See also* RETIRED ENLISTED MEN, 6, 12.
11. **Reenlistment**—The mere fact that an enlisted man of the Marine Corps has been placed on the retired list, does not bar him from reenlistment, provided he is physically and otherwise qualified. File 10438–03.
12. **Schools, naval and military**—Retired enlisted men as instructors at. *See* File 7657–361, J. A. G., May 6, 1916. *See also* RETIRED ENLISTED MEN, 6, 10.
13. **Transportation**—Retired enlisted men to their homes. File 7657–389, Sec. Navy, Sept. 25, 1916.
14. **Same**—Where the home is "beyond the continental limits of the United States." File 7657–389, Sec. Navy, Sept. 25, 1916.

Digitized by Google

RETIRED OFFICERS.

1. **Active duty**—The act of August 22, 1912 (37 Stat. 329), provided that "hereafter any naval officer on the retired list may, with his consent, in the discretion of the Secretary of the Navy, be ordered to such duty as he may be able to perform at sea or on shore," etc. *Held*, To apply to Marine officers. File 26280–61.
2. **Same**—Marine officers ordered to active duty after June 6, 1912. *See* RETIRED OFFICERS, 45.
3. **Boatswain, retired**—Tried by general court-martial. G. C. M. Rec. 32614; C. M. O. 34, 1916.
4. **Carpenter, retired**—Tried by general court-martial. C. M. O. 48, 1907.
5. **Chief boatswain, retired**—Tried by general court-martial. C. M. O. 15, 1915.
6. **Chief of Bureau**—Retired officer not eligible for appointment as chief of bureau. File 21, Nov. 25, 1902; 15315–5. *See also* BUREAU CHIEFS, 14.
7. **Citizenship**—Of retired officer living abroad indefinitely. *See* CITIZENSHIP, 17, 18; RETIRED OFFICERS, 32.
8. **Civil office or employment.** *See* RETIRED OFFICERS, 28, 31.
9. **Civil service**—An officer on the retired list may take the civil-service examination, and his status on the retired list does not preclude him from taking an examination or accepting a clerical position in the customhouse, assuming the compensation of such position to be less than $2,500 per annum, subject to possible recall to active duty. File 4901–04; 5650–00; 4642–63.
10. **Civil War service**—Retired officer advanced for Civil War service. *See* CIVIL WAR SERVICE, 5, 6.
11. **Commandant of the Marine Corps**—*See* MARINE CORPS, 47.
12. **Commander in chief of a fleet**—Retaining an officer as commander in chief of a fleet after he has been placed on the retired list because of age. File 27231–75, J. A. G., July 24, 1916.
13. **Commercial attaché.** *See* File 27231–67, J. A. G., Aug. 20, 1915; Sec. Navy, Aug. 23, 1915. *See also* RETIRED OFFICERS, 26, 34.
14. **Commissions.** *See* COMMISSIONS, 17, 18, 31.
15. **Commissions of marine officers on retired list**—Change of date requested. *See* COMMISSIONS, 17, 18.
16. **Compensation**—Whether or not the compensation of a retired officer is "pay," "pension," or "bounty."

    That Congress can increase or diminish the compensation of officers in Government service is well recognized, and the same is true of pensions.

    A retired officer is entitled to receive his pay, whatever may be its character, free from any deductions that are not plainly provided for by law. But he may relinquish all or part by his express assent.

    The Comptroller of the Treasury has held that retired pay is not compensation, but a pension. File 9736–18, J. A. G., June 25, 1910, p. 15. *See also* Collins *v.* U. S., 15 Ct. Cls. 22, 40; Fletcher *v.* U. S., 26 Ct. Cls. 541, 563.
17. **Comptroller's jurisdiction**—The act of June 29, 1906 (34 Stat. 554), provided that retired officers of the Navy under certain conditions should be entitled to the rank and retired pay of the next higher grade. The question of increased pay under this law was a matter under the jurisdiction of the Comptroller of the Treasury, while the question of increased rank was a matter under the jurisdiction of the Secretary of the Navy. File 26254–1451; 11, J. A. G., Apr. 12, 1915, p. 17.
18. **Congress**—An opinion was requested upon the following question:

    "Is it within the law and the Regulations of the Navy for a rear admiral, retired, to go to Congress and retain his commission in the Navy, provided he declines all compensation or pay for his services in Congress and will resign his seat in Congress whenever the Navy Department shall require his naval services?" *Held*, That the question presented is one not under the cognizance of the Judge Advocate General and upon which he is not authorized to render an official opinion.

    The following remarks, made by the Attorney General in an opinion rendered March 26, 1897 (21 Op. Atty. Gen., 510), to the Secretary of War, are pertinent in this connection:

    "It may be, and doubtless is, a subject of reasonable interest, and perhaps of great anxiety, to officers of the United States Army on the retired list to ascertain 'if an officer on the retired list of the Army can accept a diplomatic or consular appointment and still hold his position on the retired list with rank and pay.'"

Digitized by Google

"But, manifestly, the solution of that question by any retired officer of the Army, and the course of conduct which he may adopt in pursuance of such solution, is a matter of his private concern only, and not a subject with which the United States can be concerned until some action has been taken by such officer. * * *

"If Lieutenant * * *, or any other retired officer, should be called upon to determine such question in his own case, the obvious course for him to pursue is that which is open to every person inclined to pursue a course as to the legal consequences of which he is in ignorance or doubt. He should seek the advice of private counsel, learned in the law, and obtain their opinion, for which, if given without due care, such counsel can be held to a personal accountability.

"The whole matter, as it seems to me, is one strictly of private concern and in no sense of public interest." (21 Op. Atty. Gen. 510.)

"Each House shall be the judge of the elections, returns, and *qualifications* of its own Members." (Constitution, Art. I, sec. 5, cl. 1.)

"* * * No person who holds an office the salary or annual compensation attached to which amounts to the sum of $2,500 shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law; but this shall not apply to retired officers of the Army or Navy whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate." (Act, July 31, 1894, 28 Stat. 205.)

"That unless otherwise specially authorized by law no money appropriated by this or any other Act shall be available for payment to any person receiving more than one salary when the combined amount of said salaries exceeds the sum of $2,000 per annum, but this shall not apply to retired officers of the Army, Navy, or Marine Corps whenever they may be appointed or elected to public office, or whenever the President shall appoint them to office by and with the advice and consent of the Senate or to officers and enlisted men of the Organized Militia and Naval Militia in the several States, Territories, and the District of Columbia." (Act May 10, 1916, sec. 6 (39 Stat. 120). *See also* Act of Aug. 29, 1916 (39 Stat. 582).)

Attention is invited to the authorities collected in volume 2 of the American and English Annotated Cases (pp. 378–382), with reference to the holding of incompatible offices by one person, and what constitutes incompatibility.

Maj. Gen. Sickles, while a retired officer of the Army, held a seat in Congress, and under date of December 5, 1893, his status was the subject of an opinion by the Attorney General, published in volume 20 of the Attorney General's opinions, at page 686. It was there held by the Attorney General that "the question whether Congressman Sickles can receive pay as a retired Army officer is one of grave doubt which only a determination of the Supreme Court can satisfactorily settle," this doubt being stated by the Attorney General to be due in part to the provisions of Article I, section 6, clause 2, of the Constitution, providing that "no person holding any office under the United States shall be a Member of either House during his continuance in office."

There has been no decision of the Supreme Court of which I am aware rendered since the Attorney General's opinion above cited, and the only material changes in the law are contained in the acts of July 31, 1894, and May 10, 1916, above quoted. In addition, the laws now in force relating to the assignment of retired naval officers to active duty are different from those which were in force with reference to retired Army officers at the time the Attorney General's opinion was rendered, and this might possibly have a bearing upon the status of retired naval officers with relation to the constitutional provision last above quoted.

In connection with the suggestion with reference to declining compensation or pay for services in Congress, it was decided by the Supreme Court of the United States, February 21, 1916, in the case of U. S. *v.* Andrews (240 U. S. 90), that "public policy prohibits any attempt by unauthorized agreement with an officer of the United States under guise of a condition or otherwise to deprive him of the right to pay given by statute." File 27231–74, J. A. G., May 12, 1916.

19. **Consular appointment.** *See* 21 Op. Atty. Gen. 510; R. S., 1223; R. S. 1440; RETIRED OFFICERS, 26; DIPLOMATIC OFFICERS, 3.
20. **Corporations**—Employment of retired officers by. *See* RETIRED OFFICERS, 28, 31.
21. **Counsel in court-martial trials**—Compensation prohibited. *See* COUNSEL, 17. *See also* File 27231–60 as to right of a retired officer, who was a member of the bar, to receive compensation for acting as counsel in a court-martial trial from an accused enlisted man.

Digitized by Google

22. **Courts-martial**—Retired officers are subject to jurisdiction of naval courts-martial. *See* JURISDICTION, 114; RETIRED OFFICERS, 3–5, 33, 74.
23. **Court-martial duty**—If an officer is retired while sitting as a member of a court-martial, specific orders for his continuance on such duty are required and a copy thereof should be attached to the record of each case as a modification of the precept. Where the record failed to show that such orders had been issued the department held that such would not invalidate the proceedings since such orders were in *fact* issued to said retired officer. C. M. O. 23, 1910, 5. *See also* COURT, 49.
24. **Culebra, P. R.**—Health officer. *See* APPOINTMENTS, 35; RETIRED OFFICERS, 40.
25. **Death gratuity**—Not payable in case of retired officers. *See* RETIREMENT OF OFFICERS, 20.
26. **Diplomatic appointments**—"Under section 1440, R. S., if a retired officer accepts an appointment in the diplomatic or consular service of the Government he shall be considered as having resigned his place in the Navy" (File 9736–18, J. A. G., June 25, 1910, pp. 1, 15, 16, 19). "And this includes retired officers of the Navy." (File 27231–3, J. A. G., Nov. 1, 1909. *See also* File 12–4, Nov. 15, 1906; 27231–3, J. A. G., Nov. 1, 1909; 26255–234; 21 Op. Atty. Gen. 510; R. S. 1223; DIPLOMATIC OFFICERS, 1, 3; RETIRED OFFICERS, 18.
27. **Director of a corporation.** *See* RETIRED OFFICERS, 34, 36.
28. **Domestic corporations**—The act of June 10, 1896 (29 Stat. 361), provides that it is unlawful for any officer in the Navy or Marine Corps on the active or retired list to be employed by any person or company furnishing naval supplies or war material to the Government. (*See* C. M. O. 29, 1915, p. 11.)

    Whether a retired officer may or may not accept any civil position is a question to be determined by him upon his own responsibility, as the Government would not become interested in the matter unless and until he should have accepted illegal employment. (File 9736–15, Sec. Navy, Mar. 28, 1910; 9736–18, J. A. G., June 25, 1910, quoting 21 Op. Atty. Gen., 510.) File 9736–60, Sec. Navy, Oct. 9, 1915; C. M. O. 35, 1915, 11.

    There is no law which would prohibit a retired naval officer from accepting employment as president of a corporation in the United States not engaged in business with the United States Government. File 9736–55, J. A. G., Aug. 11, 1915; C. M. O. 29, 1915, 11.
29. **Employment of.** *See* RETIRED OFFICERS, 18, 26, 28, 31, 34–37, 42.
30. **Expatriation.** *See* RETIRED OFFICERS, 31.
31. **Foreign corporations**—The act of June 10, 1896 (29 Stat. 361), relating to the employment of officers by Government contractors, is still in force. There is no statute which would prevent the employment of a retired officer of the naval service "by a foreign company manufacturing war munitions," provided it does not furnish its product to the United States Government.

    In this connection attention is invited to an opinion of the Judge Advocate General dated December 17, 1912 (File 17606–49, Nav. File 7032–26; Naval Instructions, 1913, I–705), concerning the residence of naval officers in foreign countries, the citations contained in which letter should be of interest in the present case, particularly the State Department's decisions that "by the general law, as well as by the decisions of the most enlightened judges both in England and in this country, a neutral engaged in business in an enemy's country during war is regarded as a citizen or subject of that country * * * ;" that a person who voluntarily takes up his residence in another country "contributing his labor, talents, or wealth, to the support of society there," may be regarded as having waived his right of protection from his own Government; and that such facts may become material upon the question whether he has not expatriated himself and voluntarily relinquished his rights as a citizen of the United States. (*See* 3 Moore's Digest of International Law, pp. 759–760.)

    The question whether a retired naval officer should be permitted to reside in a foreign country and engage in business with a foreign company manufacturing war munitions is one of policy, which should be given very thoughtful consideration. File 9736–58, J. A. G., Aug. 11, 1915; C. M. O. 29, 1915, 11. *See also* File 9736–67, J. A. G. May 16, 1916.
32. **Foreign country**—Living in a foreign country indefinitely—Question does not come under the jurisdiction of the Navy Department but should be submitted to the Department of State. File 9212–35, J. A. G., Apr. 9, 1913.

Digitized by Google

33. **General court-martial**—Retired officers tried by—Boatswain (G. C. M. Rec. 32614; C. M. O. 34, 1916); carpenter (C. M. O. 42, 1907); chief boatswain (C. M. O. 15, 1915); rear admiral (C. M. O. 41, 1915); second lieutenant, Marine Corps (C. M. O. 23, 1896). *See also* JURISDICTION, 104.

34. **Government contractors**—Employment of officer by, prohibited—Employment as director of a company furnishing supplies to the Government is not legal. File 9736–9. *See also* File 9736–12, Sec. Navy, Dec. 4, 1909.

The naval appropriation act of June 10, 1896 (29 Stat. 361), forbids the employment of any officer of the Navy or Marine Corps on the active or retired list by a firm or company furnishing naval supplies or war materials to the Government. However, if the Navy Department desires to promote American trade in a foreign country it may detail an officer at the expense of the Government and as the representative thereof to assist such persons whose interests, in the opinion of the Secretary of the Navy, justify such proceedings. File 6077–32:4 Apr. 18, 1911; 9736–35, Sec. Navy, June 20, 1913; 9736–36, Sec. Navy, June 20, 1913.

35. **Same**—If a naval officer has accepted employment with a person or company furnishing naval supplies or war material to the Government in violation of the act of June 10, 1896 (29 Stat. 361), there is no doubt that he may be brought to trial therefor by general court-martial notwithstanding the fact that he has returned the amount of his retired pay to the Government. No officer of the Navy or Marine Corps has heretofore been brought to trial by general court-martial for violation of the law cited above. Should evidence be obtained sufficient to establish that a company by which a naval officer is employed is in fact engaged in furnishing naval supplies or war material to the United States Government, the question whether he should be brought to trial therefor by court-martial or otherwise dealt with is one of policy not under the cognizance of the office of the Judge Advocate General. File 9736–61; 1, J, A, G., Aug. 28, 1916.

36. **Same**—Under the act of June 10, 1896 (29 Stat. 361), a retired naval officer can not accept employment as assistant superintendent of motive power with a company furnishing naval supplies or war material to the Government, even though such officer has nothing to do with the manufacture or sale of products. Same, as to acceptance of position as "director" of a company furnishing supplies to the Navy. File 9736–9, J. A. G., June 25, 1910, p. 17. *See also* File 9736–14, Sec. Navy, Jan. 9, 1910.

37. **Same**—The employment of a retired officer as superintendent or foreman with contractors performing work on contracts at a naval training station is specifically prohibited by law, and the department would consider the acceptance of such employment as in the highest degree objectionable. (File 9736–17, Sec. Navy, May 26, 1910.) File 9736–1, J. A. G., June 25, 1910, p. 18.

38. **Hague Conference**—The President can appoint a retired officer of the Navy as a delegate to the Hague Conference, section 1440, R. S., providing that if any officer of the Navy accepts or holds an appointment in the diplomatic or consular service he shall be considered as having resigned his place in the Navy, does not affect his eligibility, nor does the Dockery Act of July 31, 1894 (28 Stat., 205), prohibiting any person who holds an office under the Revised Statutes at a salary of $2,500 or over from holding any other office under the United States to which compensation is attached. File 9947–93, J. A. G., May 20, 1912.

39. **Harbor master**—A chief boatswain retired was elected to the position of harbor master and the department *held* that there was no Federal law or regulation prohibiting him from holding the position in question. File 9736–69, J. A. G., Aug. 11, 1916.

40. **Health officer**—A retired naval surgeon can not be appointed to the position of health officer of Culebra, P. R. *See* APPOINTMENTS, 35.

41. **Jury duty**—If a retired officer is summoned before a United States court for jury duty, he should urge to the judge the objection arising from his military status to his serving on a civil jury. *See* JURY, 13.

Retired officers of the Navy are not exempted by the Federal statutes from service as jurors on State courts. The question as to whether a retired officer should be required to serve in such capacity is one for the court to decide and is affected by the possible interference of such service with a retired officer's liability to be assigned to active naval duty in accordance with law. File 21090–5, Solicitor, Nov. 8, 1912. *See also* File 21090–5:1, J. A. G., Nov. 9, 1912, to the same effect.

Under the laws of some States the holder of an office under the United States, whose official duties, at the time, prevent his attendance as a juror, is exempt. File 21090–5:1, J. A. G., Nov. 9, 1912.

Digitized by Google

42. **Legality of employment must be determined by the officer or enlisted man**—Whether a retired officer may or may not accept any civil position is a question to be determined by him upon his own responsibility, as the Government would not become interested in the matter unless and until he should have accepted illegal employment. (File 9736-18, J. A. G., June 25, 1910, quoting 21 Op. Atty. Gen., 510; 9736-15, Sec. Navy, Mar. 28, 1910.) File 9736-60, Sec. Navy, Oct. 9, 1915; C. M. O. 35, 1915, 11.

43. **Major general, commandant**—Retired marine officer can not be appointed as. *See* MARINE CORPS, 47, 48.

44. **Marine officers**—A retired marine officer is eligible to detail to service as a teacher or professor in any school or college under the act of Mar. 2, 1895 (28 Stat., 826), providing in part as follows:

"*Provided*, That any retired officer of the Navy or Marine Corps may, on his own application, be detailed to service as a teacher or professor in any school or college, but while so serving such officer shall be allowed no additional compensation."

Concerning the provision which refers to "additional compensation," it was held by the Attorney General in construing a similar provision of section 1260, R. S., "that this does not refer to any additional compensation from the college, but from the United States." (20 Op. Atty. Gen., 689.)

The act of Feb. 26, 1901 (31 Stat., 810) and act of Apr. 21, 1904 (33 Stat., 225), were considered in this opinion. File 11112-649, J. A. G., Sept. 8, 1916. *See also* File 9736-22, Sec. Navy, Aug. 12, 1911; R. S., 1225.

45. **Same**—"*Held*, That after June 6, 1912, retired officers of the Marine Corps can not be ordered to perform active duty under the law as it now stands." File 27231-47, J. A. G., May 31, 1912. *But see* RETIRED OFFICERS, 1.

46. **Same**—Act of Aug. 22, 1912 (37 Stat., 329). *See* RETIRED OFFICERS, 1.

47. **Same**—Rank of retired marine officers—As affected by act June 3, 1916 (39 Stat., 183) Section 24 of this act does not apply to the Marine Corps "in so far as affects the rank of retired officers who have performed, or who may in the future perform, the required amount of active duty." File 26509-158:2, J. A. G., June 27, 1916.

48. **Same**—Retired marine officers requested change of date in commissions. *See* COMMISSIONS, 17, 18.

49. **Same**—Pay of retired marine officer ordered to active duty by the Secretary of the Navy under act of Aug. 22, 1912 (37 Stat., 329). *See* PAY, 91; RETIRED OFFICERS, 1.

50. **Mayor of a city in one of the States**—Revised Statutes 1860 "does not prohibit a retired officer from accepting an office as mayor of a city in one of the States if duly elected thereto. In such case, however, a retired officer is, of course, subject to recall to naval duty if the exigencies of the service so require under the law." (File 5650-00, Sec. Navy, Sept. 21, 1900.) File 9736-18, J. A. G., June 25, 1910, p. 17. *See also* Act of June 7, 1900 (31 Stat., 703); File 27231-3, J. A. G., Nov. 1, 1909.

51. **Medical Corps**—Employed on active duty—An officer of the Medical Corps of the Navy on the retired list may be employed on active duty under the act of Aug. 22, 1912 (37 Stat., 329). File 27231-65, J. A. G., June 30, 1915; C. M. O. 22, 1915, 10.

52. **National Guard**—It has been decided by the Attorney General (29 Op. Atty. Gen., 298) that an office in the National Guard of a State is not a civil office within the meaning of section 1222, R. S., relating to the Army, the Attorney General stating in part:

"I have the honor, therefore, to advise you that, in my opinion, an officer on the active list of the Regular Army may accept the office to which you refer without violating the provisions of section 1222, R. S. Whether the acceptance by an officer of the Army of an office in the National Guard of a State would be inconsistent with the policy expressed in the Constitution and laws of the United States with respect to these two establishments, and whether there are not reasons other than those contained in section 1222, R. S., which would make it illegal or improper for an officer of the Army to subject himself to conflicting State jurisdiction, are matters upon which I express no opinion." File 8093-17, J. A. G., May 22, 1914.

53. **Naval Home**—Forfeiture of retired pay when admitted to Naval Home. *See* NAVAL HOME, 1.

54. **Naval Militia of a State**—A retired officer of the Navy can legally accept a commission as an officer in the National Guard or Naval Militia of a State, quoting from letter of Acting Judge Advocate General to aid for personnel, Dec. 23, 1910, File 9736-19. The letter cited is, however, modified by the provision of the act of Aug. 22, 1912 (37 Stat., 329), providing that naval officers may, *with their consent*, be ordered to duty. File 9736-29, J. A. G., Oct. 17, 1912.

Digitized by Google

55. **Same**—There is nothing in the law which would prohibit a retired naval officer from accepting a commission as commanding officer of the Naval Militia of a *State*. In case of acceptance, however, such officer will be subject to recall to naval duty if the exigencies of the service so require under the act of June 7, 1900 (31 Stat., 703), or in time of war. (File 9736-19, J. A. G., Dec. 23, 1910.) The responsibility of such officer commissioned as commanding officer of the Naval Militia of a State would not be to the governor only, but within the purview of matters covered by the Articles for the Government of the Navy and other lawful rules, would be responsible even to the extent of punishment by naval courts-martial; also to the Secretary of the Navy. His accountability for Government property intrusted to him personally would not be different from that of other officers of the Navy similarly intrusted. (File 9736-19:1.)
56. **Same**—There is no legal objection to a retired naval officer accepting a commission in the Naval Militia, the objection, if any, being one of policy only. Op., J. A. G., Feb. 17, 1916. *See also* File 26254-2073, Sec. Navy, Aug. 24, 1916.
57. **Same**—"It is suggested that the commissioning of a warrant officer in the Navy with the rank of a lieutenant in the Naval Militia, to wear, it is assumed, the uniform of a lieutenant, in which position he may come in contact with officers of the Navy, his actual seniors in rank, would be open to objection upon grounds of policy, and would not conduce to the best interests of the service." File 4580-04, J. A. G., May 24, 1904, quoted in File 8093-17, J. A. G., May 22, 1914.
58. **Same**—While there is no law expressly prohibiting an officer of the Regular Navy from holding an office in the Naval Militia, it is believed that the holding of such office contemporaneously with holding an office in the Regular Navy is incompatible with the best interests of both the Regular Navy and Naval Militia. File 8093-17, J. A. G., May 22, 1914.
59. **"Offices"**—The Attorney General has held that an officer may hold two distinct offices and receive the pay of each. (14 J. A. G. 437.) But if two *incompatible* offices are held by the same person, it is otherwise. Also held that the Secretary of the Navy can appoint a retired officer to supervise the completion of certain tables of planets. File 9736-18, J. A. G., June 25, 1910, p. 12. *See also* RETIRED OFFICERS, 18, 66.
60. **Officers, retired**—Tried by general court-martial. *See* RETIRED OFFICERS, 33.
61. **Part of Navy**—Naval officers, when placed on the retired list, are still part of the naval service and subject to the jurisdiction thereof. (*See* Murphy *v.* U. S., 38 Ct. Cls. 511, 521). *See* RETIRED OFFICERS, 3-5, 33, 62, 74; File 27231-5, Sec. Navy, Dec. 9, 1909.
62. **Passed assistant surgeon, retired**—Recommended for trial by general court-martial. File 26251-12462.
63. **Pay**—Compensation of retired officers defined. *See* RETIRED OFFICERS, 16.
64. **Same**—Half pay when retired under the provisions of section R. S., 1447. 14 J. A. G. 427; C. M. O. 49, 1915, 27.
65. **Same**—Forfeiture of retired pay when admitted to Naval Home. *See* NAVAL HOME, 1.
66. **Same**—A retired officer of the Navy whose retired pay amounts to $2,500 per annum is within the prohibition of the act of July 31, 1894, section 2 (28 Stat., 205). File 9736-42, Sec. Navy, Mar. 7, 1914. *See also* RETIRED OFFICERS, 18, 60.
67. **Pension.** *See* RETIRED OFFICERS, 16.
68. **Porto Rico**—Health officer of Culebra, P. R. *See* APPOINTMENTS, 35.
69. **Professors**—Marine officers as. *See* RETIRED OFFICERS, 44.
Naval officers as. *See* File 21449-2; 21403.
70. **Rank of marine officers**—As affected by the act of June 3, 1916 (39 Stat., 183). *See* RETIRED OFFICERS, 47.
71. **Rear admiral, retired**—Tried by general court-martial. C. M. O. 41, 1915.
72. **Representatives, House of**—*Suggested:* That it is inadvisable that a retired naval officer "go to Congress and retain his commission in the Navy," even though he declines all compensation or pay for his services in Congress, and will resign his seat in Congress whenever the Navy Department shall require his service. *See* RETIRED OFFICERS, 18.
73. **Residence**—Voting. *See* VOTING, 12.
74. **Second lieutenant, Marine Corps, retired**—Tried by general court-martial. C. M. O. 23, 1896.
75. **Ship, merchant**—There is no Federal statute which would prevent a retired officer of the Navy from accepting command of a merchant vessel provided he does not accept employment with any person or company furnishing naval supplies, etc., to the Government. File 9736-51, J. A. G., Nov. 19, 1914.

Digitized by Google

A naval officer can not lawfully serve as master of a private steam vessel in the merchant service without having previously obtained the license required by section 4438, R. S., although he may be eligible, by virtue of his commission, to take command of a steam vessel of the United States in the naval service. (15 Op. Atty. Gen. 60.)

There is no objection to a retired naval officer accepting command of a merchant vessel. (Letter of Department of State, dated Nov. 24, 1914.) *See* File 9736-51.

76. **Signatures**—The word "retired" may appropriately, and should be, appended to the signatures of officers on the retired list. File 3575-03.
77. **State offices.** File 27231-3.
78. **Superintendent of the State, War, and Navy Building**—Eligibility of a retired naval officer. File 9510-5.
79. **Voting.** *See* VOTING.
80. **War**—Censor duty in time of war. File 21393-185:560.
81. **War slate.** File 3800-640:2; 28573-64.
82. **Warrant officers, retired**—Tried by general court-martial. C. M. O. 34, 1916.

RETIREMENT OF ENLISTED MEN.

1. **Fleet Naval Reserve.** *See* RETIREMENT OF ENLISTED MEN, 3.
2. **Laws relating to**—"That when an enlisted man or appointed petty officer has served as such thirty years in the United States Navy, either as an enlisted man or petty officer, or both, he shall, by making application to the President, be placed on the retired list hereby created, with the rank held by him at the date of retirement; and he shall thereafter receive seventy-five per cent of the pay and allowances of the rank or rating upon which he was retired: *Provided*, That if said enlisted man or appointed petty officer had active service in the Navy or in the Army or Marine Corps, either as volunteer or regular, during the Civil or Spanish-American War, such war service shall be computed as double time in computing the thirty years necessary to entitle him to be retired," etc. (Act Mar. 3, 1899, sec. 17; 30 Stat., 1008.)

"That in computing the necessary thirty years' time for retirement of petty officers and enlisted men of the Navy, all service in the Army, Navy, or Marine Corps shall be credited." (Act June 22, 1906; 34 Stat., 451.)

"That when an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, and that said allowances shall be as follows: * * * *Provided*, That in computing the necessary thirty years' time all service in the Army, Navy, and Marine Corps shall be credited.

"SEC. 2. That all acts and parts of acts, so fas as they conflict with the provisions of this act, are hereby repealed." (Act Mar. 2, 1907; 34 Stat., 1217.)

"* * * The period of time during which members of the naval reserve were actively employed with the Navy while enlisted in the naval reserve shall, for the purpose of retirement, be counted as active service in the Navy in the case of those who reenlist in the Navy after service in the naval reserve." (Act of Mar. 3, 1915, 38 Stat., 940.)

"Men transferred to the Fleet Naval Reserve shall be governed by the laws and regulations for the government of the Navy and shall not be discharged from the Naval Reserve Force without their consent, except by sentence of court-martial. They may upon their own request, upon completing thirty years', including naval and fleet naval reserve service, be placed on the retired list of the Navy with the pay they were then receiving plus the allowances to which enlisted men of the same rating are entitled on retirement after thirty years' naval service," (Act Aug. 29, 1916.) File 26254-2114, Sec. Navy, October, 1911.

3. **Service required**—For the purpose of determining the thirty years' service necessary for retirement, all service should be counted, namely, Army, Navy, Marine Corps, active Naval Reserve service as referred to in the Act of March 3, 1915 (38 Stat., 940), and Fleet Naval Reserve service, in the cases of men transferred to and retired from the Fleet Naval Reserve. File 8124-55, J. A. G., Oct. 17, 1916: C. M. O. 37, 1916.

Members of the Fleet Naval Reserve upon retirement are entitled to have war service "computed as double time in computing the thirty years necessary to entitle" them to be retired in accordance with the act of March 3, 1899 (30 Stat., 1008). File 26254-2114, Sec. Navy, Oct. 16, 1916; C. M. O. 37, 1916.
4. **War service**—*See* RETIREMENT OF ENLISTED MEN, 3.

Digitized by Google

RETIREMENT OF OFFICERS.

1. **Acceptance.** *See* RETIREMENT OF OFFICERS, 18.
2. **Acting assistant surgeons**—Can not, under the law, be retired for physical disability. File 27231–51, Sec. Navy, June 30, 1915, and July 14, 1915.
3. **Action**—Of President. *See* RETIREMENT OF OFFICERS, 42–47.
4. **Admiral of the Navy**—After the victory of the present Admiral of the Navy over the Spanish Squadron at Manila, the following law was enacted (Mar. 2, 1899; 30 Stat., 995, 1045):

   "That the President is hereby authorized to appoint by selection and promotion an Admiral of the Navy, who shall not be placed upon the retired list except upon his own application."

   It can not be contended that the retention of this distinguished officer upon the active list, at his pleasure, is meant to be other than a reward. File 2623–114, J. A. G., Aug. 19, 1910, p. 10.
5. **Age**—Retirements for age and for physical disability do not appear to be *rights of retirement* to which an officer is entitled, but are, on the contrary, *compulsory* and are provided to rid the service of the aged, the enfeebled, and the physically unfit. 15 J. A. G., 15. *See also* RETIREMENT OF OFFICERS, 21, 28.
6. **Same**—There are many instances indicatory that Congress has never intended that retirement for age shall be considered as beneficial, but, on the contrary, as distinctly adverse to the interests of the person so retired. 15 J. A. G., 9. *See also* RETIREMENT OF OFFICERS, 21, 28.
7. **Age, retirement for age prior to Aug. 29, 1916**—The court, in U. S. ex. rel. George L. Foreman *v.* George von L. Meyer, held in subsequence that an officer of the Navy must have had 45 years' service to entitle him to retirement for age. *See* File 5460–32: 17, J. A. G., Feb. 7, 1912, which comments adversely upon the court's ruling above.

   An officer of the Navy does not have to have had 45 years' service before he can be retired for age, but may be retired for age after attaining the age of 62 years. The department's construction of the retirement laws, in consonance therewith, are therefore considered proper and contrary to the court's ruling above. File 5460–32:17, J. A. G., Feb. 17, 1912.
8. **Same**—Laws relating to retirement for age and construction of same. *See* RETIREMENT OF OFFICERS, 28.
9. **Age, retirement for age subsequent to Aug. 29, 1916**—"Except as herein otherwise provided, hereafter the age for retirement of all officers of the Navy shall be sixty-four years instead of sixty-two years as now prescribed by law." (Act of Aug. 29, 1916; 39 Stat., 579.)

   The age limit for retirement of officers of the Navy, provided in the act of August 29, 1916 (39 Stat., 579), will apply to retired officers who may be restored to the active list by acts of Congress. File 286872, J. A. G., Sept. 9, 1916.
10. **Army**—Abstract of retirement laws. *See* RETIREMENT OF OFFICERS, 29.
11. **Benefit**—Congress has never intended that retirement for age shall be considered as beneficial. *See* RETIREMENT OF OFFICERS, 6.
12. **Causes of**—Twelve officers, at least, who were found physically qualified for promotion, but unqualified professionally, mentally, or morally, have been placed upon the retired list in accordance with the act of April 21, 1864, sec. 1 (13 Stat., 53). At least three officers who were examined and found physically disqualified were retired under section 4 of above act (13 Stat., 53). 14 J. A. G., 422.
13. **Chief carpenter**—With Civil War service. *See* CIVIL WAR SERVICE, 6.
14. **Chiefs of bureaus**—Subsequent retirement of officers who have served as chiefs of bureaus. File 27231–66:2, J. A. G., Oct. 21, 1915.
15. **Chiefs of Staff Corps.** *See* CHIEFS OF STAFF CORPS, 1.
16. **Civil War service**—Higher grade for Civil War service. *See* CIVIL WAR SERVICE, 5, 6.
17. **Clerks to assistant paymasters, Marine Corps.** *See* PAYMASTERS' CLERKS, MARINE CORPS, 5, 6.
18. **Communication of acceptance**—While in the case of an officer who resigns his commission it is necessary to communicate to him the acceptance of such resignation, yet the same conditions do not exist where a change of status is involved, as the transfer of an officer from the active to the retired list, and the facts are only communicated to the officer concerned to inform him of the fact that he has been retired, on and from a certain date. File 26543, J. A. G., Aug. 28, 1911, p. 2.
19. **Congress**—Can not change finding of a retiring board. *See* RETIREMENT OF OFFICERS, 26.

Digitized by Google

20. **Death gratuity**—An officer of the Navy was selected for retirement under the act of March 3, 1899, sec. 9 (30 Stat., 1004, 1006); findings of board approved by the President July 3, 1911; the officer died July 4, 1911. *Held*, That since this officer was no longer on the active list but on the retired list, the provisions of law for the payment of a death gratuity were not applicable. File 26543-62:1, J. A. G., Aug. 28, 1911.
21. **Disadvantage**—Retirement is looked upon as disadvantageous by officers. File 26253-114, J. A. G., Aug. 19, 1910, p. 11. *See also* RETIREMENT OF OFFICERS, 5, 6.
22. **"Discharged"**—Defined and compared with "wholly retired" and "dismissed." *See* DISCHARGE, 11.
23. **"Dismissed"**—Defined and compared with "wholly retired" and "discharged." *See* DISCHARGE, 11.
24. **Employment**—In civil capacity during Philippine campaign—Since employment in connection with the Marine Corps in the Philippines during the Philippine Campaign in a civilian capacity did not operate to make such employee an officer or enlisted man of said corps (File 19245-43:1, Sec. Navy, Mar. 8, 1912) the department held that a pay clerk, having been so employed, should not be considered as having been in the military service in connection with questions of precedence or retirement for length of service. File 19245-43:3, Sec. Navy, July 6, 1915; C. M. O. 27, 1915, 10.
25. **Feeble**—Retirement of. *See* RETIREMENT OF OFFICERS, 5.
26. **Finding**—Of a retiring board can not be changed by act of Congress. File 26255-83:4, J. A. G., Aug. 4, 1911, p. 2.
27. **Involuntary retirement**—Laws relating to. *See* RETIREMENT OF OFFICERS, 28, 29.
28. **Laws relating to retirement of officers of the Navy**—The act of December 21, 1861, provided that officers of the Navy should be retired from active service for two separate reasons, namely: (1) Whose name shall have been borne on the Navy Register for 45 years; (2) who shall be of the age of 62 years. The Navy Department has, for nearly 40 years, construed the law, now embodied as section 1444, R. S., as only requiring the fulfillment of *either* requirement. The construction of those laws by the department should be controlling. File 26260-874, J. A. G., June 3, 1910, p. 5.
29. **Same**—Abstract of retirement laws showing differences between the laws relating to retirement of officers of the Army, Navy, and Marine Corps. File 27231-10, Feb. 9, 1910.
30. **Same**—In general under section 1456, R. S., and the act of August 5, 1882 (22 Stat., 284), misconduct is not ground for retirement. File 26260-874, J. A. G., June 3, 1910, p. 5.
31. **Same**—A commander who has failed to qualify for promotion can not be retained at the head of his list until he does qualify, by virtue of section 1458, R. S. In such a case, the provisions of sections 1447 and 1496, R. S., would apply and the officer would receive one-half pay upon retirement. File 26260-874, J. A. G., June 3, 1910, pp. 5-8. *See also* File 5460-32:17, J. A. G., Feb. 7, 1912.
32. **Leave of absence**—Requested prior to retirement. *See* LEAVE OF ABSENCE, 10.
33. **Legal right**—To be examined for promotion when physically incapacitated for duty—An officer has not a legal right to be ordered before a board of medical examiners for promotion instead of being ordered before a retiring board, where he is due for promotion, but the records of the department in his case are such as to establish *prima facie* his physical incapacity for active duty. This applies, for example, (*a*) to an officer who has already appeared before a retiring board upon which action has been suspended or which has not otherwise been finally disposed of; (*b*) to an officer who is on sick leave or on the sick list when his promotion becomes due, and has been in that status for a prolonged period prior thereto; (*c*) and to an officer who has received permanent physical injuries of a disabling character before his promotion comes due. File 27231-63, J. A. G., May 27, 1915; C. M. O. 22, 1915, 10.
34. **Line of duty.** *See* SURGICAL OPERATIONS.
35. **Marine officers**—"The commissioned officers of the Marine Corps shall be retired in like cases, in the same manner, and with the same relative conditions, in all respects, as are provided for officers of the Army, except as is otherwise provided in the next section." (R. S., 1622.) File 26280-61.

From the very language of section 1622, R. S., it would occur that it was intended to apply only to the retirement of marine officers, and not to their status after retirement. This is what was held by the Court of Claims in Jonas *v.* U. S. (Ct. Cls.), the court stating:

"Section 1622 simply provides for the conditions precedent to the retirement of an officer of the Marine Corps, but in no way changes the jurisdiction to which he is subject or the conditions under which he may again be placed upon active duty."

Digitized by Google

"The meaning of the provision, 'with the same relative conditions,' is obscure. It might be regarded as including eligibility for assignment to active duty. But I think this would be extending its meaning beyond what was intended. I am of opinion that it will be given its appropriate meaning by confining it to conditions pertaining to retirement alone." (11 Comp. Dec., 8.)

"The language of section 1622 is broad and sweeping, and as it is the only provision upon the subject of retirement it must be held to mean just what it says—that 'the commissioned officers of the Marine Corps shall be retired in like cases in the same manner, and with the same relative conditions in all respects, as are provided for officers of the Army.' In other words, officers of the Marine Corps, in the matter of retirement, were placed by that section upon exactly the same footing as officers of the Army." (25 Op. Atty. Gen., 262.)

36. **Same**—A marine officer was examined for promotion to the next higher grade and failed physically, whereupon the marine examining board resolved itself into a retiring board; the officer was found incapacitated for active service, the result of an incident of the service. The actual retirement should not take place before the occurrence of the vacancy to which the officer would be entitled if qualified (he having been examined prior to the existence of the vacancy). Action was withheld until a vacancy occurred, when the record was transmitted to the President with the recommendation that the finding be approved and the officer retired in the next higher grade, under the acts of October 1, 1890 (26 Stat., 562), and July 28, 1892 (27 Stat., 321). File 26260-1658, May 6, 1912.

37. **Naval officers**—In general. File 26260-1294, J. A. G., June 10, 1911.

38. **Paymasters' clerks.** File 26253-364:1, J. A. G., Mar. 23, 1915.

39. **Paymasters' clerks, Marine Corps.** *See* PAYMASTERS' CLERKS, MARINE CORPS, 5, 6.

40. **Physical disability**—"Hereafter, if any officer of the United States Navy shall fail *in his physical examination for promotion* and be found incapacitated for service by reason of physical disability contracted in the line of duty, he shall be retired with the rank to which his seniority entitled him to be promoted." (Act Mar. 4, 1911; 36 Stat., 1267.)

The purpose of the enactment of March 4, 1911, above quoted, as shown by the Secretary of the Navy's annual report for the fiscal year 1909 (p. 34), and by letters written by this department to Congress urging the legislation in question (File 26509-1/2-40 and 40:1; 26255-195:2), was to reward officers who had served the full period in their existing grade and who, upon becoming due for promotion by seniority, were found upon examination therefor to be physically disqualified for such promotion to which they were regarded as being in equity and justice entitled by reason of efficient service rendered by them on the active list. In other words, the law was intended to cover the cases of officers who had served throughout their existing grade on the active list but who, upon examination for promotion, were discovered to be physically disqualified for the duties of a higher grade. (*See* File 26255-386:1, Jan. 27, 1915.) File 27231-63, J. A. G., May 27, 1915. *See also* PROMOTION, 157; RETIREMENT OF OFFICERS, 50.

41. **"Plucking Board"**—*Held*, That the vacancies caused by retirements in cases where the provision in the act of March 4, 1911 (36 Stat., 1267), applies, *should be counted* in determining the annual "average vacancies enumerated in section 8" of the Navy personnel act. (Act of March 3, 1899, 30 Stat. 1006.)

The provisions of the act of March 4, 1911 (36 Stat., 1267), were intended to be identical with the Army law of October 1, 1890 (26 Stat., 562), and to have the identical operation thereof.

The vacancies created by the provision of the act of March 4, 1911 (36 Stat., 1267), are vacancies in the grades held at the time of retirement from which promotion would otherwise be made. File 26297-9, J. A. G., Feb. 8, 1912.

The so-called Plucking Board was the act of March 3, 1899, section 9 (30 Stat. 1006), as amended by the act of August 22, 1912 (37 Stat., 328). It was repealed by the act of March 3, 1915 (38 Stat., 938). File 26251-169, p. 7. *See also* PROMOTION, 123.

"The act of March 3, 1899, section 9 (30 Stat., 1004), known as The Navy Personnel Act, provided for a board of rear admirals whose duty it was to select officers for retirement, in order to create vacancies. It was provided that the Secretary of the Navy 'shall place at its disposal the service and medical records on file in the Navy Department of all the officers in the grades of captain, commander, lieutenant commander, and lieutenant;' that 'the board shall then select, as soon as practicable after the first day of July, a sufficient number of officers from the before-mentioned grades, as constituted on the thirtieth day of June of that year, to cause the average vacancies

Digitized by Google

enumerated in section eight of this Act'; and that 'each member of said board shall swear, or affirm, that he will without prejudice or partiality, and having in view solely the special fitness of officers and the efficiency of the naval service, perform the duties imposed upon him by this Act." File 26251-169; J. A. G., Nov. 28, 1916, pp. 7-8.

42. **President**—"Whenever, in the judgment of the President, an officer is incapacitated to perform the duties of his office, the President, at his discretion, may direct the Secretary of the Navy to refer the case of such officer" to a retiring board. File 27231-63, J. A. G., May 27, 1915.
43. **Same**—Action of President in approving the finding of a retiring board is a judicial act "equivalent to the judgment of an appropriate tribunal." (Burchard *v.* U. S., 125 U. S., 176.) File 26256-10/A, J. A. G., Jan. 25, 1909, p. 4.
44. **Same**—After approval by the President of the report of a retiring board the case can not be reopened. Where the connection of an officer with the service has been severed by his resignation, discharge, or dismissal, he can be reinstated only by a new appointment made by and with the advice of the Senate. The mere revocation of the acceptance of his resignation or of the order terminating his connection with the service can not have this effect. (20 Enc. Law, 636, etc.) File 5252-72, J. A. G., Sept. 27, 1915.
45. **Same**—The President may approve, disapprove, or issue orders in the case. File 26253-275, Sec. Navy, Apr. 4, 1913.
46. **Same**—Subsequent modification by the President of his former action. File 26253-398, April, 1915. *See also* File 26260-1392:29, February, 1912.
47. **Promotion**—Officer due for promotion but incapacitated for duty. *See* RETIREMENT OF OFFICERS, 33.
48. **Right, legal**—An officer has no legal right to be ordered before a board of medical examiners for promotion instead of being ordered before a retiring board. *See* BOARDS OF MEDICAL EXAMINERS, 6; RETIREMENT OF OFFICERS, 33.
49. **Staff Corps**—Retirement of chiefs of staff corps. *See* CHIEFS OF STAFF CORPS.
50. **Statute**—Act of March 4, 1911—The Naval Appropriation act of March 4, 1911 (36 Stat., 1267), contains the following:

"Hereafter, if any officer of the United States Navy shall fail in his physical examination for promotion and be found incapacitated for service by reason of physical disability contracted in the line of duty, he shall be retired with the rank to which his seniority entitled him to be promoted."

This enactment was intended to cover the cases of officers who had served throughout their existing grade on the active list, but who, upon examination for promotion were discovered to be physically disqualified for the duties of a higher grade. It does not apply to the case of an officer who, because of physical disability, never rendered any real service in his existing grade, and whose physical incapacity for promotion was well known and established by the official records even prior to his being commissioned in his present grade.

Accordingly, *Held* that a midshipman who was promoted to ensign while physically incapacitated for duty, but who was nevertheless retained on the active list notwithstanding his continued incapacity and the adverse report of a retiring board, until he became due for promotion to lieutenant (junior grade), should be ordered before another retiring board, and if found incapacitated for active duty due to an incident of the service should be retired with his present rank; and that the law neither requires nor contemplates that he be examined for promotion with a view to his retirement with the rank of lieutenant (junior grade). File 26253-386:1, Sec. Navy, Jan. 27, 1915. *See also* file 26253-334:2; C. M. O. 6, 1915, 16. *See also* RETIREMENT OF OFFICERS, 40.

51. **Transfer**—From one status to another on the retired list. *See* File 26254-236.
52. **Voluntary**—Abstract of laws relating to. 14 J. A. G., 287, Feb. 9, 1910.
53. **Warrant officers.** *See* File 26253-114, J. A. G., Aug. 19, 1910, p. 2.
54. **"Wholly retired"**—Defined and compared with "Discharged" and "Dismissed." *See* DISCHARGE, 11.

REVEALING VOTE; OPINION, OR SENTENCE. *See* OATHS, 47.

REVENUE-CUTTER SERVICE. *See also* COAST GUARD.

1. **Medals of Honor.** *See* MEDALS OF HONOR, 3.
2. **Transfer of naval vessel**—Authority of Congress is necessary for transfer of naval vessel to the Revenue-Cutter Service. File 3160-54, May 4, 1907.

Digitized by Google

REVIEWING AUTHORITY. *See also* CONVENING AUTHORITY; REVISING POWER; SECRETARY OF THE NAVY.

1. **Abuse of authority.** *See* CRITICISM OF COURTS-MARTIAL, 35.
2. **Action of**—Importance of. *See* CONVENING AUTHORITY, 2.
3. **Approval**—Necessity of. *See* CONVENING AUTHORITY, 2.
4. **Changing action after promulgation.** *See* CONVENING AUTHORITY, 6.
5. **Clemency**—The power of exercising clemency is vested in the reviewing authority, not in courts-martial or members. *See* ADEQUATE SENTENCES, 3-6; CLEMENCY, 13; COURT, 17.
6. **Convening authority**—The convening authority of a general court-martial is the reviewing authority, except where the sentence is death or the dismissal of a commissioned or warrant officer. (A. G. N., 53.) *See* CRITICISM OF COURTS-MARTIAL, 35.
7. **Definition**—In general, the senior officer present is the incumbent of that office, and not the particular individual who may happen at some particular time to occupy the position. File 26287-1121, J. A. G., Feb. 24, 1912.
8. **Disapproval**—Effect of. *See* CONVENING AUTHORITY, 21; CRITICISM OF COURTS-MARTIAL, 35; REVIEWING AUTHORITY, 20.
9. **Evidence**—As to the intervention of the reviewing authority in such matters [unobjected-to evidence], such action is believed to be unnecessary, even if it be not improper or irregular. While there is no such thing, of course, as a bill of exceptions in a court-martial proceeding, yet if objections are made during the course of the trial they should be considered by the reviewing authority. But if no objection is made, then in accordance with ordinary procedure there is nothing in question for the reviewing authority to decide as to the admissibility of evidence. A possible exception to this, however, in view of the greater latitude allowed in all court-martial procedure, would be a case where the trial court had ignored the objectionable character of certain evidence on the ground of public policy.

   The reviewing authority should not, therefore, have concerned himself with the question of the admissibility of the evidence in question; in other words, he might properly have approved the proceedings, because, as the particular evidence was not objected to upon the trial, and as it did not contravene any rule of public policy, he need not have concerned himself with the matter. C. M. O. 31, 1911. *See also* EVIDENCE, 82-84.
10. **Exemptions in sentences**—Exemption of $20 to be paid when discharged is not subject to action of convening or reviewing authority. *See* EXEMPTIONS IN SENTENCES, 1, 2, 6, 7.
11. **Just**—The reviewing authority must be convinced of the justness of the finding and sentence before approving. C. M. O. 6, 1909, 3.
12. **Mitigation or remission**—Of sentence after final action on. *See* CONVENING AUTHORITY, 62; SECRETARY OF THE NAVY, 56.
13. **Numbers, loss of**—Action on general court-martial, where it is desired to place officer at foot of list and there lose numbers. *See* NUMBERS, LOSS OF, 10.
14. **Objections to evidence.** *See* EVIDENCE, 82, 83.
15. **Plea in bar of trial**—Reviewing authority may not compel a court to reverse its judgment upon a plea in bar of trial. *See* REVIEWING AUTHORITY, 16; NAVAL MILITIA, 39 (p. 407).
16. **Powers of**—It is not in the power of the revising authority to compel a court to reverse its judgment upon a plea in bar of trial, or to change its finding or sentence, when, upon being reconvened by him, it has declined to modify the same, nor either directly or indirectly to enlarge the measure of punishment imposed by sentence of a court-martial. (R-846.) The members of a duly constituted and organized court-martial can not be dictated to or interfered with in their proceedings by the highest military authority. (R-722.) C. M. O. 4, 1914, 11, overruling C. M. O. 16, 1911, 3, containing a statement from Winthrop, p. 378, that where a court holds a plea in bar valid the convening authority may "order it positively to try the charges." *See also* REVISION, 24.
17. **Record**—The reviewing authority has only the record from which to form an opinion as to the merits of the case. C. M. O. 6, 1909, 3. *See also* COURT, 16, 20.
18. **Remission or mitigation**—Of sentence after final action on. *See* CONVENING AUTHORITY, 62; SECRETARY OF THE NAVY, 56.
19. **Sentences**—General courts-martial must not lose sight of the fact that their adjudged sentences are inoperative and of no effect until approved as provided by law. C. M. O. 6, 1909, 3. *See also* CONVENING AUTHORITY, 2.

    Effect of disapproval by reviewing authority. *See* CONVENING AUTHORITY, 21; CRITICISM OF COURTS-MARTIAL, 35; REVIEWING AUTHORITY 20.

Digitized by Google

20. **Sentence approved, proceedings disapproved**—In a summary court-martial case where the convening authority *approved* the proceedings and sentence and the reviewing authority (senior officer present) disapproved the proceedings but *approved* the sentence, the department stated in part:

"No sentence of a summary court-martial shall be carried into execution until the proceedings and sentence have been approved by the officer ordering the court and by the commander in chief, or, in his absence, by the senior officer present." (A. G. N. 32.) [*See also* SUMMARY COURTS-MARTIAL, 33.]

Where there is a sentence the reviewing authority may and often does exercise the authority of dispaproval as to some portion or portions of the proceedings not essential to support the sentence. Thus he may, in his review, disapprove a ruling of the court upon an objection to evidence, or a ruling upon some interlocutory matter as a motion for a continuance, which, though erroneous, does not impugn the final judgment; or he may disapprove some statement or omission in the record, which, not being at variance with a statutory requirement, does not constitute a fatal defect. But this form of unfavorable comment is entirely consistent with a final approval of the sentence or of a punishment; a disapproval indeed of certain of the proceedings is often accompanied by an approval of the sentence or of a part of it. (*See* WINTHROP, p. 692.)

The remarks of the reviewing authority (senior officer present) in this case, however, disapproved the entire proceedings, leaving nothing to support the sentence. Certainly if the entire proceedings were devitalized by the disapproval, they retained no force to sustain the finding and the sentence predicated thereon. No authority is found in FORMS OF PROCEDURE, 1910, nor in the preceding volume (Lauchheimer), authorizing this form of action by a reviewing authority.

It may be true that it was intended merely to comment adversely upon the particular fact that the confession of the accused was admitted. If this were true, and it may be regarded in that light, perhaps, then the sentence may, of course, be sustained. The reviewing authority says in his remarks, after disapproving "the proceedings in the foregoing case," etc., that the sentence is approved because "there seems to be sufficient evidence exclusive of that given by Lieut. * * *, United States Navy, to establish the guilt of the accused, as found by the court."

It is believed that a careful reading of the foregoing indicates that the intention of the reviewing authority was merely to disapprove the proceedings as to the one particular matter, but that his language was rather inartificial for that purpose, and, unless read in connection with the latter part of the remarks, might well be regarded as a complete disapproval of the whole proceedings. It is believed that this was not the intention, however, and that the whole indorsement, read altogether, may properly be held to mean that only that single act of the court is disapproved. This is not an unreasonable construction, and as the guilt of the accused appears to have been shown, there would be no miscarriage of justice in reading the remarks in this sense. C. M. O. 31, 1911, 3–4. *See also* CONVENING AUTHORITY, 21.

21. **Unobjected-to evidence.** *See* EVIDENCE, 82–84; REVIEWING AUTHORITY, 9.

22. **Witnesses**—"The court, having personally heard the witnesses, is, ordinarily, more competent to arrive at the facts from the evidence presented than is a reviewing authority, even though said reviewing authority may by long experience be more expert in weighing evidence than is the court." File 26251–12159, Sec. Navy, Oct. 30, 1916. *See also* EVIDENCE, 129.

REVISED STATUTES.

1. **Nature of**—The "Revised Statutes" is one act of Congress (act June 22, 1874) entitled "An act to revise and consolidate the statutes of the United States in force on the first day of December, anno Domini one thousand eight hundred and seventy-three."

2. **Object of**—"The main object of the revision was to incorporate all the existing statutes in a single volume, that a person desiring to know the written law upon any subject might learn it by an examination of that volume, without the necessity of referring to prior statutes upon the subject. * * * If it be but another volume added to the prior Statutes at Large, the main object of the revision is lost, and no one can be certain of the law without an examination of all previous statutes upon the same subject." (Hamilton *v.* Rathbone, 175 U. S. 421. *See also* Murdock *v.* Memphis, 20 Wall. 617.) File 26280–61, Sec. Navy, July 10, 1916.

REVISING AUTHORITY. *See* REVISING POWER.

Digitized by Google

REVISING POWER. *See also* CONVENING AUTHORITY; REVIEWING AUTHORITY; SECRETARY OF THE NAVY.

1. **Clemency**—If court adjudges inadequate sentence, the revising authority will not grant clemency. *See* CLEMENCY, 54.
2. **Same**—Clemency is to be exercised by the "revising power," not by the court. *See* ADEQUATE SENTENCES, 5.
3. **Recommendations**—To the clemency of. *See* CLEMENCY.
4. **Record of proceedings**—Minutes of opinion and decision in cases of objections are for information of revising authority. C. M. O. 49; 1915, 11.

REVISION.

1. **Absence of accused**—A general court-martial properly ruled that an accused should not be present during the proceedings in revision while the latter returning the case for revision was being read. Otherwise the accused would be informed of the findings of the court, etc. File 26251-12159 (Record of proceeding, first revision, p. 2).
2. **Acquittal**—Adhering to. *See* CRITICISM OF COURTS-MARTIAL, 19, 20, 22.
3. **Action of convening authority.** *See* REVISION, 9, 10.
4. **Authority**—It is laid down as a thing not open to controversy in all the books on military law, that the superior authority may order a court-martial to reassemble to revise its proceedings and its sentence. (6 Op. Atty. Gen., 203.)
   Whether a general court-martial record shall be returned to the general court-martial for revision by the department (convening authority) is a question of policy which addresses itself to the department alone. C. M. O. 4, 1913.
5. **Boards of inquest.** *See* BOARDS OF INQUEST, 7.
6. **Boards of investigation.** *See* BOARDS OF INVESTIGATION, 16.
7. **Clemency**—Court adhering to its recommendation to clemency in revision. *See* FINDINGS.
8. **Clerical errors**—Correction of. *See* ACCUSED, 8; CLERICAL ERRORS, 3; RECORD OF PROCEEDINGS, 26.
9. **Convening authority**—Upon the receipt of the record of a court-martial the reviewing officer shall proceed at once to scrutinize the same, in order to return it for revision, if such course be necessary, before the dissolution of the court. (R-836.)
10. **Same**—The convening authority (fleet) "approved the proceedings in revision in this case, but disapproved the finding and sentence in revision." By the wording of the action of the convening authority he approved only the proceedings *in revision*, and disapproved the finding and sentence *in revision*. The words "in revision" should be omitted, thus making the action cover the whole of the proceedings, both original and in revision. The appropriate action in this case would read: "The proceedings of the general court-martial in the foregoing case of Lieut. (junior grade) * * *, United States Navy, are approved; the findings and sentence are disapproved for the following reasons: * * *. He will be released from arrest and restored to duty." (Forms of Procedure, 1910, p. 52; C. M. O. 23, 1910, p. 3.) C. M. O. 4, 1916, 3, 5.
11. **Courts of inquiry.** *See* COURTS OF INQUIRY, 47.
12. **Criticism of court-martial**—Where the subject of the unfavorable criticism is an error capable of being corrected by the return of the proceedings to the court, it is just that this course should first be pursued. *See* CRITICISM OF COURTS-MARTIAL, 35.
13. **Dissolution of court**—No revision after dissolution. *See* COURT, 69–71, 144.
14. **Evidence**—Illegal to introduce new evidence in revision. C. M. O. 23, 1904, 1; 2, 1905, 3; 22, 1905; 23, 1905; 54, 1905; 142, 1900; 61, 1894, 2; 37, 1909, 4; 15, 1910, 12; 26, 1910, 7; 5, 1911, 5; 8, 1911, 8; 10, 1912, 5; 5, 1914, 5.
15. **Same**—Article R-837, United States Navy Regulations, 1913, provides as follows:
   "(1) When a court is ordered to revise its proceedings, new testimony shall not be brought forward in any shape.
   "(2) The revision shall be strictly confined to a reconsideration of the matter already recorded in the proceedings, no part of which is to be amended, altered, or annulled in any way."
   The Forms of Procedure for Courts and Boards in the Navy and Marine Corps provide as follows:
   "No new testimony admitted: When a court is ordered to revise its proceedings no new testimony shall be brought forward in any shape" (p. 175).
   The decisions in the Army on this subject are stated as follows (Dig. Army, 1912, p. 523, par. 5):
   "It is now settled in our law that a court-martial is not empowered, at this proceeding (that is, proceeding in revision), to take or receive testimony." C. M. O. 5, 1914, 5.

Digitized by Google

16. **Same**—Summary court-martial proceedings disapproved because additional evidence received on revision. File 27201-199 and 201.
17. **Findings**—If court adheres to former findings (or findings and acquittal) in revision, such statement should be in handwriting of judge advocate. C. M. O. 29, 1914, 5-6.
18. **Handwriting**—Findings and sentence in revision should be in handwriting of judge advocate or recorder even if adhered to. *See* FINDINGS, 48-50; SENTENCES, 52.
19. **Judge advocate**—It is not necessary that the same judge advocate officiate on the revision of a case as took part in the original proceedings. If a new officer be detailed in that capacity, however, the orders of the convening authority, modifying the precept in that respect, shall be read and a copy appended to the record in revision. (R-838 (2).)
20. **Members**—Constitution of court in revision. *See* REVISION, 22.
21. **New judge advocate.** *See* REVISION, 19.
22. **New members**—An officer who was not a member of the general court-martial which tried the accused, but subsequently was appointed to such, renders the proceedings in revision illegal, if he sits upon the court during the proceedings in revision. C. M. O. 47, 1910, 10.
23. **New trial**—A revision is not a new trial. A new trial is a rehearing of the case. The court-martial in revision does not rehear the case; it only considers the record for the purpose of correcting or modifying any conclusions thereon. A true analogy from the civil courts is the case of a jury sent out to reconsider its verdict. (6 Op. Atty. Gen., 205.)
24. **Plea in bar**—"While many precedents may be found for the return of proceedings to a court-martial by the revising authority, with a presentment of his reasons for differing from the court in sustaining the plea in bar, I can find no precedent case in which, under similar circumstances, the convening authority *ordered* the court to proceed with the trial, nor do I know of any provision of law or any regulation conferring such authority." The English practice agrees with the above: "If the court allow the plea, the convening officer can not overrule the finding, inasmuch as to do so would be to compel the court to try the prisoner, and thus render its members liable to possible action for damages after the expression of their own opinion that they had no jurisdiction. But the convening officer may convene another court." (Manual of Military Law, War Office, 1887, p. 623.) C. M. O. 9, 1893, 11, 12. *See also* REVIEWING AUTHORITY, 15, 16.
25. **Previous convictions**—May, in certain cases, be introduced in revision. *See* PREVIOUS CONVICTIONS, 19.
26. **Quorum.** *See* REVISION, 30.
27. **Reasons asked for**—Where the court rendered a full and honorable acquittal in a case where it was believed that the evidence clearly warranted a conviction, the department in returning the record for revision stated among other things: It is directed that "should the particular feature which has governed the court in its previous finding not be adequately covered in the above and should the court therefore still adhere to its previous finding * * * it spread upon the record for the information of the department the reasons complete and in detail which governed it in arriving at its finding." File 26251-12159, Sec. Navy, Oct. 30, 1916, p. 6.
28. **Reasons for adhering**—"The department in returning the record of the proceedings to the court pointed out the irregularity of procedure, incompetency of evidence, and illegal conclusion reached, and notwithstanding this the court, after reconvening, adhered to its original finding without even attempting to *set forth its reasons* for so doing or show any justification for its course, which action the undersigned is wholly unable to understand." C. M. O. 37, 1909, 6.
29. **Reconvening order**—Should be prefixed. *See* REVISION, 30.
30. **Record of proceedings**—If the court be reconvened to amend or otherwise remedy a defect or omission in the record, which may be done if the facts warrant, the reconvening order must be prefixed to the record, which shall also show that at least five members of the court, the judge advocate, and the accused were present, and that the amendment was then made to conform to and express the truth in the case. The five members above mentioned must be among those who authenticated the original sentence. (R-838(1).) *See* C. M. O. 49, 1915, 12.
31. **Same**—Original record not to be amended, altered, or annulled. C. M. O. 47, 1910, 5; 17, 1910, 5; 5, 1911, 5; 5, 1912, 14; 5, 1914, 5. *See also* CORRECTIONS, 4.
32. **Same**—Record of proceedings in revision should be prefixed, not appended, to the record of which it is a part. C. M. O. 23, 1910, 4; 29, 1914, 3.

Digitized by Google

33. **Sentence**—When the court, in revision, adjudges another sentence, it must be stated in the record that the court revokes the former sentence, as otherwise the accused will stand sentenced twice for one offense, which is illegal. C. M. O. 42, 1894, 3; 37, 1909, 7.
34. **Same**—Where there are two former sentences, in order to prevent ambiguity, the phraseology should be altered so as to indicate which sentence the court adheres to; as, for example, "the court does respectfully adhere to its former sentence, as awarded upon the first revision in the foregoing case." C. M. O. 42, 1909, 12.
35. **Sentence, adhering to**—On revision the statement that "the court does respectfully adhere to its former sentence" is equivalent to a rewriting of the sentence, and should be in the handwriting of the judge advocate. C. M. O. 42, 1909, 11; 23, 1910, 3; 30, 1910, 8; 29, 1914, 6; 42, 1914, 4; 8, 1915, 3; 6, 1916, 2.
36. **Same**—"It is noted in the record of proceedings in revision of the general court-martial in the foregoing case of Pay Clerk * * *, United States Navy, that the record of the action of the court in adhering to its former sentence is typewritten. This should have been in the handwriting of the judge advocate." (Forms of Procedure, 1910, p. 51, changes dated July 10, 1914.) [*See also* Index-Digest, 1914, pp. 34, 38.] C. M. O. 6, 1916, 2. *See also* HANDWRITING, 9.
37. **Summary court-martial**—Record in revision should be prefixed, not appended. *See* SUMMARY COURTS-MARTIAL, 67, 81.

REVOCATION.

1. **Appointment**—Of paymaster's clerk. *See* C. M. O. 15, 1902.
2. **Same**—Of officers. *See* COMMISSIONS, 20.
3. **China campaign badge.** *See* CHINA CAMPAIGN BADGES.
4. **Commissions**—Impossible, if signed and sealed. *See* COMMISSIONS, 22, 32, 33.
5. **Discharge.** *See* DISCHARGE, 23, 24, 25.
6. **Discharge obtained by fraud.** *See* DISCHARGE OBTAINED BY FRAUD.
7. **Dishonorable discharge**—Where an enlisted man has been sentenced by general court-martial to dishonorable discharge, and such sentence has been approved and executed, it can not afterwards be revoked and an honorable discharge substituted. File 26516-9, J. A. G., May 28, 1909. *See also* DISCHARGE, 24; DISHONORABLE DISCHARGE, 20.
8. **Dismissal.** *See* DISMISSAL, 31; MIDSHIPMEN, 75.
9. **Philippine Campaign Badge.** *See* PHILIPPINE CAMPAIGN BADGES, 3.
10. **Post traders.** *See* POST TRADERS, 1.
11. **Resignations.** *See* RESIGNATIONS, 21, 22.
12. **Retirements.** *See* RESIGNATIONS, 22.
13. **Secretary of the Navy**—Revocation of action in courts-martial. *See* SETTING ASIDE, 8.
14. **Sentences.** *See* SENTENCES, 93, 94.

REWARDS.

1. **Actual delivery**—No reward is paid by the Navy for the arrest of a deserter but only for his actual delivery. File 5621-9, Sec. Navy, Sept. 10, 1907.
2. **Administrator**—It is proper and legal that a reward for a deserter returned to the naval authorities by a sheriff be paid to the administrator of the estate of said sheriff. Care should be taken, however, to insure the payment of the reward to a person duly appointed as administrator. File 26516-177, J. A. G., June 26, 1915; C. M. O. 22, 1915, 10.
3. **Deputy United States marshal**—Reward may be paid to. File 26516-103:1.
4. **Detectives.** *See* REWARDS, 11, 12.
5. **Excluding certain persons or firms from offer**—If Bureau of Navigation desires to bar any person or firm from delivering deserters and receiving rewards therefor, this may be accomplished by inserting a clasue in the offer of reward to the effect that such reward will not be paid to any individual or firm which has been denied the right to arrest deserters by the Navy Department. File 26516-92:1, J. A. G., Sept. 27, 1912. *See also* File 26516-216.
6. **Expiration of offer.** *See* REWARDS, 8.
7. **General public.** *See* REWARDS, 9, 10.
8. **Lapse of offer**—Where the offer of a reward for the apprehension and delivery of a deserter by a commanding officer expires before a civil officer delivers the deserter to a recruiting officer of the Navy, who tells the civil officer he is entitled to the reward of $50 for the delivery, the reward can not be paid, for the offer was not in effect when the delivery was made, the recruiting officer was not the "commanding officer"

Digitized by Google

within the meaning of R-3635, so that his statement to the civil officer was not in itself an offer of a reward, and the status of the case is the same as the case considered in the comptroller's decision of February 5, 1914 (156 S. & A. Memo. 2981), where no reward was offered, and it was accordingly held that no reward could be paid, but that the expenses incurred by the civil officer in making delivery might legally be allowed.

It has been provided in Army Regulations that "a reward of $50 will be paid to any civil officer or civilian for the apprehension and delivery" of deserters. Under a regulation of this character rewards may be paid whether offered in a specific case or not, the regulation itself constituting a general offer of a reward in all cases within its provisions. Difficulties of the character arising where an offer of reward has lapsed before delivery of the deserter and of like nature are therefore due to the limitations contained in the Navy Regulations on the subject. *Recommended*, That Navy Regulations be amended. File 26516-164, J. A. G., Dec. 30, 1914.

9. **Offers for**—Where reward is offered to general public for arrest of a deserter from the naval service, such reward may be paid to any person complying with terms of offer without inquiry as to authority of such person to make arrests. File 26516-92 and 92:1, J. A. G., Sept. 27, 1912.
10. **Private citizens**—While private citizens may be entitled to receive a reward for returning a deserter from the Navy, the payment of such reward would not protect him from liability to the deserter for false imprisonment, if he was not authorized to make arrests. File 26516-92 and 92:1, J. A. G., Sept. 27, 1912.
11. **Private detective agency**—"A reward for the arrest of a deserter or straggler with authorized expenses incurred in his return to the service may be paid to a private detective agency notwithstanding the prohibition in the act of March 3, 1893 (27 Stat., 591), against the employment in any Government service of an 'employee of the Pinkerton Detective Agency, or similar agency.'" File 26516-38, J. A. G., Dec. 3, 1910; 26516-92:1, Sept. 27, 1912.
12. **Private detectives**—"It has long been the practice to pay rewards to private detectives for the arrest and return of deserters and stragglers from the Navy, and reimbursement of expenses thus incurred has repeatedly been allowed without question." le 16154, Sec. Navy, May 27, 1903, quoted in File 26516-38, J. A. G., Dec. 3, 1910, p. 4.
13. **Sheriff**—Payment of reward to the administrator of the estate of a sheriff. *See* REWARDS, 2.
14. **Substantial compliance**—A legal offer for a reward for the return of a deserter was made and the deserter brought to the proper place for delivery and offered to the commanding officer. *Held*, Such is a substantial compliance with the offer made in the reward paper sent out. While a literal delivery of the deserter was not made, the person who had him in charge was prepared to fully complete that part of the contract. The offer being in the nature of a contract, after partial completion of the terms it could not then be revoked by the refusal to receive the deserter on board the ship. The reward may be paid to the proper person by the commanding officer. File 26516-195, Sec. Navy, Oct. 15, 1915.

RIGHT AND WRONG TEST. *See* INSANITY, 35; RESPONSIBILITY FOR CRIME, 1.

ROAD POLL TAX. *See* POLL TAXES, 1.

ROBBERY.

1. **Charge and specification.** *See* CHARGES AND SPECIFICATIONS, 88, 92.
2. **Definition.** *See* ROBBERY, 5, 7.
3. **Drunkenness**—Admissible only to prove the absence of the necessary specific intent. *See* DRUNKENNESS, 49.
4. **Enlisted man**—Charged with. C. M. O. 8, 1913, 5; 9, 1916, 6.
5. **Essentials**—It is established by a large number of decisions that the element in the legal definition of the crime of robbery which requires the taking to be "from the person" or "in the presence" of the owner or custodian should not be narrowly construed. C. M. O. 8, 1913, 6.
6. **Intent.** *See* INTENT, 2; ROBBERY, 7, 8.
7. **Proof of**—At midnight three enlisted men, including the accused, entered a shop and ordered "three ice creams" and afterwards one of them stole some chewing gum. Upon being remonstrated with by the shopkeeper the man struck the shopkeeper, whereupon the latter escaped into his room. The shopkeeper hearing the cash register ring he returned to the store and saw the accused leaving the store. The accused

Digitized by Google

was charged with "Robbery," the specification alleging that he did "by violence, feloniously take, steal, and carry away from a cash register" a sum of about $35. At the trial all the essential elements of robbery were proved; the intimidation of the custodian, violence, the felonious taking and carrying away with intent to deprive the owner of his property, together with the presence, actual or constructive, of the custodian. *Held*, That the fact that the custodian was not in actual sight of the cash register at the exact moment the money was taken is immaterial, and it would be a narrow interpretation of the definition of the crime of robbery to hold that the offense actually committed by the accused was not robbery. *Held, further*, That, as the element which constitutes the essential difference between "theft" and "robbery" was not alleged in the specification, the specification did not support the charge, there was no legal trial and conviction therein, and the finding was disapproved. C. M. O. 8, 1913, 6–7. *See also* CHARGES AND SPECIFICATIONS, 92.

8. **Specific intent**—Required. C. M. O. 42, 1909, 10; 8, 1911, 5.
9. **Theft**—The essential feature of the crime of "robbery" which distinguishes it from theft both in common law and statutory definition is the taking from the person or in the presence of the owner or custodian. (U. S. *v.* Jones, 26 Fed. Cas. No. 15494; State *v.* McCoy, 63 W. Va. 69; Houston *v.* Com., 87 Va. 257; Com. *v.* Humphries, 7 Mass. 242.)

The considerable difference between the authorized punishments for the two offenses is an additional reason for alleging the respective crimes strictly according to their accepted legal definitions. C. M. O. 8, 1913, 6.

RULES FOR TARGET PRACTICE.

1. **Regulations**—Full force and effect of regulations. *See* REGULATIONS, NAVY, 14.

RULES OF EVIDENCE. *See* EVIDENCE, 106–109.

RULES OF STATUTORY CONSTRUCTION AND INTERPRETATION. *See* STATUTORY CONSTRUCTION AND INTERPRETATION.

SABBATH DAY. *See also* SUNDAY LAWS.

1. **Adjournment of courts-martial.** *See* ADJOURNMENT OF COURTS-MARTIAL.
2. **Observance of**—"The President, Commander in Chief of the Army and Navy, desires and enjoins the orderly observance of the Sabbath by the officers and men in the military and naval service. The importance for man and beast of the prescribed weekly rest, the sacred rights of Christian soldiers and sailors, a becoming deference to the best sentiments of a Christain people, and a due regard for the Divine will, demand that Sunday labor in the Army and Navy be reduced to the measure of strict necessity.

"The discipline and character of the national forces should not suffer, nor the cause they defend be imperiled, by the profanation of the day or name of the Most High.

"'At this time of public distress,' adopting the words of Washington in 1776, 'men may find enough to do in the service of God and their country, without abandoning themselves to vice and immorality.' The first General Order issued by the Father of his Country after the Declaration of Independence indicates the spirit in which our institutions were founded and should ever be defended: '*The General hopes and trusts that every officer and man will endeavor to live and act as becomes a Christian soldier defending the dearest rights and liberties of his country.*' * * * ABRAHAM LINCOLN." G. O. 5, Feb. 10, 1863, publishing a general order of President dated November 15, 1862.

SAILBOAT.

1. **Gift to Government.** *See* GIFTS TO GOVERNMENT, 1.

SAILMAKERS AND CHIEF SAILMAKERS.

1. **Chief sailmaker**—Tried by general court-martial. C. M. O. 73, 1901; 4, 1908.
2. **Command.** *See* COMMAND, 21.
3. **General court-martial**—Tried by. C. M. O. 10, 1879; 52, 1880; 30, 1881; 32, 1881; 53, 1888; 39, 1892; 18, 1897; 90, 1897.
4. **Staff officers**—Classed as staff officers. *See* COMMAND, 21.
5. **Warrant officer**—A sailmaker is a warrant officer. C. M. O. 18, 1897, 5.

Digitized by Google

SALARIES. *See also* EMOLUMENT; "OFFICE," 3, 4, 17, 18; PAY.

1. **Waiving or withholding**—Under existing judicial decisions the salary of a Government officer which is fixed by law can not be withheld by executive officers nor waived by the officer himself (Rush *v.* United States, 35 Ct. Cls. 223; Andrews *v.* United States, 47 Ct. Cls. 51, new trial allowed and judgment rendered in favor of claimant, March 16, 1914). File 27231-47.

SALE OF COMMISSIONS. *See* COMMISSIONS, 34; CONGRESS, 11.

SALVAGE.

1. **Right of officers and crew to.** *See* File 27601-116:2, J. A. G., May 17, 1915; 27673-342, J. A. G., Dec. 23, 1915.
2. **Same**—"Under section 1536 R. S. it is made a part of the duty of the Navy to assist vessels in distress. In an opinion rendered as early as July 8, 1856 (7 Op. Atty. Gen., page 756), the Attorney General held that 'officers and crews of the public ships of the United States are not entitled to salvage, civil or military, as of complete legal right,' and added that 'the allowance of salvage, civil or military, in such cases, like the allowance of prize money on captures, is against public policy and ought to be abolished in the sea service as it was long ago in the land service.' The distribution of prize-money has since, by act of March 3, 1899 (30 U. S. Statutes at Large, p. 1007), been abolished, but there has been no late legislation respecting salvage.

   "In the recent history of the Navy no claim has been allowed for salvage, the department having taken the ground, in a number of cases, that such claims should not be made. In one or two instances, where a bonus was voluntarily tendered for distribution among the officers and men of a naval vessel, such gift has been informally accepted." (*See also* File 7173, J. A. G.) File 4496-79, Sec. Navy, Oct. 17, 1907.
3. **Same**—In a recent salvage case the "actual cost of certain salvage services" rendered a merchant vessel by a naval vessel, $890.15, the amount thereof, was collected and deposited to the credit of the United States. File 27601-116.

SAMOA.

1. **General Order No. 121.** *See* GENERAL ORDER No. 121, Sept. 17, 1914, 22.
2. **Officer**—Tried by general court-martial at Tutuila, Samoa. C. M. O. 33, 1915.
3. **Reports from executive officers.** *See* GUAM, 10.

SCANDALOUS CONDUCT TENDING TO THE DESTRUCTION OF GOOD MORALS.

1. **Attempted suicide**—Charged under. *See* ATTEMPTED SUICIDE.
2. **"Beat up"**—A statement made by one man to another that he will "beat up" a third party can not be construed as scandalous conduct tending to the destruction of good morals within the meaning of paragraph 1 of article 8 of the Articles for the Government of the Navy. C. M. O. 21, 1910, 11.
3. **Debts**—Neglect and failure to pay charged under. *See* DEBTS, 24. This offense in general should be charged under "conduct unbecoming an officer and a gentleman."
4. **Enlisted men**—Charged with. C. M. O. 25, 1914, 3; 10, 1915, 4; 3, 1916, 6.
5. **Fraudulent enlistment**—At one time was charged under. *See* FRAUDULENT ENLISTMENT, 14, 82.
6. **Fraudulently**—Misappropriating and applying to his own use money lawfully collected as duly authorized agent of laundryman, charged under. C. M. O. 18, 1908, 2.
7. **Judge advocate**—Tried by general court-martial on charge of. C. M. O. 104, 1896.
8. **Midshipman**—Charged with. C. M. O. 36, 1909.
9. **Money**—An officer having received large sums of money belonging to enlisted men as deposits with him for safe-keeping while he was commanding officer was unable to account for $8,000. Tried by general court-martial. G. O. 67, Dec. 5, 1865.
10. **Officers**—Tried by general court-martial. G. O. 67, Dec. 5, 1865; C. M. O. 57, 1880; 4, 1909; 5, 1909; 48, 1910; 52, 1910; 2, 1911; 15, 1911; 27, 1911; 6, 1912; 13, 1912; 22, 1912; 39, 1912; 4, 1913; 7, 1913; 15, 1913; 31, 1913; 37, 1913; 6, 1914; 7, 1914; 8, 1914; 24, 1914; 27, 1914; 30, 1914; 50, 1914; 19, 1915; 47, 1915; 1, 1916; 18, 1916; G. C. M. Rec. 28881.
11. **Same**—Officer tried by general court-martial for engaging in a brawl and disturbance in a public bar room. C. M. O. 23, 1882.
12. **Paymaster's clerks**—Charged with. C. M. O. 29, 1911, 3; 30, 1911; 35, 1913; 24, 1915; 26, 1915.
13. **Warrant officers**—Charged with. C. M. O. 34, 1909; 35, 1909; 5, 1913; 29, 1913; 22, 1914; 32, 1914.
14. **Warrant officers (commissioned)**—Charged with. C. M. O. 29, 1913; 16, 1914.
15. **Same**—Retired chief boatswain charged with. C. M. O. 15, 1915.

Digitized by Google

SCHOOL TAX. *See* POLL TAXES, 1.

SCREENING AN OFFENDER.

1. **Dismissal**—Of an acting assistant surgeon for screening an offender (an acting master) who kicked and abused a seaman. G. O. 35, May 5, 1864.

SEA LAWYER.

1. **Defense of an officer**—Convening authority declared that defense of an officer consisted of "a mass of flimsy technicalities, 'sea lawyer' objections, and efforts to escape by unofficerlike methods the penalties sure to follow his misdeeds, when the case was stripped of these and the facts remained." C. M. O. 16, 1911, 3.

SEA-DUTY.

1. **Naval Academy**—Sea duty as part of the course at the Naval Academy. *See* NAVAL ACADEMY, 22.
2. **Sea duty pay.** C. M. O. 21, 1916. *See also* PAY, 64, 96.

SEALS.

1. **Beneficiary slips.** *See* DEATH GRATUITY, 28.
2. **Commissions**—Signed and sealed, can not be revoked. *See* COMMISSIONS, 22.

SEAMAN GUNNERS.

1. **Classification**—Hereafter seamen gunners will not be classed with petty officers, but with seamen first class. G. O. 341, Jan. 1, 1886.
2. **Definition.** *See* SEAMAN GUNNERS, 4.
3. **Reduction in rating**—Seaman gunners can not be reduced to a lower rating except by sentence of a court-martial. G. O. 341, Jan. 1, 1886.
4. **Same**—A quartermaster third class, United States Navy, was convicted by a general court-martial of "Absence from station and duty without leave" and sentenced to be reduced to the rating of seaman gunner and to be confined at hard labor for a period of six months, with corresponding forfeiture of pay and dishonorable discharge.

   The department on March 30, 1914, approved the sentence but mitigated the same to detention in the disciplinary barracks, Port Royal, S. C. The accused was unconditionally restored to duty from said barracks on September 14, 1914, with the rating of seaman gunner.

   It later appeared from the statement of his commanding officer that the accused never attended the school for the instruction of seaman gunners, and that he had not successfully completed such a course, and was, therefore, not entitled to a certificate as seaman gunner, as provided in Navy Regulations, 1913, R-3564, nor was he entitled to the emoluments therefor, as provided in Navy Regulations, R-3565. These facts were not disclosed by the record of the general court-martial in this case which was approved by the department.

   Under the forgoing circumstances the question was raised as to what was the correct rating of the accused.

   The table of "Classification for disrating," contained in Navy Regulations, 1913, R-619, shows "seaman gunner" as one of the established ratings, but in authorizing reductions to that rating states: "When holding a certificate as such, otherwise seaman." This table is stated in the article cited to be published for the guidance of summary courts-martial. However, in court-martial order No. 30, November 1, 1912, page 6, it is expressly stated, with reference to the sentence of a general court-martial: "Reduction to the rating of seaman gunner is applicable only in those cases of men holding a certificate as such."

   Navy Regulations, 1913, R-901 (3), provides that court-martial orders "shall have full force and effect as regulations for the guidance of all persons in the naval establishment;" and the department has emphatically announced that court-martial orders are published by the department for the information and guidance of all officers in the service, and that they may be held accountable for ignorance thereof when occasion arises in which they should be governed by instructions contained in such orders. (C. M. O. 33, 1912, p. 3; File 26251-9538, pp. 5-6; 26278-2704.)

   It thus appears, both from the nature of the case and an express order on the subject issued by the department and having full force and effect as a regulation, that reduction of a petty officer to the rating of seaman gunner is not authorized, even by sentence of general court-martial, where such petty officer does not hold a certificate as seaman gunner. Action of a court-martial alone is not sufficient to make an enlisted man a seaman gunner. Before he can hold that rating he must, under the regulations, take a course of instruction and receive a certificate as such.

Digitized by Google

There is no doubt that the purpose of the court was to comply with Navy Regulations, 1913, R–816 (3), which provides that—

"In all cases in which the sentence imposed on a petty officer involves confinement, it should include reduction to one of the ratings below petty officer in the branch to which he belongs; and in the case of a noncommissioned officer of the Marine Corps, to private."

"The law certainly does not contemplate that an enlisted man shall be reduced to a rating he is not competent to fill." (Comp. Dec., Jan. 23, 1915, App. No. 24240; File 26254–1703.)

Had the court sentenced the accused to reduction to "seaman" the sentence would have been legal and would have fulfilled the requirements of Navy Regulations, 1913, R–816. Or had the error been disclosed by the record, the case could have been returned to the court for correction, in accordance with precedent, before the sentence was approved. (C. M. O. 30, 1912, p. 6.)

But, however plain the purpose of the court, the sentence imposed was expressed in language equally plain, and was stated to be, that the accused "be reduced to the rating of seaman gunner, United States Navy." This sentence, for reasons given above, was improper and inoperative. To change the sentence so as to reduce the man to the rating of "seaman" would be to substitute a different sentence for that imposed by the court, and would not be authorized. Therefore the attempted reduction in the accused's rating was ineffectual, and he retains the rating of quartermaster, third class, United States Navy (File 26251–8890:6). C. M. O. 49, 1914–5–6.

SECRECY.

1. **Confidential publications.** *See* CONFIDENTIAL PUBLICATIONS.
2. **Courts-martial trials.** *See* COURT, 126, 127, 171.
3. **Oaths**—Naval courts-martial. *See* CRITICISM OF COURTS-MARTIAL, 22, 35, 36; OATHS, 20, 47.

SECRET SOCIETY.

1. **Medical officers—Signing forms for enlisted men to secure sick dues.** *See* MEDICAL RECORDS, 5.

SECRETARY OF THE NAVY.

1. **Abuse of his powers**—The Secretary of the Navy represents the President, and exercises his power on the subjects confided to his department. He is responsible to the people and the law for any abuse of the powers intrusted to him. His acts and decisions, on subjects submitted to his jurisdiction and control by the Constitution and laws, do not require the approval of any officer of another department to make them valid and conclusive. (U. S. *v.* Jones, 18 How., 95.) File 26543–66, J. A. G., Sept. 8, 1911, p. 8.
2. **Same**—Legal liability. *See* LEGAL LIABILITY, 3; SECRETARY OF THE NAVY, 1.
3. **Absence of**—In the absence of the Secretary and Assistant Secretary of the Navy, the President has directed that, until further orders, the duties of the Secretary of the Navy shall be performed by the following designated persons, in the order named: The Chief of the Bureau of Navigation; in his absence, the Chief of the Bureau of Ordnance; and in the absence of those two, the Chief of the Bureau of Steam Engineering. File 12753–9, June 29, 1912. *But see* Act of Mar. 3, 1915 (38 Stat., 940), which provides that the Chief of Naval Operations "shall be next in succession to act as Secretary of the Navy" during the temporary absence of the Secretary and the Assistant Secretary. *See also* PRECEDENCE, 29.
4. **Act of**—Is act of the President. *See* PRESIDENT OF THE UNITED STATES, 13, 26; REGULATIONS, NAVY, 16.
5. **Acting Secretary of the Navy.** *See* PRECEDENCE, 29.
6. **Administration of the Navy**—The Secretary of the Navy is charged with the administration of the entire Navy. *See* ADEQUATE SENTENCES, 3.
7. **Appeals.** *See* APPEALS.
8. **Arrest**—If in cases where such action should be taken by the convening authority (fleet or station), the record does not disclose that the accused was released from arrest and restored to duty, the Secretary of the Navy will issue directions. C. M. O. 13, 1914; 40, 1915. *See also* C. M. O. 32, 1915.
9. **Auditor for the Navy Department**—In certain cases Secretary of the Navy refuses to furnish information to the Auditor. *See* AUDITOR FOR THE NAVY DEPARTMENT, 5; DEATH GRATUITY, 23; SECRETARY OF THE NAVY, 50.

Digitized by Google

10. **Boards of Medical Examiners**—Precept signed by. *See* BOARDS OF MEDICAL EXAMINERS, 5.
11. **Censure**—Secretary of the Navy may express approval or disapproval or censure acts or omissions of any officer, enlisted man, or civil employee. *See* COMMENDATORY LETTERS, 2; PUBLIC REPRIMAND, 17, 18; SECRETARY OF THE NAVY, 63.
12. **Civil liability**—For abuse of power. *See* LEGAL LIABILITY, 2, 3; SECRETARY OF THE NAVY, 1.
13. **Commendatory letters.** *See* COMMENDATORY LETTERS, 2; SECRETARY OF THE NAVY, 63.
14. **Commissions**—The Secretary of the Navy may sign commissions issued to officers but "it is proper" that the commission should declare the act to be the act of the President performed by the head of the department as his representative. (22 Op. Atty. Gen. 82. *See also* O'Shea *v.* U. S., 28 Ct. Cls. 392). File 28687-4:1, J. A. G., Sept. 16, 1916. *See also* File 26521-152, J. A. G., Sept. 22, 1916.
15. **Same**—Numbering of commissions is act of the Secretary. (Index, 1915, 11.) *See* COMMISSIONS, 26.
16. **Commuting sentences**—Secretary of the Navy may not commute a sentence. *See* COMMUTING SENTENCES; SECRETARY OF THE NAVY, 54.
17. **Same**—While he may not commute he may remit, mitigate, or set aside. *See* ADDITIONAL PUNISHMENT, 1.
18. **Comptroller of the Treasury**—Policy of department regarding. *See* COMPTROLLER OF THE TREASURY, 2.
19. **Courts of Inquiry.** *See* COURTS OF INQUIRY, 2, 10.
20. **Court-martial orders**—Fleet and station cases. *See* COURT-MARTIAL ORDERS,, 12.
21. **Criticism**—Of officers, enlisted men or civil employees. *See* COMMENDATORY LETTERS, 2; PUBLIC REPRIMAND, 17, 18; SECRETARY OF THE NAVY, 63.
    Criticism of courts-martial. *See* CRITICISM OF COURTS-MARTIAL.
22. **Decisions**—Weight of the decisions of the Secretary of the Navy. *See* SECRETARY OF THE NAVY, 39.
    Decisions of the Secretary of the Navy distinguished from *opinions* of the Judge Advocate General. *See* JUDGE ADVOCATE GENERAL, 30.
23. **Same**—In easily accessible form in court-martial orders. *See* COURT-MARTIAL ORDERS, 8.
24. **Delegation of authority**—As reviewing officer of a general court-martial can not be delegated, "he has been made by law the person whose duty it is to review the proceedings of courts-martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him, and decide personally whether they ought to be carried into effect. *Such a power he can not delegate.* His personal judgment is required as much so as it would have been in passing on the case if he had been one of the members of the court-martial itself." (Runkle *v.* U. S., 122 U. S., 543.) *See* CRITICISM OF COURTS-MARTIAL, 35.
25. **Disapproval of sentences by convening authority**—No sentence can be carried into execution which has been disapproved by the convening authority (fleet) and the Secretary of the Navy is without power. File 7719-03, Sec. Navy, Nov. 18, 1903. *See also* CRITICISM OF COURTS-MARTIAL, 35.
26. **Examining boards**—Precept signed by. *See* NAVAL EXAMINING BOARDS, 4.
    Action upon records of Marine and Naval Examining Boards. *See* PROMOTION, 5, 134.
27. **Fleet and station cases**—Where the Secretary of the Navy is not the convening authority, in general, it is unnecessary for him to take any action on general court-martial cases unless he desires to set aside the proceedings or remit or mitigate the sentence in whole or in part. C. M. O. 38, 1905, 2; Index-Digest, 1914, 35; Index, 1915, 45. *See also* C. M. O. 107, 1894, 2; 89, 1899; 34, 1900; 4, 1914, 11; 19, 1914; 39, 1914; 48, 1914; 13, 1915; 17, 1915; 40, 1915. *But see* C. M. O. 13, 1914.
28. **Same**—Authority of Secretary of Navy to return for revision. *See* CRITICISM OF COURTS-MARTIAL, 35.
29. **Fleet and station court-martial orders.** *See* COURT-MARTIAL ORDERS, 12.
30. **Same**—"This being a squadron case, and having received the approval of the commander in chief, further action by higher authority is not necessary in order to give it validity." It is, however, the right, and may in proper circumstances be the duty of the department to review a squadron case. (C. M. O. 9, 1893; 48, 1904.) File 3220-04, J. A. G., Aug. 9, 1904.
31. **Furlough**—Secretary may place an officer on furlough. *See* FURLOUGH, 2; OFFICERS, 106.

Digitized by Google

32. **General courts-martial**—Action of Secretary of the Navy in general court-martial cases—"The court having concluded its labors by acquitting the accused, the duty is devolved by law upon the Secretary of the Navy, as the convening and revising authority, to either approve or disapprove the findings of the court. The proper discharge of this duty involves, necessarily, the same calm, dispassionate, and unbiased consideration of the evidence and of the facts thereby established as has, presumably, been given thereto by the court." C. M. O. 41, 1888, 4–5.
33. **Same**—The department has a duty to perform, and that is, not only to carefully consider and weigh all the evidence before it, in order to determine whether it shall approve or disapprove the findings of the court, but likewise to avoid the possibility of sanctioning any conclusion, not clearly and fully sustained by the evidence, which may operate to create a dangerous precedent. It is possible that this consideration may not have been present in the mind of the court, but whether present or not, the responsibility of the department in this regard cannot be evaded or ignored." C. M. O. 41, 1888, 9. *See also* SETTING ASIDE, 10.
34. **Same**—Jurisdiction to convene. *See* MARINES SERVING WITH THE ARMY, 7.
The Secretary of the Navy may empower certain officers to convene general courts-martial. *See* CONVENING AUTHORITY, 27.
35. **Same**—Power of Secretary of the Navy—To act on general courts-martial, in cases in which he is not convening authority, after final approval by convening authority. *See* File 26504–211; CRITICISM OF COURTS-MARTIAL, 35.
36. **Same**—"When received the record must be reviewed and recorded in accordance with law." File 14625–183:25, Sec. Navy, Apr. 9, 1912.
37. **Same**—The Secretary of the Navy, when the convening authority, cannot delegate his power to review but must do so personally. *See* CRITICISM OF COURTS-MARTIAL, 35; SECRETARY OF THE NAVY, 24.
38. **Judicial question**—Not authorized to decide. *See* VOTING, 7.
39. **Law, questions of**—The decision of the department on questions of law is just as binding on naval courts-martial as a decision of a State supreme court on the lower courts of that State. G. C. M. Rec. 29422, p. 336.
The department does not consider that it is called upon to furnish courts-martial with voluminous or exhaustive citations in support of the statements of the law. Congress has by express statutory enactment (Act, June 8, 1880, 21 Stat., 164) given the Judge Advocate General, under the direction of the Secretary of the Navy, cognizance of all questions of naval law arising in the naval service concerning the personnel; and has furnished him with all necessary legal machinery, consisting of officers and civilian lawyers who have made a specialty of naval law in all its branches, and are supplied with exhaustive references to decisions and precedents in both civil and military cases, including every reported decision of the Federal and State courts since the foundation of this Government. In addition, Congress has by Statute (R. S., 356, 357), placed at the command of the Secretary of the Navy the entire legal machinery of the Department of Justice whenever he may find it necessary to call upon that department for assistance in determining questions of law arising in the naval service upon which he is in doubt. All the above mentioned sources of legal knowledge are made available to naval courts-martial by a regulation, issued by the President pursuant to statutory authorization (R. S., 1547), as follows: "All communications pertaining to questions of law arising before courts-martial, or to the proceedings thereof, which may require the action of the department, shall likewise be forwarded direct by such presiding officers" to the Judge Advocate General. (R–850.) As a general rule members of courts-martial are not qualified by training and experience to strip reported civil cases of technical terminology and weigh the principles announced in the various citations with assurance of deducing therefrom the correct conclusion of law. File 26251–12159, Sec. Navy, Dec. 9, 1916, pp. 1–2.
In deciding questions of law for naval courts-martial, the department prefers to state legal conclusions in general terms, in every instance being prepared to support its statements of the law should it be called upon to do so in the civil courts, as sometimes happens. File 26251–12159, Sec. Navy, Dec. 9, 1916, p. 3.
40. **Legal liability**—For abuse of power. *See* LEGAL LIABILITY, 3; SECRETARY OF THE NAVY, 1.
41. **Litigation in civil courts**—Policy of Secretary of Navy. **See** CIVIL COURTS, 7.
42. **Mark of desertion**—Discretion of Secretary of Navy. File 26539–551, J. A. G., Mar. 17, 1913. *See also* MARK OF DESERTION.

Digitized by Google

43. **Midshipmen**—Dismissal by Secretary of the Navy. *See* MIDSHIPMEN, 80.
44. **Same**—Discharge upon own application at end of four years' course. *See* MIDSHIPMEN.
45. **Naval examining boards**—Secretary of Navy signs precept. *See* NAVAL EXAMINING BOARDS, 4.
Action upon record of Naval Examining Board. *See* PROMOTION, 5.
46. **Naval Militia**—It is not the duty of the Secretary of the Navy to prescribe who shall constitute the Naval Militia. *See* NAVAL MILITIA, 4, 33.
47. **Officers**—Secretary may censure, commend, etc. *See* COMMENDATORY LETTERS, 2; SECRETARY OF THE NAVY, 63.
48. **Pardon**—The Secretary of the Navy can not pardon an offense. *See* PARDON S, 47.
49. **Plea in bar**—Can not *order* court to try charges, where court allows plea in bar. *See* REVIEWING AUTHORITY, 15; REVISION, 24.
50. **Powers**—Of the Secretary of the Navy in cases in which the Auditor for the Navy Department requested information for the evident purpose of reviewing and possibly overruling decisions of the Navy Department upon questions of a purely military nature. *See* File 26260-347:C, Sec. Navy, Oct. 20, 1909; 26543-66, Sec. Navy, Sept. 8, 1911. *See also* AUDITOR FOR THE NAVY DEPARTMENT, 5; DEATH GRATUITY, 23.
51. **Same**—Powers of where convening authority disapproved sentence—Where a convening authority, other than the Secretary of the Navy, of a general court-martial disapproved the sentence, the department stated in part: "The result of this action by the convening authority is that the officer escapes punishment altogether, as no sentence can be carried into execution which has been disapproved by the reviewing authority. No question, therefore, which concerns the accused officer is before the department, which is without power in the premises." File 7719-03.
52. **Same**—In cases where he is not the convening authority the Secretary of the Navy can only inquire whether, in the exercise of his discretion, the convening authority has acted within the limits of his authority or overstepped them. *See* CRITICISM OF COURTS-MARTIAL, 35.
53. **Same**—In one case an indorsement of the Marine Corps stated in part: "As the sentence in this case was approved * * * by the 'fleet convening authority,' it appears that no further action can now be taken." The sentence in this case was inadequate and the department so stated, but concurred in the above remarks. File 26262-2658; Sec. Navy, Oct. 13, 1916.
54. **Same**—The Secretary of the Navy may set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court-martial convened by his order or by that of any officer of the Navy or Marine Corps. C. M. O. 89, 1899; 26, 1912, 4; 49, 1914, 4. *See also* File 26254-1823:2, p. 5; 20 Op. Atty. Gen., 243; 15 Op. Atty. Gen., 175; 17 Comp. Dec. 311; 13 Comp. Dec. 726; *The Laura*, 114 U. S., 411; 6 Op. Atty. Gen. 488; SETTING ASIDE, 10.
55. **Same**—Power of Secretary of the Navy to remit or mitigate after final approval by convening authority. File 26504-210; 26504-211.
56. **Same**—Only convening authority authorized to remit or mitigate sentences after final action thereon—The department has held that officers of the naval service convening general courts-martial are not authorized to remit or mitigate the sentences imposed by such courts-martial having once acted thereupon. For example, where such officers had approved the proceedings, findings, and sentence of courts-martial and restored men to duty on probation, directing that should such men commit any serious offense report thereof be made to the convening authority for his consideration, with a view to terminating the probation, the department held that such procedure was objectionable, and that the convening authority should forward the record to the department, "with recommendations as to the remission of the sentences," in order that "*the only authority empowered to carry out the recommendations may in its discretion remit or mitigate the sentences.*" C. M. O. 17, 1910, 5-6; 1, 1912, 4.
"The record [of proceedings of a general court-martial] having been approved by the Commander in Chief, *stands complete.*" 13 J. A. G. 323, June 11, 1904.
57. **Praise**—Secretary may praise, censure, commend, criticise, etc. *See* COMMENDATORY LETTERS, 2; PUBLIC REPRIMAND, 17; SECRETARY OF THE NAVY, 63.
58. **President**—Acts through the Secretary of the Navy—The act of the Secretary of the Navy in a matter under his jurisdiction is in legal contemplation the act of the President (Weller *v.* U. S., 41 Ct. Cls., 324). *See* NAVAL EXAMINING BOARDS, 4; REGULATIONS, NAVY, 16.

Digitized by Google

59. **Same**—"The President, it is well settled, may act through the head of a department, and the acts of the head of a department are to be deemed the acts of the President," with certain exceptions now immaterial. (Truitt *v.* U. S., 38 Ct. Cls., 398.) File 26521-152, J. A. G., Sept. 22, 1916.

An order of the Secretary of the Navy appointing a meteorologist at a navy yard must be regarded as the order of the President. (Hayden *v.* U. S., 38 Ct. Cls., 39.) File 26521-152, J. A. G., Sept. 22, 1916.

60. **Public Reprimand**—*See* PUBLIC REPRIMAND, 17, 18; SECRETARY OF THE NAVY, 63.
61. **Record of proceedings**—Secretary of the Navy declined to go behind the record. *See* JUDGE ADVOCATE, 105.
62. **Records of the department**—The Secretary of the Navy is made by law the personal custodian of the department's records. *See* RECORD OF PROCEEDINGS, 85; RECORDS OF THE DEPARTMENT, 7.
63. **Reprimand**—The assumption that the Secretary of the Navy can not pronounce a rebuke, public or private, upon an officer for a breach of discipline, or a failure in the performance of duty, without obtaining the sanction of a court, is an unheard of proposition. The department impartially awards praise or blame to the officer who deserves one or the other, as occasion may arise; and the practice is as old as the department itself. Cases have occurred where the department, without trial, has pronounced emphatic reprimand upon officers in general orders. The publicity that is given either to its commendation or its reproof is a matter within its own discretion, in the exercise of which it consults only the public interests. File 26251-2993, Mar. 10, 1910, quoting letter of Sec. Navy, Jan. 14, 1891. *See also* C. M. O. 9, 1893; File 26283-522, Feb. 12, 1913; COMMENDATORY LETTERS, 2; PUBLIC REPRIMAND, 17, 18.
64. **Resignations**—The Secretary of the Navy is the proper administrative officer to accept resignations of naval officers. *See* RESIGNATIONS, 28.
65. **Reviewing authority of general courts-martial**—Delegation of powers. *See* CRITICISM OF COURTS-MARTIAL, 35; SECRETARY OF THE NAVY, 24.
66. **Revision**—Power of the Secretary of the Navy to return records for revision after it has been acted upon by the convening authority. File 26504-211.
67. **Revocation**—Of action on courts-martial. *See* SETTING ASIDE, 8.
68. **Setting aside, proceedings, sentences, etc.** *See* SETTING ASIDE, 10.
69. **Steam engineering**—The Secretary of the Navy or Acting Secretary, as the case may be, may sign all mail which requires the signature of the Chief of the Bureau of Steam Engineering during a vacancy in that office. File 22724-7e, May 14, 1909.
70. **Summary courts-martial**—Action on. *See* SUMMARY COURTS-MARTIAL, 83.
71. **Voting**—The Secretary of the Navy is without jurisdiction to decide right of officers and enlisted men to vote. *See* VOTING, 7.
72. **Vulgar and indecent acts and associations of an officer**—Secretary of the Navy may place officer on furlough. *See* OFFICERS, 106.
73. **Waving Regulations.** *See* REGULATIONS, NAVY, 90-95.

SEDITION.

1. **Definition**—The accused was tried by general court-martial on a foreign station on the charges of "Scandalous conduct tending to the destruction of good morals," and "Uttering seditious words."

The specification of the first charge alleged that, in a public barroom in Shanghai China, in the presence of two enlisted men of His Britannic Majesty's navy, and several enlisted men of the United States Navy, the accused used, in a loud tone of voice, an obscene expression against the United States Navy, and also stated that the American bluejacket is no good, and had not treated the English right, or language of like import.

The specification of the second charge alleged that, in the same place and in the presence of the same witnesses above mentioned, the accused used, in a loud tone of voice, seditious words in reference to the United States Navy, saying, in substance, "F—— the United States Navy."

The accused pleaded not guilty to both charges and the specifications thereof.

The court found both specifications proved and the accused guilty of both charges.

Whereas the evidence conclusively proves the allegations set forth in the specifications, in so far as the spoken words are concerned, thereby justifying the finding of guilty to the first charges there are two points which present themselves in considering the second charge and its specification: First, as to whether the words uttered are

Digitized by Google

seditious; and, second, if classed in that category, the necessity of not only alleging but establishing the fact that they were intentionally so, and uttered with that purpose.

The American and English Encyclopedia of Law, under the caption "Sedition," recites as follows:

"In the United States it has been held that all publications which tend to degrade and vilify the Constitution, to promote insurrection and circulate discontent through its members, to asperse its justice and anywise impair the exercise of its functions, are seditious, and are visited with the peculiar rigor of the law." (Respublica *v.* Dennie, 4 Yates (Pa.), 270.)

And the same authority further states:

"Sedition is conduct tending toward treason, but wanting an overt act; attempts made by meeting or speeches or by publications to disturb the tranquility of the State which do not amount to treason. All contempts against the *sovereign* and the government, and riotous assemblies for *political* purposes, may be reckoned under the head of sedition."

"In criminal law; the raising commotions or disturbances in the State; it is a revolt against legitimate authority. The distinction between sedition and treason consists in this, that the ultimate object of sedition is a violation of the public peace or at least such a course of measures as evidently engenders it, yet it does not aim at direct and open violence against the laws or the subversion of the constitution." (Bouv.)

"Any act which, if aimed against the military authorities would be mutiny, constitutes, *if directed against the civil authorities*, the crime of sedition." (O'Brien.)

"This offense [sedition] which, as designated in the present article, is by the earliest writers nearly identified with mutiny, is in the more recent treatises distinguished as being *a resistance to the civil power*, demonstrated by riot or aggravated disorder. Thus, Simmons says: 'Sedition is supposed to apply to acts of a treasonable or riotous nature, directed rather against the public peace and the civil authority than military superiors, though necessarily involving or resulting in insubordination to the latter.'" (Winthrop's Military Law, Vol. II, p. 898.)

In view of what the foregoing recognized authorities hold to be sedition, and as seditious words necessarily mean words of a seditious character, it is the opinion of the department that the words used by this accused can not well be classed as seditious; neither should the same be considered more than a low, obscene, and idle expression, without any particular intent to either vilify the Constitution through the United States Navy, or to promote insurrection, or in any way impair the exercise of the functions of the United States Government.

In view of this conclusion it hardly seems necessary to take up the second point involved, namely, that if classed as seditious the necessity is apparent of not only alleging, but establishing the fact that they were intentionally so and uttered with that purpose. Some remarks on this phrase of the case might, however, be appropriate.

In treating the subject of evidence, and particularly as it relates to the introduction under certain circumstances of evidence of other offenses to show intent, Wigmore, a recognized authority, says that in sedition (including seditious riot and seditious libel) other acts and *utterances* are receivable under the present principles to evidence *seditious intent*. In the same way the accused may offer his utterances and acts to evidence his loyal (i. e., nonseditious) intent. (Wigmore on Evidence, vol. 1, sec. 369, p. 370.)

The specification in this case contained no allegation to the effect that the words uttered were either known to be seditious, or that they were spoken with that intent; and, in the opinion of the department, such allegation would appear to be essential.

Furthermore, the evidence rather conclusively indicates that the accused was intoxicated at the time he used the expression on which this charge is based.

"Where the question is whether words have been uttered with a deliberate purpose or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered." (Greenleaf on Evidence, Vol. III, sec. 6, p. 10.)

The same authority further remarks that, "Intoxication is now very generally held to be admissible, not to excuse a crime, but as bearing upon the question of mental capacity to entertain express malice, or to exercise deliberation, or the actual presence of a deliberate intent in the mind of the prisoner at the time of the act."

Digitized by Google

Where, therefore, the actual existence of any particular purpose, motive, or intent is a necessary element to constitute a particular species of crime or degree of criminality, the fact that the accused was intoxicated at the time may be taken into consideration in determining the purpose, motive, or intent with which he committed the act. (3 Greenleaf on Evidence, 10, note.)

Winthrop further remarks that drunkenness, if clearly shown in evidence to have been such as to have incapacitated the party from entertaining such purpose or intent, will ordinarily be properly treated as constituting a legal defense to the specific act charged. It might be remarked, however, that if the drunken act has involved a disorder or neglect of duty prejudicial to good order and discipline, and such will almost invariably be the fact, the accused may be convicted of an offense under the latter charge. (Winthrop's Military Law, 2 ed., p. 441.)

From a careful review of the evidence adduced in this case, it appears that the accused was intoxicated, and hardly capable of entertaining a deliberate purpose or intent, and the words spoken by him were nothing more than a low, obscene, and idle expression of a drunken man, uttered without particular significance or meaning, certainly without seditious meaning or purpose, and should be treated as such.

In view of the foregoing the findings of the court on the second charge and specification thereof were disapproved by the department; but the punishment adjudged by the court being considered none too severe for the offenses of which the accused was found guilty, the proceedings and the findings on the first charge and the sentence were approved. C. M. O. 14, 1910, 13–15.

2. **"Uttering seditious words"**—Enlisted man charged with. *See* MALICIOUSLY UTTERING SEDITIOUS WORDS, 1; SEDITION, 1; UTTERING SEDITIOUS WORDS.

SELECTION.

1. **Promotion by selection.** *See* PROMOTION BY SELECTION.

SELF DEFENSE. *See* MANSLAUGHTER, 12; MURDER, 32.

SELF-INCRIMINATION.

1. **Accused**—Status of, as witness. *See* WITNESSES, 1–11.
2. **Accused may not object to another incriminating himself**—The accused can not object to such testimony and has no right to insist upon the privilege and require the court to exclude the evidence on that ground. The witness may waive his privilege and testify in spite of any objection coming from the accused or his counsel. If the witness claims his privilege but is nevertheless required to testify, it is a matter exclusively between the court and the witness. Under such circumstances the accused is in no worse predicament than if the witness had come forward voluntarily to testify or had failed to avail himself of his privilege. (17 Op. Atty. Gen., 616) C. M. O. 29, 1914, 7. *See also* File 26262–2405.
3. **Claiming**—How the privilege is claimed—The method of the witness availing himself of the privilege is by claiming it after the question has been put. (McKelvey, p. 376.) "The proper course in any case where a witness claims the privilege of declining to answer questions on the grounds of self-crimination [or degredation] is for the witness to state in specific terms why he refuses to answer, and then the court must decide whether or not the privilege should be allowed." (C. M. O. 17, 1910, 13.) "The witness should not be required to explain fully how his answer would tend to criminate [or degrade] him." (40 Cyc., 2550.) The grounds on which the refusal is based, that is whether criminating or degrading (C. M. O. 17, 1910, 13), as well as the question, should appear in the record. (McKelvey, p. 376.) C. M. O. 29, 1914, 12.
4. **Comment, no**—Witness may decline to answer and if privilege is allowed, no inference or unfavorable comment is to be made—"In the exercise of this privilege the law protects the witness from unfavorable presumptions; for if it be exercised, no legal inference as to the truth of the matter which was the subject of the inquiry is permitted to be drawn." (1 Winth., p. 525.) "In any case where it is rightly claimed and is upheld by the court the privilege is so complete that the prosecutor will not be allowed to even comment upon the refusal of the witness to answer." (C. M. O. 17, 1910, 13.) C. M. O. 29, 1914, 11.
5. **Compulsion**—If the answer, made under compulsion, is criminating, it can not be used in evidence against the witness subsequently—If the privilege claimed by the witness be on the ground of self-crimination, and the "court should compel him to answer a question, deemed proper by it, the answer thereto, if it should prove criminating, can not be given in evidence against him." (Dudley, p. 289.) "The general rule certainly

Digitized by Google

is that evidence given or statements made by a party under compulsion or order of court, tending to criminate himself, can not be put in evidence on a criminal proceeding against him." (U. S. *v.* Prescott, 2 Dill, 405, 827 Fed. Cas.16085.) C. M. O. 29, 1914, 14.

6. **Contempt of court**—If directed by the court the witness must answer the question or be in contempt. *See* CONTEMPT OF COURT, 7.
7. **Court decides whether the privilege should be allowed**—The question of whether an answer might criminate or tend to criminate or degrade a witness is a preliminary question of fact for the court to decide. (*See* C. M. O. 17, 1910, 13, and McKelvey, p. 380.) "A witness can not be left to say for himself when he will or will not answer questions and then defend himself from punishment by hiding behind his privilege." (McKelvey, p. 380.) "The witness will not be required to explain in what manner the answer would criminate [or degrade] him, as this would defeat the object of the rule." (Jones on Evidence, p. 889.) "A witness is not the sole judge whether a question put to him, if answered, may tend to criminate [or degrade] him. * * * But if the fact once appear, that the witness is in danger, great latitude will be allowed him in judging for himself the effect of any particular question." (2 Bouv., 1244.) "It is not the rule, however, that the privilege must always be extended to the witness, if asked. While the court should be extremely careful to protect the witness in his right, yet the *danger must be something more than a merely fanciful or imaginary danger*.

"It must be real, with reference to the probable operation of law in the ordinary course of things, and not merely speculative, having reference to some remote and unlucky contingency. The court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is *reasonable ground to apprehend danger* to the witness from his being compelled to answer, and that it would naturally subject him to actual punishment." (3 Jones on Evidence, pp. 888–889.) C. M. O. 29, 1914, 14.

In connection with the discussion in Court-Martial Order No. 29, 1914, page 14, lines 13–38, of criminating and degrading questions, the following is quoted from a decision of Chief Justice Marshall: "It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case the witness must himself judge what his answer will be; and if he say so on oath that he can not answer without accusing himself, he can not be compelled to answer." (U. S. *v.* Burr, 25 Fed. Cas., 38; Counselman *v.* Hitchcock, 142 U. S., 547.) C. M. O. 53, 1914, 5.

8. **Court, in proper cases, may inform the witness of his privilege**—In proper cases, however, the court may, in its discretion, inform the witness of his rights. (17 Op. Atty. Gen., 616; C. M. O. 49, 1910, 9; 14, 1910, 12.) "So, whereas, there appears to be no objection, if it be deemed necessary, to cautioning an ignorant witness against incriminating himself, when he voluntarily takes the stand, such caution should be properly worded. That is, if he is without counsel, he may, if deemed necessary, be advised, that in the examination in chief he need not answer questions which will tend to criminate him; but, if answered on the direct examination, he must submit to a full cross-examination on the subject matter that is brought out, notwithstanding the answers may tend to criminate or disgrace him." (C. M. O. 49, 1910, 9; 14, 1910 12.) C. M. O. 29, 1914, *See also* C. M. O. 16, 1916, 7; G. C. M. Rec. 31509, p. 34.
9. **Court of inquiry**—The defendant before a court of inquiry shall be allowed, if he so desires, to testify in his own behalf, but he may decline to answer any question which may tend to incriminate himself. (R–421.) *See* File 26251–12895, 1917.
10. **Degrade.** *See* SELF CRIMINATION, 11, 12.
11. **Disgrace**—Questions, the answers to which would disgrace or degrade, but not tend to criminate, may be asked on matters material to the issue on trial but not as to collateral, irrelevant, or immaterial matters—"A witness may be compelled to answer as to a matter which is material to the issue on trial, notwithstanding his answer may have a tendency to disgrace him or bring him into disrepute; but may refuse to answer where the inquiry is as to collateral, irrelevant, or immaterial matters. Accordingly he may fall back upon his privilege and refuse to answer if his answer could have no effect upon the case except to impair his credibility, unless the answer of the witness will not directly show his infamy, but only tend to disgrace him, in which case he is bound to answer." (40 Cyc., 2534.) "He can not, it would seem, refuse to give testimony, which is material and relevant to the issue, for the reason that it would disgrace him or expose him to civil liability." (2 Bouv., 1244.)

Digitized by Google

This privilege does not permit a witness to remain silent "when the answer which the witness may give will *not directly and certainly show his infamy*, but will *only tend to disgrace*" (1 Greenl. Ev., sec. 456), as "it must be seen to have that effect certainly and directly" (2 Bouv., 1244); that is, the answer must be one which would *clearly degrade* and *not merely tend to degrade*.

Since the proviso to the act of February 16, 1909, section 12 (35 Stat., 622) (Navy Regulations, 1913, R-42), discussed under the heading "Witness is privileged from answering criminating questions," is declaratory of the common law on the subject, the common law principles expressed above are not inconsistent with this proviso and apply to all witnesses who appear before any kind of a naval court. C. M. O. 29, 1914, 11-12.

12. **Same**—As to impeaching a witness it may be stated as the weight of modern authority that, "the fact that a witness has been convicted of crime may be brought out as bearing on his credibility, where the crime amounts to a felony, or is infamous in its nature, and involves moral turpitude. But it is usualy held that a witness is not to be discredited by showing his conviction of a mere misdemeanor, or minor offense not involving moral turpitude, or infamous in its nature." (40 Cyc., 2607.) C. M. O. 16, 1916, 8. *See also* WITNESSES, 52.

13. **No privilege**—On the ground that the answer would tend to criminate if the testimony can not be used to convict or as to a matter brought out in examination-in-chief.—"The privilege [against self-crimination] can not, of course, be claimed where the criminal liability has ceased—as where the witness has been finally tried for the offense referred to in the question" (1 Winth. p. 525. *See also* C. M. O. 25, 1909); "or prosecution for the same has been barred by the statute of limitations. Nor can it be claimed on the cross-examination where the witness has voluntarily testified without objection, as to the subject of the question on the examination-in-chief." (1 Winth., p. 525.) Nor where the witness has been pardoned for the offense involved in the inquiry. (40 Cyc., 2542.) Where a witness declines to testify on the ground that his testimony might criminate him, and the President has issued an unconditional pardon, the witness is thereby deprived of the right to claim the privilege, without reference to whether he accepted the pardon or not. (U. S. *v.* Burdick, 211 Fed. Rep., 492. *See also* Hale *v.* Henkel, 201 U. S., 43.)

But if the privilege is claimed on the ground that the answer would degrade or disgrace the witness, as hereinafter explained, and the inquiry is as to matter not involved in the issues on trial—as, for instance, questions affecting the witness's credibility—the fact that criminal liability has ceased by reason of former trial, the bar of the statute of limitations, or pardon, does not prevent the witness claiming the privilege. C. M. O. 29, 1914, 11. *See also* SELF-INCRIMINATION, 12.

14. **Same**—The case of U. S. *v.* Burdick (211 Fed. Rep., 492) cited in Court-Martial Order No. 29, 1914, page 11, lines 22-26, was reversed by the Supreme Court of the United States.

The facts in this case are as follows: Burdick first appeared before a grand jury and declined under oath to answer questions on the ground of crimination. The President thereupon issued an unconditional pardon for any offenses committed by Burdick in reference to the subject matter of the questions, the answers to which Burdick claimed might criminate him. Burdick declined to accept the pardon, or to answer certain questions, giving the reason, as before, that the answers might tend to criminate him. He was presented by the grand jury to the district court for contempt and adjudged guilty thereof, but given an opportunity to purge himself of contempt by answering the questions. He refused again. The district court decided that the President "has power to pardon for a crime of which the individual has not been convicted and which he does not admit, and that acceptance is not necessary to toll the privilege against incrimination."

The Supreme Court reversed the district court, Mr. Justice McKenna, who delivered the opinion of the court on January 25, 1915, saying in part as follows: "Granting, then that the pardon was legally issued and was sufficient for immunity, it was Burdick's right to refuse it, as we have seen; and it, therefore, not becoming effective, his right under the Constitution to decline to testify remained to be asserted." (Burdick *v.* U. S., 235, U. S., 267.) C. M. O. 53, 1914, 5.

15. **Pardon.** C. M. O. 29, 1914, 11; 53, 1914, 5. *See also* SELF-CRIMINATION, 13, 14.

Digitized by Google

16. **Personal privilege**—Privilege is a personal one and may be claimed by the witness only—The privilege may be claimed by the witness but is strictly personal to him and if he does not claim it for himself no one else can claim it for him. (40 Cyc., 2548; C. M. O. 49, 1910, 9; 55, 1910, 10; 14, 1910, 12; 6, 1913, 4; 8 1913, 5; 17 Op. Atty. Gen., 616.) Accordingly the accused can not claim the privilege for another who is a witness (40 Cyc., 2548; 17 Op. Atty. Gen., 616), nor can such claim be interposed by counsel for the accused (40 Cyc., 2548; 17 Op. Atty. Gen., 616; C. M. O. 49, 1910, 9; 55, 1910, 10: 6, 1913, 4) nor should the court interfere, but should leave the matter with the witness to avail himself of his privilege, or not, as he sees fit. (3 Jones on Evidence, p. 893; C. M. O. 49, 1910, 9; 8, 1913, 5; 29, 1914, 12. *See also* C. M. O. 18, 1897, 4.)
17. **Privilege in general**—Witness is privileged from answering criminating questions—"It is an established principle of the common law, recognized indeed and affirmed in the United States Constitution, that a witness * * * may refuse and can not be required to answer a question the answer to which may tend to criminate him; or, as it is expressed by Greenleaf, 'have a tendency to expose him to a penal liability, or to any kind of punishment, or to a criminal charge'; or even, in the language of Chief Justice Marshall, form a link in the 'chain of testimony which is necessary to convict an individual of crime.' * * * in military cases the principle has properly been recognized where the answer to the question might subject the witness either to a *military or a civil* prosecution." (1 Winth., pp. 524–526.)

    The act of February 16, 1909, section 12 (35 Stat., 622) (Navy Regulations, 1913, R–42), contains the following proviso:

    "No witness shall be compelled to incriminate himself or to answer any question which may tend to incriminate or degrade him."

    It would appear that the said proviso was intended to be *declaratory of the common law on the subject*, and under such circumstances the rule of construction applies that statutes are to be construed with reference to the principles of common law and in harmony therewith, unless a different intention on the part of the legislature is manifested.

    Accordingly the principles under this heading apply to all witnesses, whether in the naval service or civil life. C. M. O. 29, 1914, 10.
18. **Waiving the privilege**—How the privilege is waived—"The witness may waive the privilege by *failing* to make timely objection. For still stronger reasons, the privilege is waived if no objection whatever is made." (3 Jones on Evidence, p. 893.) "The privilege being for the protection of the witness, he may waive it, but once having elected to do so he is not permitted to stop, but must go on and make a full disclosure" (Dudley, p. 290; *see also* C. M. O. 17, 1910, 15), "although in so doing he exposes himself to a criminal charge." (C. M. O. 17, 1910, 14.) C. M. O. 29, 1914, 13.
19. **Witness must answer**—If directed by the court to answer, the witness must do so or be in contempt. C. M. O. 29, 1914, 13. *See also* CONTEMPT OF COURT, 7.
20. **Witness only may claim.** *See* SELF-INCRIMINATION, 16.

SELF-SERVING STATEMENTS. C. M. O. 29, 1914, 8; 2, 1917, 2. *See also* WORDS AND PHRASES.

SENATE.

1. **Appointments of officers**—Confirmation by Senate. *See* COMMISSIONS, 36.
2. **Court of inquiry**—Reopened on request of Senate. *See* COURTS OF INQUIRY, 49.
3. **Resolution**—Senate resolution requested Secretary of the Navy to reopen court of inquiry. *See* COURTS OF INQUIRY, 49.

SENIOR OFFICER PRESENT. *See also* SUMMARY COURTS-MARTIAL, 38.

1. **Action of**—Importance of. *See* CONVENING AUTHORITY, 2.
2. **Same**—Word "findings" not used in action on summary courts-martial. C. M. O. 36, 1914, 5. *But see* FINDINGS, 86.
3. **Binding of court-martial records.** *See* BINDING OF COURT-MARTIAL RECORDS.
4. **Changing action after promulgation**—As a reviewing authority (senior officer present) can not change his action upon a court-martial after such action has been promulgated and the accused duly notified, it would not be proper for the successor in office of such senior officer present to do what the original reviewing authority could not do. If the proceedings have not been published nor the accused notified, it would be proper for such successor in office to take further action upon a case as might seem to him necessary and proper. File 26287-1121, J. A. G., Feb. 24, 1912.

Digitized by Google

5. **Convening authority also**—Should there be no officer present senior to the convening authority of a summary court-martial, he shall, in subscribing his action upon the record, add to his title the words, "Senior Officer Present." C. M. O. 34, 1913, 3. *See also* CONVENING AUTHORITY, 2, 58.
6. **Same**—An enlisted man was tried by summary court-martial on board the U. S. S. *Ozark* and sentenced to forfeiture of pay and bad-conduct discharge. The record disclosed that the convening authority was also the senior officer present and took separate actions thereon; that is, he acted on the case as convening authority and also took separate action thereon as senior officer present. Navy Regulations, 1913, R-620 (4) provide, "If the convening authority approves the whole or any part of the sentence adjudged, he shall transmit the record to the commander in chief, or in his absence to the senior officer present. Should no officer senior to himself be present, he shall, in subscribing his action upon the record, add to his title the words 'Senior Officer Present.'" This one action is thus made to serve a double purpose in such cases. (*See* C. M. O., 6, 1915, p. 5) C. M. O. 12, 1915, 5.
7. **Commandant of navy yard.** *See* COMMANDANTS OF NAVY YARDS AND NAVAL STATIONS, 4.
8. **Definition.** *See* REVIEWING AUTHORITY, 7.
9. **Disapproval of proceedings**—And approval of sentence by senior officer present. *See* REVIEWING AUTHORITY, 20.
10. **Engine room.** *See* EMERGENCY, 5.
11. **G. O. 110.** *See* GENERAL ORDER 110, July 27, 1914, 21.
12. **Navy yards and naval stations.** *See* COMMANDANTS OF NAVY YARDS AND NAVAL STATIONS, 4.
13. **Reconvening**—Senior officer present may direct the convening authority to reconvene summary court-martial. C. M. O. 29, 1915, 11. *See also* RECONVENING, 16.

SENIORITY.

1. **Promotion by seniority.** *See* PROMOTION, 172–174.
2. **Superior officer**—Seniority in the Navy list conveys superiority. *See* SUPERIOR Officers, 1.

SENTENCES.

1. **Abbreviated improperly.** *See* ABBREVIATION, 2.
2. **"Accessories"**—Used in sentences of civil courts. *See* ACCESSORIES, 1.
3. **Same**—Definition—The words "other accessories of said sentence" when used in the sentence of a general court-martial shall be understood to include the following: The person so sentenced shall perform hard labor while confined pursuant to such sentence, and after his accrued pay (and allowances in the case of an enlisted man of the Marine Corps) shall have discharged his indebtedness to the United States at the date of approval of such sentence, shall forfeit all pay (and in the case of an enlisted man of the Marine Corps sentenced to dishonorable discharge, all allowances) that may become due him during a period equivalent to the term of such confinement (or if sentenced to dishonorable discharge during his current enlistment), except the sum of $3 per month during such confinement for necessary prison expenses, and if dishonorably discharged pursuant to such sentence, a further sum of $20 to be paid him when discharged. (R-816 (5).) *See* C. M. O. 3, 1914, 4.
4. **Accused**—Sentence furnished accused. *See* ACCUSED, 36, 57; RECORD OF PROCEEDINGS, 32.
5. **Additional numbers**—Included in counting numbers lost by sentence. *See* ADDITIONAL NUMBERS, 2.
6. **Adequate.** *See* ADEQUATE SENTENCES.
7. **Adhered to**—Should be in handwriting of judge advocate. *See* REVISION, 17.
8. **Alias**—Of accused should be included. *See* ALIAS, 4.
9. **Allowances.** *See* ALLOWANCES, 1, 3, 4, 8–10.
10. **Alterations**—The judge advocate in recording the sentence in revision made a clerical error in the phraseology and also, having made a mistake in writing a word, attempted to correct his error by writing the word "adhere" over it. It has previously been pointed out that if the judge advocate makes a mistake in recording the sentence he should rewrite the whole page. (*See* Forms of Procedure, 1910, p. 43; C. M. O. 6, 1916, pp. 3–4.) It has also repeatedly been remarked that the members of the court as well as the judge advocate, are responsible for errors of the above character appearing in the record. (*See* C. M. O. 55, 1910, pp. 9–10; 14, 1913, p. 5; 27, 1913, p. 12; 17, 1915, p. 2; 35, 1915, p. 7; 6, 1916, p. 4; 10, 1916, 3.)

Digitized by Google

11. **Ambiguous.** *See* C. M. O. 11, 1915; DISCHARGE, 3.
12. **Antedating.** *See* ANTEDATING, 3; CONFINEMENT, 1, 9.
13. **Approved**—Only that accused might not escape punishment. *See* APPROVAL ONLY THAT ACCUSED MIGHT NOT ENTIRELY ESCAPE PUNISHMENT.
14. **Army**—Sentence imposed by Army court-martial mitigated by President after return of accused to naval jurisdiction. *See* MARINES SERVING WITH ARMY, 6.
    Mitigation of sentence after final approval. *See* ARTICLES OF WAR, 3.
    Sentence of dismissal mandatory by law for "conduct unbecoming an officer and a gentleman." *See* CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN, 6; COURT, 169.
15. **Authentication of.** *See* AUTHENTICATION OF SENTENCES, 1; COURT, 149, 175.
16. **Bad-conduct discharge.** *See* BAD-CONDUCT DISCHARGE.
17. **Bread and water.** *See* BREAD AND WATER.
18. **Civil court sentence suspended**—Jurisdiction of naval courts-martial. *See* JURISDICTION, 124.
19. **Clemency.** *See* CLEMENCY, 13, 41, 54, 57.
20. **Clerical errors**—Correction of, in revision. *See* CLERICAL ERRORS, 3; RECORD OF PROCEEDINGS, 26.
21. **Same**—The department returned a general court-martial record for revision as "the sentences contained a clerical error, inasmuch as the word '*to*' was omitted before the words '*be paid*'." C. M. O. 7, 1897, 2.
22. **Commuting sentences.** *See* COMMUTING SENTENCES.
23. **"Conduct unbecoming an officer and a gentleman"**—Dismissal should be mandatory in Navy. *See* CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN, 6; COURT, 169.
24. **Confinement.** *See* CONFINEMENT; DECK COURTS, 35–37.
25. **Confinement to limits of ship, post, or station**—Not viewed with favor. *See* CONFINEMENT, 12, 19, 20, 21, 22.
26. **Convening authority can not dictate**—To the court what sentence to adjudge. *See* CONVENING AUTHORITY, 60; CRITICISM OF COURTS-MARTIAL, 36.
27. **Court**—Should not prescribe in its sentence how or when such sentence shall be executed. Such matters are properly within the province of the reviewing authority. *See* COURT, 168; GENERAL ORDER No. 110, July 27, 1914, 21.
28. **Court-martial orders**—Should be consulted to secure uniformity. *See* COURT-MARTIAL ORDERS, 17.
29. **Date**—To begin. C. M. O. 27, 1887, 16. *See also* ANTEDATING, 3.
30. **Death.** *See* DESERTION, 137; CHARGES AND SPECIFICATIONS, 47; MILITARY COMMISSIONS, 1; SENTENCES, 70.
31. **Deck court.** *See* DECK COURTS, 51–56.
32. **Deprivation of liberty on shore on foreign station.** *See* DEPRIVATION OF LIBERTY ON SHORE ON FOREIGN STATION.
33. **Designation and name of accused**—Should be included in sentence. C. M. O. 37, 1909, 3; 42, 1909, 6; 55, 1910, 8; 30, 1910, 7; 1, 1913, 5; 20, 19, 1913, 3; 42, 1914, 5; 2 1915, 2. *But see* C. M. O. 12, 1914; 17, 1914; 23, 1914, where name and designation was erroneously omitted. *See also* DESIGNATION OF ACCUSED, 2–4.
34. **Dictate**—Convening authority can not dictate to court what sentence to adjudge. *See* CONVENING AUTHORITY, 60; CRITICISM OF COURTS-MARTIAL, 36.
35. **Disapproved by convening authority**—No sentence can be carried into execution which has been disapproved by the convening authority (fleet) and the Secretary of the Navy is without power. *See* CONVENING AUTHORITY, 21; CRITICISM OF COURTS-MARTIAL, 35; REVIEWING AUTHORITY, 20.
36. **Discharge.** *See* BAD-CONDUCT DISCHARGE; DISHONORABLE DISCHARGE; ORDINARY DISCHARGES.
    Remission of unexecuted loss of pay by discharge. *See* BAD-CONDUCT DISCHARGE, 3.
37. **Dissolution of court**—Sentence imposed prior to dissolution may be approved. *See* C. M. O. 4, 1914, 1.
38. **Dismissal.** *See* ACTING BOATSWAINS, 2; DISMISSAL.
39. **Erasures.** *See* ERASURES, 2, 3.
40. **Extra police duties.** *See* EXTRA POLICE DUTY.
41. **Excessive.** *See* CONVENING AUTHORITY, 60; EXCESSIVE SRNTENCES.
42. **Executed fully**—Can not be any restoration. *See* PARDONS, 35.

Digitized by Google

43. **Same**—When the sentence of a naval court-martial, lawfully confirmed, has been executed, the proceedings in the case are no longer subject to review by the President; they have passed beyond his control and are at an end. (15 Op. Atty. Gen., 291.) File 26516–6, J. A. G., May 28, 1909. *See also* 7 Op. Atty. Gen., 99; 25 Op. Atty. Gen., 581; NUMBERS, LOSS OF, 11, 12.
44. **Execution, impossibility of**—To lose ten numbers when only seven. C. M. O. 18, 1897, 5.
45. **Exemptions in sentences.** *See* EXEMPTIONS IN SENTENCES.
46. **Extra police duties.** *See* DECK COURTS, 56; EXTRA POLICE DUTY.
47. **Figures**—The sentence as recorded in the handwriting of judge advocate should express the period of confinement in figures as well as in words. G. C. M. Rec. 30083.
48. **Flogging.** *See* DESERTION, 119; FLOGGING, Marine Corps Gazette, March, 1916, p. 45.
49. **Form of sentence**—Sentences of general courts-martial in the cases of enlisted men of the Navy and Marine Corps which include confinement at hard labor will ordinarily be in the following form:

"The court therefore sentences him, ——— ———, ———, United States ——— (to be reduced to the rating (or rank) of ———), to be confined for a period of ——— (then to be dishonorably discharged from the United States naval service), and to suffer all the other accessories of said sentence, as prescribed by the Navy Regulations." (R–816 (4).)

50. **Fraudulent enlistment**—Enlistments in both Navy and Marine Corps. *See* FRAUDULENT ENLISTMENT, 83.

Sentence should include dishonorable discharge. *See* FRAUDULENT ENLISTMENT, 40, 84.

51. **Guard duty.** *See* GUARD DUTY, 3.
52. **Handwriting**—Sentences must be in handwriting of deck-court officers, recorders, or judge advocates. C. M. O. 24, 1909, 3; 29, 1914, 5; 42, 1914, 5; 8, 1915; G. C. M. Rec. 22105, 22149. *See also* HANDWRITING, 7–9; REVISION, 18, 35, 36.
53. **Hard labor.** *See* HARD LABOR.
54. **Illegal.** *See* BREAD AND WATER, 4.
55. **Inappropriate sentences**—"To be discharged with bad-conduct discharge, as a deserter, the discharge to be dated upon the day he left the *Juniata*, May second, eighteen hundred and eighty-nine." Disapproved by the department as "being both improper and inadequate." C. M. O. 70, 1889.

Similarly, "to be dishonorably discharged as a deserter from the service." Department disapproved as inappropriate and inadequate. C. M. O. 82, 1889.

56. **Same**—Department does not favor sentences of public reprimand for officers; loss of pay for commissioned officers other than commissioned warrant officers; or suspension from duty. *See* PAY, 100, 109. PUBLIC REPRIMAND, 5; SUSPENSION FROM DUTY.
57. **Insanity.** *See* INSANITY, 37, 38, 39.
58. **Interlineations**—The sentence must be recorded by the deck-court officer's, recorder's or judge advocate's own hand and must be free from erasures and interlineations. G. C. M. Rec. 23760. *See also* File 26251–11076, Sec. Navy, Oct. 13, 1915, where an initialed interlineation was held not to invalidate.

In reviewing the general court-martial record in the case of a private, it was noted that the sentence contained an interlineation initialed by the judge advocate. While this irregularity was not such as would invalidate the proceedings, the department disapproves such action by the judge advocate. The members of the court, as well as the judge advocate, are responsible that the record does not contain irregularities of this character. (Forms of Procedure, 1910, p. 43.) File 26251–11076, Sec. Navy, Oct. 13, 1915; G. C. M. Rec. No. 31051; C. M. O. 35, 1915, 7.

59. **Joinder.** *See* JOINDER, TRIAL IN, 15.
60. **Judge advocate**—Must sign sentence. C. M. O. 30, 1900.
61. **Mandatory.** *See* CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN, 6; REDUCTION IN RATING, 19.
62. **Marine serving with Army.** *See* MARINES SERVING WITH ARMY, 6, 7.
63. **Midshipmen.** *See* MIDSHIPMEN, 32.
64. **Mitigation or remission after final action.** *See* CONVENING AUTHORITY, 62.
65. **Name and designation**—Of accused should be included in sentence. *See* DESIGNATION OF ACCUSED, 2, 3; NAMES, 6; SENTENCES, 33.
66. **Same**—Must be in handwriting of recorder or judge advocate. *See* DESIGNATION OF ACCUSED, 4.
67. **Numbers in sentence.** *See* SENTENCES, 47.
68. **Numbers, loss of.** *See* NUMBERS, LOSS OF.

Digitized by Google

69. **Officers**—The policy of the department does not favor a sentence involving solely loss of pay in the case of commissioned officers other than commissioned warrant officers. C. M. O. 48, 1915, 5. *See also* PAY, 100.
70. **Old sentences**—"To be fined five dollars and shot to death but recommended to mercy." G. C. M. Rec. 116, July 16, 1812.
"To be privately advised to be more circumspect." G. C. M. Rec. 111.
71. **Pay, forfeiture of.** *See* PAY.
72. **Same**—Remission by discharge. *See* BAD-CONDUCT DISCHARGE, 3.
73. **Paymaster General**—The following sentence was confirmed by the President: "The court thereupon sentenced the said Paymaster General * * * 'to be dismissed from the position of Chief of the Bureau of Provisions and Clothing in the Department of the Navy. To be suspended from rank and duty as a pay inspector, on furlough pay, for three years, and to retain his present number in his grade during that period.'" C. M. O. 8, 1886, 33.
74. **Paymaster's clerk**—While not necessary sentence of dismissal was confirmed by President. C. M. O. 24, 1915; 26, 1915. *See also* PAYMASTER'S CLERKS, 8, 9.
75. **Physical condition of accused.** *See* CLEMENCY, 41.
76. **Phraseology**—In one case the department remarked—The sentence was not expressed in the phraseology outlined in the Forms of Procedure, 1910, p. 42. The members of the court, as well as the judge advocate, should always remember that "while the phraseology used [in the Forms of Procedure] need not be absolutely adhered to" (Forms of Procedure, 1910, p. 3) it should not be departed from unless there is a very good reason for doing so. C. M. O. 6, 1916, 4.
77. **President**—May remit sentences, etc. *See* PARDONS; PRESIDENT OF THE UNITED STATES.
78. **Public reprimand.** *See* PUBLIC REPRIMAND.
79. **Rank**—Of accused, when an officer or marine, should be included in sentence. *See* SENTENCES, 33.
80. **Rating**—Of accused when an enlisted man of the Navy should be included in sentence. *See* SENTENCES, 33.
81. **Reconsideration of.** *See* File 26258-302, May 29, 1912. *See also* 16 Op. Atty. Gen. 104.
82. **Reduction in rating.** *See* REDUCTION IN RATING.
83. **Remission or mitigation after final action.** *See* CONVENING AUTHORITY, 62.
84. **Remission of unexecuted loss of pay**—By discharge. *See* BAD-CONDUCT DISCHARGE, 3.
85. **Remitted**—Sentence should be remitted only as an act of clemency toward the accused. File 26287-560, Sec. Navy, Aug. 3, 1910. *See also* File 26251-7004:2, Sec. Navy, Mar. 31, 1913; ALLOTMENTS, 6, 7; CLEMENCY, 53; PAY, 23.
86. **Remitted in toto**—To avoid a miscarriage of justice. C. M. O. 37, 1915, 1.
87. **Restoration to duty in sentence**—Court has no power to sentence an accused to be released and restored to duty upon the expiration of the period of confinement. C. M. O. 60, 1892; 41, 1900; 37, 1909, 3. *See also* COURT, 168.
88. **Restriction.** *See* RESTRICTION.
89. **Reviewing authority**—Court usurps prerogatives of reviewing authority by adjudging an inadequate sentence. *See* COURT, 164.
90. **Same**—Reviewing authority of a summary court-martial disapproved the proceedings but approved the sentence. *See* REVIEWING AUTHORITY, 20.
91. **Revision**—Sentence adjudged in revision after dissolution of court is of no legal effect. *See* COURT, 68; SENTENCES, 37.
92. **Same**—Sentence, even if adhered to, should be in the handwriting of the judge advocate. *See* REVISION, 18; SENTENCES, 52.
93. **Revoked or removed**—The sentence of an officer who was convicted by general court-martial of negligence which caused the loss of his ship, was later "removed in consequence of the good conduct" of said officer during the War of the Rebellion. G. O. 101, Mar. 11, 1869. *See also* G. O. 102, Mar. 11, 1869, and G. O. 104, Mar. 13, 1869, in which sentences were "revoked." In these cases pay which had been forfeited was restored.
94. **Revoked**—By the Secretary of the Navy, after having been promulgated. G. O. 104, Mar. 13, 1869; 113, Mar. 18, 1869; 102, Mar. 11, 1869; 101, Mar. 11, 1869.
95. **Secretary of the Navy**—May place an officer on furlough if he is not dismissed when found guilty of vulgar and indecent acts and associations. C. M. O. 49, 1915, 27. *See also* OFFICERS, 106.
96. **Same**—Power over sentence. *See* SECRETARY OF THE NAVY, 50-57.

Digitized by Google

97. **Severe**—Proceedings and finding approved but, in view of unanimous recommendation to clemency and the fact that the sentence appeared to be a *severe* one, the sentence was disapproved. C. M. O. 87, 1907, 1.
98. **Setting aside.** *See* SETTING ASIDE.
99. **Signatures of members.** *See* AUTHENTICATION OF SENTENCES, 1; COURT, 175.
100. **Signed**—The sentence of a summary court-martial shall be signed by all the members and the recorder. C. M. O. 15, 1910, 12. *See* COURT, 175, where signature was omitted.
101. **Solitary confinement.** *See* SOLITARY CONFINEMENT.
102. **Statutory.** *See* STATUTORY SENTENCES.
103. **Stripped of insignia.** *See* C. M. O. 7, 1888, 1; An. Rep., J. A. G., 1908, p. 21.
104. **Substitution**—After a case has been finally acted on the reviewing authority is not authorized to change a sentence involving reduction to "seamen gunner" to reduction to "seamen" as this would be substituting a different sentence for that imposed by the court, and would not be authorized. C. M. O. 49, 1914, 6. *See also* SEAMEN GUNNERS, 4.
105. **Same**—Court not to substitute punishment of different nature from limitations—A court is not to sentence an officer to punishment which is of a different nature than that prescribed by the limitations, as restriction to ship or station, loss of pay, suspension from duty, in the case of drunkenness where the limitation for this offense is "to lose ten (10) numbers." C. M. O. 21, 1910, 17; 1, 1911, 3.
106. **Summary courts-martial.** *See* SUMMARY COURTS-MARTIAL, 86–92.
107. **Suspended for one year**—Action withheld for one year. C. M. O. 3, 1909.
108. **Suspension from duty.** *See* SUSPENSION FROM DUTY.
109. **Suspended twice by President**—And then remitted. *See* DISMISSAL, 33.
110. **Typewritten**—The finding and sentence of deck courts and courts-martial should never be typewritten, but should be in the handwriting of the deck court officer, recorder or judge advocate. C. M. O. 24, 1909, 3. *See also* HANDWRITING, 9; REVISION, 35, 36.
111. **Uniformity**—Where the same summary court-martial adjudged sentences in two different cases for practically identical offenses which varied greatly, the department stated: "Since it is obvious that the best interests of discipline and justice can not be served if the equality of punishments is disregarded, the department directed the convening authority in these cases to exercise care in the future that sentences of summary courts-martial conform to an established schedule before final approval and publication. C. M. O. 10, 1911, 8.
112. **Same**—Courts-martial should use prescribed forms of sentences in order to secure uniformity. C. M. O. 37, 1914; 52, 1914.
"Undue leniency is as hurtful to the proper conduct of a military command as undue severity and should be carefully avoided." File 20971-19, Sec. Navy, Aug. 20, 1909.
113. **Undesirable sentences.** *See* PUBLIC REPRIMAND, 5; SENTENCES, 55, 56; SUSPENSION FROM DUTY, 4, 5, 9–13.
114. **Unique sentence.** C. M. O. 31, 1881, 2.
115. **Unusual sentence.** C. M. O. 27, 1887, 16.
116. **Vote on**—Divulging. *See* OATHS. 47.
117. **Warrant officers (commissioned).** *See* WARRANT OFFICERS, 29, 30.
118. **"Year"**—Where word "year" is used, year is construed to mean 12 calendar months. File 26504-24, J. A. G., Nov. 3, 1908.

SENTINELS.

1. **Abuse of**—Officer tried by general court-martial. *See* COUNTERSIGN, 1; OFFICERS, 110; SENTINELS, 18.
2. **Condition when posted**—The department mitigated the sentence of a sentinel who had been found guilty of "Leaving post before being regularly relieved" because "of the fact that a doubt exists as to the condition of the accused for duty at the time he was posted as a sentry." C. M. O. 69, 1897, 2.
3. **Corporal of the guard**—Tried by general court-martial for assaulting and striking a general court-martial prisoner. C. M. O. 4, 1896.
4. **Countersign.** *See* COUNTERSIGN.
5. **Disciplinary Barracks.** *See* SENTINELS, 13.
6. **Disrespect**—Officer tried by general court-martial. *See* COUNTERSIGN, 1; OFFICERS, 110; SENTINELS, 18.
7. **Drunk**—Sentinel posted when drunk. *See* SENTINELS, 2, 15, 16.
8. **Escaping prisoners**—Duty of sentinel. *See* MANSLAUGHTER, 9; PRISONERS, 19.
9. **Firearms**—Use of. *See* FIREARMS, 2.

Digitized by Google

10. **Guard duty.** *See* MANSLAUGHTER, 9; SENTINELS, 13.
11. **"Interfering with a sentinel"**—Enlisted man tried by general court-martial on this charge. C. M. O. 102, 1903, 2.
12. **Marine Corps.** *See* MANSLAUGHTER, 9; SENTINELS, 13.
13. **Naval prisons**—"A sentinel in charge of prisoners or detentioners shall be instructed that his most important duties are to preserve the peace of the prison or detention system, prevent the escape of prisoners or detentioners, and observe their performance of the work assigned. He shall maintain a soldierly bearing and shall, as far as practicable, use military commands in formation, marching, halting, breaking ranks, and in controlling prisoners or detentioners." (Manual for the Government of United States Naval Prisons and Detention Systems, 1916, Sec. 90, pp. 18–19.)
14. **Officer**—Tried by general court-martial on charge of "conduct to the prejudice of good order and discipline" for disrespect and abuse of a sentinel. *See* COUNTERSIGN, 1; OFFICERS, 110; SENTINELS, 18.
15. **Posted when intoxicated**—The accused was intoxicated when posted as a sentinel—Was charged with "Drunkenness on post"—The department stated: "It appears from the evidence that the accused was * * * when posted as a sentinel; and, while such fact does not render him any the less liable for the offenses of which he has been found guilty, the department considers that it does to some extent relieve his delinquencies of their flagrancy." (*See* C. M. O. 62, 1894; 89, 1895.) C. M. O. 21, 1897, 2. *See also* C. M. O. 136, 1900; 142, 1900; 80, 1898.
16. **Same**—Should not be allowed to mount guard when intoxicated. C. M. O. 136, 1900; 142, 1900.
17. **Prisoners**—Duty of sentinel when prisoner attempts to escape. *See* MANSLAUGHTER, 9.
18. **Respect for**—An officer having been found guilty of "Conduct to the prejudice of good order and discipline," the specifications thereunder alleging that he abused the sentinel and in general acted prejudicial to good order and discipline, the department stated in part: "The department deems it proper to call attention to the remarkable fact that an officer of his age, rank, and an experience in the service covering a period of 23 years should display such ignorance of the duties of sentinels, such lack of respect for the sacred character of the countersign, and such a thorough disregard of the proper treatment of inferiors charged with responsible duties." C. M. O. 95, 1893, 3.

SENTRIES. *See* SENTINELS.

SEPARATE OR DETACHED BATTALIONS.

1. **Deck courts**—Convening of, by commanding officers of. *See* DECK COURTS, 10–14; SUMMARY COURTS-MARTIAL, 22, 38.
2. **Summary courts-martial**—Convening of, by commanding officers of. *See* SUMMARY COURTS-MARTIAL, 22, 38.

SEPARATE OR DETACHED COMMAND.

1. **Deck courts**—Convening of, by commanding officers of. *See* DECK COURTS, 10–14; SUMMARY COURTS-MARTIAL, 22, 38.
2. **Summary courts-martial**—Convening of, by commanding officers of. *See* SUMMARY COURTS-MARTIAL, 22, 38.

SERVICE ON NAVAL COURTS-MARTIAL. *See* COURT, 170.

SERVICE RECORDS. *See also* DESCRIPTIVE LISTS; EVIDENCE, DOCUMENTARY, ¶ 19; LETTERS, 16; REPORTS OF DESERTERS RECEIVED ON BOARD.

1. **Acquittals**—The commanding officer of a naval vessel is not authorized to make entry upon the enlistment record of an enlisted man who has been acquitted of the offense charged against him by a duly constituted court, as such action would be contrary to R-624 (2). File 26287-587.
2. **Charged with "Desertion"**—"An entry upon the enlistment [service] record that a man deserted upon a certain date is not legal evidence of desertion by him, but is evidence only that he is charged with desertion." File 26251-1963:1, J. A. G., Aug. 17, 1910, p. 7. SERVICE RECORDS, 16, overrules above.
3. **Same**—Where an accused was found guilty of "Desertion," the only evidence introduced being "his enlistment record and descriptive list and an entry in the log of the U. S. R. S. *Vermont*, the former stating that the accused had run at Newport, July 7, 1901, from the U. S. S. *Alabama*, and the latter that he was brought on board the U. S. R. S. *Vermont* August 10 following." The accused made no defense and the court found him guilty of the charge of desertion. "The documents introduced in

Digitized by Google

evidence afforded no proof whatever of the commission of the offense to which they related, but merely of the fact that the accused was charged with having left the *Alabama* and was delivered on board the *Vermont, wholly insufficient to establish the offense of desertion or that of a lesser offense, absence without leave.*" C. M. O. 156, 1901. *See also* C. M. O. 52, 1902. SERVICE RECORDS, 16, overrules above.

4. **Collateral matters.** *See* REPORTS OF DESERTERS RECEIVED ON BOARD, 4.
5. **Copy of appended to record**—Certified copy, not original, appended to record. C. M. O. 31, 1896, 3. *See also* EVIDENCE, DOCUMENTARY, 36, 45; SERVICE RECORDS, 23.
6. **Deck courts**—Entries in service record of convictions by deck courts must be authenticated by the signature of the commanding officer. *See* DECK COURTS, 21.
7. **Definition.** *See* SERVICE RECORDS, 15.
8. **Departure from service**—Service records are inadmissible in "Desertion" cases except to prove departure from the service. C. M. O. 37, 1909, 9; 47, 1910, 9. But *see* SERVICE RECORDS, 16, which modifies above.
9. **Desertion.** C. M. O. 31, 1896, 2; 155, 1900; 76, 1901; 74, 1903, 39; 28, 1904, 3; 30, 1910, 6.
10. **Same**—"It is manifest that the court erred in admitting the extract from the enlistment record of the accused as evidence of the offense, viz, 'Desertion,' therein referred to. The entry in question amounted to nothing more than a report against the accused by his commanding officer, charging him with 'Desertion.' Moreover, there was apparently no attempt made to identify the document introduced, as should have been done, by the oral testimony of its proper custodian. Even had this been done, however, the enlistment record would still have been not properly admissible, as the officer who signed the original entry * * * was available as a witness, and should have been called to testify in the premises." C. M. O. 146, 1901, 1. *See also* C. M. O. 156, 1901, 1, 2. *But see* SERVICE RECORDS, 16.

In a case disapproved because the evidence was insufficient to convict the department stated: "It is not manifest to the department why the judge advocate did not produce the enlistment [service] record of the man and read the usual entries contained thereon, showing the date and place from which the original absence took place." C. M. O. 37, 1909, 5. *See also* C. M. O. 42, 1909, 16.

Where the judge advocate introduced and the court received in evidence an extract from the accused's service record setting forth the fact that he had disposed of his uniform and effects, the department *held:* That, "this is not evidence, but an *ex parte* statement of the commanding officer of the vessel to which [the accused] was attached, based probably upon reports made to him; and the court erred in receiving it in evidence." "It has been held by the department that an enlistment [service] record, introduced in a trial for desertion, is only evidence to show the departure of the man from his station. Any attending circumstances which may have been recorded in the enlistment [service] record must be proved by confrontation of the accused with the witnesses against him." C. M. O. 47, 1910, 9. *Overruled* by C. M. O. 31 1915, 14-16, contained in SERVICE RECORDS, 16.

11. **Evidence**—The statement of age contained in the service record is evidence of such a character as may be accepted by naval courts-martial. C. M. O. 94, 1905, 1.
12. **Fraudulent enlistment**—The accused was charged with "Fraudulent enlistment," and the judge advocate introduced the service record of the accused. Counsel for accused objected to the introduction of this service record of the accused in his fraudulent enlistment on the ground that it was irrelevant *Held:* Pending the introduction of *prima facie* proof that the accused and the *alias* were one and the same person this service record was clearly irrelevant and the court erroneously overruled the objection to its introduction. C. M. O. 6, 1913, 3; *see also* C M. O. 94, 1905, 1.
13. **Intent, proof of**—An entry upon an enlistment record properly identified is always admissible in evidence. Such an entry is no proof, however, of intent, as, the specific intent to abandon the naval service or terminate the pending contract of enlistment. File 3047-04, J. A. G. *But see* SERVICE RECORDS, 16, which modifies above.
14. **Same**—"An entry upon the enlistment record that a man deserted upon a certain date is not legal evidence of a desertion by him, but is evidence only that he is charged with desertion." File 26251-1963:1. *But see* SERVICE RECORDS, 16, which modifies above.
15. **Nature of**—An enlistment record is an "original document" and "is the official history of the man's service, including his conduct record, during the period of such enlistment, expressly required by law and regulations to be kept for purposes of record." C. M. O. 105, 1903, 4. *See also* C. M. O. 74, 1903, 2; LETTERS, 16.

Digitized by Google

16. **Same**—"Service Records" and "Reports of Deserters Received on Board" are such documents as may, when properly identified and produced, be admitted in evidence. The general rule is that it is sufficient if the record is kept in the discharge of a public duty and is a convenient and appropriate mode of discharging that duty in order that it may be admitted as a public document. Thus, a record has been held admissible if it was kept by the direction of superior officers and in accordance with the rules and practice of the office. (17 Cyc., 307.) The entries made in service-record books and official certificates are not in the nature of private entries or memoranda, since they are made by public officers, whose duty it is to record truly the facts stated therein; and it is not necessary that the entries be made personally by a public officer himself, if the entries are made under his direction by a person authorized by him.

The most frequent use of documentary evidence before courts-martial arises in cases of trial for "Deserton," and there has been some confusion in applying the rules of evidence in this regard. The following rules apply to the use of "Service Records" and "Reports of Deserters Received on Board" as evidence before naval courts-martial:

The mere entry of desertion in a "Service Record," with entries of attendant circumstances, is not sufficient to prove the *gravamen* of the offense. While admissible, it is only *prima facie* evidence, open to explanation, and to rebutting testimony, and while it would, in the absence of rebutting testimony, show that the accused was attached to and serving on board the vessel, or stationed at the navy yard or naval station indicated, that he was found to be absent at a certain time, that his absence continued for 10 days or more, and that it was not satisfactorily explained, it would not be of sufficient weight to establish the fact that he had intended permanently to abandon the service, that he was possessed of the *animus non revertendi* when the officer made the entry. Yet the entries mentioned are admissible evidence of the stated facts that were within the knowledge of the officers who made the entries, and are by no means without probative force in determining whether the offense of "Desertion" has been committed.

The entries on a "Report of Deserter Received on Board" are entitled to consideration when such report has been properly received in evidence, to prove the date and place of return from unauthorized absence of the party mentioned therein, together with his condition at the time, the state of his wearing apparel, etc. (*See* File 26504-142, J. A. G., May 18, 1912.)

The question of *animus non revertendi* must, of necessity, always be a conclusion from certain facts, and is for the court to determine from all the evidence in the case.

The foregoing (introduction of "Service Record" and "Report of Deserters Received on Board") "present applications in various instances of the well-established rule that official reports and certificates made contemporaneously with the facts stated, and in the regular course of official duty, by an officer having personal knowledge of them, are admissible for the purpose of proving such facts." (U. S. *v.* Corwin, 129 U. S., 385; U. S. *v.* McCoy, 193 U. S., 602.) They are not conclusive evidence of the facts stated therein, and rebutting testimony may be offered; but they may well establish the case for the prosecution, if an accused fail to produce sufficient evidence in rebuttal thereof to overcome the *prima facie* case so made out against him.

"Manifestly the design and meaning of this rule is not to convert incompetent and irrelevant evidence into competent and relevant evidence simply because it is contained in an official communication." (U. S. *v.* Corwin, 129 U. S., 385-386.) Should the officer who made the entries be testifying under oath, his assertion that an accused had deserted would be excluded as inadmissible; he could only be heard to state facts within his knowledge, such as the fact that the acused had been absent without leave, had disposed of his clothing before so absenting himself, etc., from which the court would conclude whether such facts would warrant a finding of guilty on a charge of "Desertion." The officer's assertion that an accused had deserted would itself imply the existence of primary and more original and explicit sources of information.

The facts necessary to make out a case of "Desertion" may be proved not only by the records, but also by parol evidence. Where records, as the above, are introduced as evidence, it is not necessary or required that the officer who made the entries be shown to be unavailable by reason of death, absence, or other circumstances of such a nature. C. M. O. 31, 1915, 14-16. *See also* EVIDENCE, DOCUMENTARY, 19.

17. **Not best evidence.** *See* REPORTS OF DESERTER RECEIVED ON BOARD, 3. But *see* SERVICE RECORDS, 16.

Digitized by Google

18. **Same**—An entry on an enlistment record is admissible in evidence for certain purposes; if practicable, the person making the entry should be called. C. M. O. 156, Sept. 20, 1901. *See also* C. M. O. 74, 1903, 3. *But see* SERVICE RECORDS, 16.
19. **Summary courts-martial**—Before a summary court-martial record is transmitted to the Judge Advocate General, a brief transcript shall be taken therefrom (except in case of acquittal) and furnished to the officer of the deck and to the executive officer for entry, respectively, in the ship's log and upon the service record of the man concerned. This transcript shall comprise the date and nature of the offense proved and the punishment adjudged as approved by the convening and reviewing authority, with the date of such approval. If the said punishment be disapproved or mitigated subsequently by the department, an entry to that effect shall be made as soon as notice thereof is received. If bad-conduct discharge, or both, be included in the sentence, the final action in either case shall be similarly entered. The transcript and entries shall be authenticated as soon as made by the signature of the commanding officer. (R–624 (2).) C. M. O. 6, 1909, 4.
20. **Plea in bar held valid**—No entry should be made on service record of a summary court-martial if he is not brought to trial by reason of his plea in bar of trial being adjudged valid by the court. File 26287–1677:1, J. A. G., Aug. 22, 1913. *See also* PLEA IN BAR, 9.
21. **Previous convictions**—An entry of conviction by a deck court on an enlistment record must be authenticated by the signature of commanding officer. File 27217–12.
22. **Procedure**—In introducing in evidence. *See* EVIDENCE, DOCUMENTARY, 36, 45; SERVICE RECORDS, 23.
23. **Record of Proceedings**—The accused was tried before a general court-martial on the charge of "Desertion" and pleaded "not guilty." In the course of the trial the judge advocate went on the stand as a witness for the prosecution as the legal custodian of the current enlistment record of the accused, and it was noted that the procedure followed was at variance with that laid down in the Forms of Procedure, 1910, page 32; that there was no notation on the record of proceedings that a copy of such documentary evidence was appended to the record, nor in fact was a copy appended. (Forms of Procedure, 1910, p. 32; C. M. O. 36, 1914, p. 7.) C. M. O. 41, 1914, 4. *See also* EVIDENCE, DOCUMENTARY, 19.
24. **Same**—Extracts read from service record as evidence should not be embodied in the record of proceedings. A certified copy should be appended. G. C. M. Rec. 29934; 30041. *See also* SERVICE RECORDS, 23.
25. **Witnesses**—Service record of a witness, improper as evidence of credibility. C. M. O. 47, 1910, 4–5.

SESSIONS OF NAVAL COURTS-MARTIAL. *See* COURT, 126, 127, 171–174.

SET OFF.

1. **Discharge**—Where a man is discharged upon expiration of enlistment without having been fully checked, the amount of a summary court-martial sentence, because of sufficient pay not having accrued to satisfy the forfeiture, the amount of such sentence which remained unchecked at date of discharge can not be *set off* against pay coming due under a subsequent enlistment. His discharge from the previous enlistment operated as a remission of the unexecuted portion of the forfeiture. Comp. Dec. Apr. 6, 1914, 158 S. and A. Memo. 3035; File 7657–241, June 26, 1914.

SETTING ASIDE.

1. **Accused**—Requested findings and sentence be set aside on grounds that he had not received a public trial. C. M. O. 6, 1915, 6. *See also* JUDGE ADVOCATE, 105.
2. **Deck court.** *See* DECK COURTS, 58.
3. **Findings set aside**—No arraignment on specification. C. M. O. 17, 1915, 1–2.
   Findings set aside in a fleet case by the Secretary of the Navy, as specification did not support the charge. C. M. O. 4, 1916. *See also* FRAUD, 5.
4. **Findings and sentence**—Of a general court-martial set aside. C. M. O. 14, 1914, 3.
5. **Proceedings**—Of a general court-martial set aside as null and void. C. M. O. 4, 1914, 11. *See also* C. M. O. 33, 1914, 5.
6. **Proceedings, findings, and sentence**—Of a general court-martial set aside as illegal. C. M. O. 4, 1916, 3.
7. **Same**—Of a general court-martial set aside. C. M. O. 78, 1905, 1.

Digitized by Google

8. **Proceedings, findings, and sentence once set aside can not be suspended**—The Acting Secretary of the Navy set aside the proceedings, findings, and sentence of a certain general court-martial and directed the discharge of the accused from the naval service in accordance with the recommendation of a board of medical survey. Thereafter the Bureau of Navigation recommended that action on the proceedings, findings, and sentence in the case be suspended. *Held*, that "the Secretary of the Navy having once acted upon the case and set aside the proceedings, findings, and sentence of the court, his powers in the premises were thereby exhausted and there is now no authority in him to revoke such action and hold the sentence in abeyance (17 Op. Atty. Gen. 302.)" File 26251-4424:7, J. A. G.
9. **Revocation**—Of action of setting aside. *See* SETTING ASIDE, 8.
10. **Secretary of the Navy**—"The Secretary of the Navy may *set aside* the proceedings, or remit or mitigate, in whole or in part, the sentence imposed by any naval court-martial convened by his order or by that of any officer of the Navy or Marine Corps." (A. G. N. 33; sec. 9, act Feb. 16, 1909; 35 Stat., 621.)
"The department reviews the record of all naval courts-martial, with a view to determining whether or not any action shall be taken under the authority of the above-quoted provision" of law. C. M. O. 26, 1912, 4. *See also* SECRETARY OF THE NAVY, 27-30, 32-37, 54.
11. **Sentence**—Of a general court-martial set aside. C. M. O. 78, 1905, 1; 4, 1916. *See also* C. M. O. 33, 1905, 1.
12. **Same**—That part of a sentence involving confinement set aside, as sentence did not provide for forfeiture of pay. C. M. O. 5, 1914, 3.
13. **Same**—Of a summary court-martial set aside as illegal. C. M. O. 22, 1915, 5-6. *See also* BREAD AND WATER, 4.
14. **Summary court-martial**—Proceedings and sentence set saide. C. M. O. 5, 1914, 4; 33, 1914, 6-8.
15. **Same**—Sentence set aside. C. M. O. 5, 1916, 6.
16. **Trial**—The trial, conviction, and judgment on the merits in the case was set aside by the department and the penalty remitted. C. M. O. 9, 1893, 13. *See also* C. M. O. 18, 1897, 5.

"SHALL AND MAY." *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 77.

SHERIFF.
1. **Rewards for deserters.** *See* REWARDS, 2.

SHIPS. *See* VESSELS.

SHIP'S LOG AS EVIDENCE. C. M. O. 15, 1910, 5.

SHIP'S STORE.
1. **Comptroller of the Treasury**—Is without jurisdiction to render a decision as to the legality of proposed expenditures from profits from sales by ship's stores in the Navy in view of the provision of the act of June 24, 1910 (36 Stat., 619), which provides that such profits should be accounted for to the Bureau of Supplies and Accounts. File 26254-1759:2. *See also* Comp. Dec. Apr. 28, 1915.
2. **Public money**—The profits from sales made by ship's stores, as authorized by act of June 24, 1910 (36 Stat., 619), are not public money within the meaning of R. S. 3648. (Comp. Dec. Aug. 11, 1914; File 26254-1571:2.) *See also* File 26254-1759, Apr. 20, 1915.
3. **Venereal prophylactic**—Sale of prohibited. *See* VENEREAL PROPHYLACTIC.

SHIP'S TAILOR.
1. **Deserted.** C. M. O. 6, 1915, 9. *See also* DESERTERS, 11.
2. **General court-martial**—Tried by. C. M. O. 24, 1879.

SHIPKEEPERS.
1. **Naval Militia.** *See* NAVAL MILITIA, 34, 39-41.

SHIPPING ARTICLES AS EVIDENCE. C. M. O. 1, 1911, 5; 12, 1911, 3; 1, 1912, 5.

SICK LEAVE.
1. **Promotion while on.** *See* RETIREMENT OF OFFICERS, 33.

SICK LIST.
1. **Drunkenness**—While on sick list. *See* DRUNKENNESS, 76, 84.
2. **Promotion**—Of officer while on sick list. *See* RETIREMENT OF OFFICERS, 33.

Digitized by Google

SICKNESS. *See also* DISEASES.
1. **Definition of "disease" as used in the act of August 29, 1916 (39 Stat. 580)**—The term "disease" as used in this act does not include "injury." (Compt. Dec., Nov. 23, 1916.) File 7657-398:2.
2. **Excuse**—Sickness has never been regarded as an excuse for abandoning station before being regularly relieved because, if indisposed, could be regularly relieved. C. M. O. 25, 1910, 2.

SIGNALS.
1. **English Morse code**—Adopted for visual signaling in and between the Army and Navy. G. O. 345, Apr. 3, 1886.
2. **Typhoon signals.** C. M. O. 7, 1915.

SIGNAL BOOKS.
1. **Battle signal books**—Officers tried by general court-martial for loss of. *See* BATTLE, 1; CONFIDENTIAL PUBLICATIONS, 1, 3.
2. **Regulations**—Force and effect as. *See* REGULATIONS, NAVY, 14.

SIGNALMEN.
1. **Naval Reserve Corps.** *See* NAVAL RESERVE, 3.

SIGNATURES.
1. **Forging.** C. M. O. 26, 1915.
2. **Members of courts-martial.** *See* AUTHENTICATION OF SENTENCES; MEMBERS OF COURTS-MARTIAL, 12, 24, 48.

SILENCE AS EVIDENCE OF A CONFESSION. *See* CONFESSIONS, 22.

SILVER SERVICE. *See* GIFTS TO GOVERNMENT, 5.

SIMPLE ACQUITTAL, *See* ACQUITTAL, 27.

"SINGLE ACT OF HAZING." *See* HAZING.

SINGLE IRONS. *See also* DOUBLE IRONS; IRONS.
1. **Sentence**—Among other things the court included in its sentence the use of single irons. C. M. O. 233, 1902.
2. **Same**—That part of the sentence which provided for his confinement in *single irons* disapproved as being unnecessary and unusual for so long a period as six months. C. M. O. 83, 1894, 2.

SINGLE WITNESS. *See* EVIDENCE, 114.

SKYLARKING.
1. **Death of enlisted men.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 49, 71; MANSLAUGHTER, 13 (p. 351).

SLANDER.
1. **Malice**—While malice is an essential ingredient of libel or slander or, as it is sometimes expressed, is the gist of the action therefor, yet the law presumes or implies malice from the publication of words actionable *per se*, whether written or oral, and no actual malice is essential to recovery. (*See* 25 Cyc. 256, 371, 372.) File 26251-12159, Sec. Navy, Dec. 9, 1916, pp. 15-16.
2. **Scandalous conduct tending to the destruction of good morals**—Enlisted men tried by general court-martial for slander under charge of. C. M. O. 35, 1915, 4.

SLEEPING ON WATCH.
1. **Officer**—Tried by general court-martial. C. M. O. 43, 1884; 34, 1912. *See also* G. C. M. Rec. 6250; 8821; 13186.
2. **Specific intent**—Not required. *See* INTENT, 2.

SLEEPING UPON HIS WATCH.
1. **Officer**—Charged with. C. M. O. 25, 1910.
2. **Officers-of-the-deck**—Found guilty of. *See* OFFICER-OF-THE-DECK, 12-14.

SMALLPOX.
1. **Medical officer**—Tried by general court-martial for neglecting his duty by failing to notify his commanding officer of the prevalence of an epidemic of smallpox in a city to which the ship was destined to sail, which information was contained in Public Health Reports officially in his possession, etc. C. M. O. 35, 1914.

Digitized by Google

SMOKER. *See also* C. M. O. 8, 1909; 51, 1910; DRUNKENNESS, 41.
1. **Clemency**—Officer ordered to attend a "smoker." *See* CLEMENCY, 37.
2. **Officers**—Tried by general court-martial for disobeying an order to attend the "United States Atlantic Fleet smoker" at Hotel Astor, New York City. C. M. O. 36, 1912.

SMUGGLING.
1. **"Attempting to smuggle liquor"**—Enlisted men charged with. C. M. O. 31, 1888.
2. **Same**—Enlisted man charged with, under "Conduct to the prejudice of good order and discipline." C. M. O. 42, 1915, 2.
3. **"Smuggling liquor and drunkenness"**—Enlisted man tried by general court-martial. C. M. O. 85, 1889.

SODOMY.
1. **Accomplices.** *See* AIDING AND ABETTING, 7; SODOMY, 6.
2. **Aiding and abetting.** *See* AIDING AND ABETTING, 7.
3. **Assault with intent to commit sodomy.** G. C. M. Rec. 30935.
4. **Charges investigated by department**—For cases where an accused charged sodomy as the cause of his trouble for which on trial, and such *charges investigated* by the department. G. C. M. Rec. 23015; 23595; 23845.
5. **Common law.** *See* SODOMY, 15.
6. **Confessions**—For cases where *confessions* of accomplice were admitted to prove the charge. *See* CONFESSIONS, 7, 23.
7. **Corpus delicti.** *See* CORPUS DELICTI, 4.
8. **Department's purpose to severely punish offenders**—It is the department's purposes that nothing be left undone to bring to justice persons in the Navy who are guilty of sodomy; and when such offenders are convicted by court-martial it is the intention that they shall be rigorously dealt with, to the end that the naval service may not be demoralized as must surely follow lenient treatment of such cases. File 26251-6020:11, Sec. Navy, July 7, 1913.
9. **Drunkenness**—For cases disapproved account *drunkenness*. G. C. M. Rec. 21287.
10. **"Frame-up"**—As a defense. File 26251-10496.
11. **Lectures**—Recommended, "That the commandants and commanding officers of the naval training stations be instructed to cause lectures or talks to be given to apprentices under training, setting forth the nature of such offenses [sodomy, sexual perversion, etc.], the liability of all parties concerned, and the fact that the department insists upon severe punishment being meted out in such cases." File 26251-11479a, J. A.G., Feb. 18, 1916.
12. **Miscellaneous remarks**—For cases having miscellaneous remarks. *See* G. C. M. Rec. 23527; 23695; 23694; 23693.
13. **Prior acts**—Evidence of prior acts of familiarity or prior offenses of the same character are admissible. File 26251-6020:11, Sec. Navy, July 7, 1913.
14. **Proof of.** *See* File 26504-136; 10374-02, J. A. G., Dec. 6, 1902; 21 J. A. G. 479-481; G. C. M. Rec. 10486; Kinnan *v.* State, 86 Neb. 234; 125 N. W. 594; Ann. Cas. 335.
15. **Punishment by statute and common law**—Sodomy was punishable at common law by death, sometimes by burning and sometimes by burying alive. Punishment is, however, almost universally regulated by statute in the several states, which very generally impose long terms in state prisons, in some instances for life. (36 Cyc. 506.) File 26251-6020:11, July 7, 1913.
16. **Scandalous conduct tending to the destruction of good morals**—Where the evidence is not sufficient to establish the crime of sodomy the court should find the accused "guilty in a lesser degree than charged, guilty of scandalous conduct tending to the destruction of good morals," where such finding is warranted by the facts adduced. *See* File 26504-136. *See also* File 231-03: 22 J. A. G. 161, holding that it is competent for the court to find the accused guilty of the included offense of attempting to commit the crime charged should the evidence not be sufficient to sustain a finding of guilty of the charge.
17. **Statute**—No statute applicable to Navy defining "sodomy." G. C. M. Rec. 10486.

SOLICITOR.
1. **Attorney General**—Requests for opinion of. *See* ATTORNEY GENERAL, 16, 17.
2. **Combining**—Offices of the Judge Advocate General and Solicitor. *See* JUDGE ADVOCATE GENERAL, 38.
3. **Counsel**—Solicitor in the office of the Judge Advocate General was assigned as associate and assistant to a judge advocate. *See* COUNSEL, 49.
4. **Duties.** *See* File 26827-3:21.

Digitized by Google

5. **History**—Solicitor's office. *See* JUDGE ADVOCATE GENERAL, 18.
6. **Investigation**—Authorized to administer oaths. *See* OATHS, 41.
7. **Statutes not relating to personnel**—Interpretation of. *See* JUDGE ADVOCATE GENERAL, 20.
8. **Supreme Court**—The solicitor in the office of the Judge Advocate General has represented the United States in the Supreme Court. U. S. *v.* Smith, 197 U. S. 386; File 469, 1904. *See also* COUNSEL, 49, 52.

"SOLICITOR AND NAVAL JUDGE ADVOCATE GENERAL." *See* JUDGE ADVOCATE GENERAL, 18.

SOLICITOR, NAVAL. *See* JUDGE ADVOCATE GENERAL, 18.

SOLITARY CONFINEMENT.
1. **Bread and water**—If sentence involves bread and water, solitary confinement must be included. *See* BREAD AND WATER, 4; CONFINEMENT, 11.
2. **Definition.** *See* CONFINEMENT, 12.
3. **Certificate of medical officer.** *See* CONFINEMENT, 5.
4. **Sentence**—Inasmuch as a month may contain more than thirty days, a sentence of "solitary confinement in double irons on bread and water for *one month*," etc., does not conform to article 30, paragraph 4, Articles for the Government of the Navy, which authorizes summary courts-martial to impose a sentence of solitary confinement not exceeding thirty days, and records containing a sentence of one month are therefore returned for revision. S. C. M. Rec. No. 43097, Sept. 15, 1904.

SPANISH WAR. *See* WAR WITH SPAIN.

SPECIAL DISBURSING OFFICERS. *See also* DISBURSING OFFICERS; PAY OFFICERS.
1. **Hospital ship.** *See* File 7039-279, J. A. G., Jan. 18, 1913.

SPECIAL ORDERS.
1. **Judicial notice.** *See* STATUTES, 10.

SPECIALISTS.
1. **Prisoners**—Examination by. *See* PRISONERS, 32.

SPECIFIC INTENT. *See also* INTENT.
1. **Absence, unauthorized.** *See* ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED, 13; ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 20.
2. **Assault.** *See* ASSAULT, 23, 24.
3. **Assault and battery.** *See* ASSAULT, 23.
4. **Assaulting with a deadly weapon and wounding another person in the service.** *See* ASSAULT, 24; ASSAULTING WITH A DEADLY WEAPON AND WOUNDING ANOTHER PERSON IN THE UNITED STATES NAVAL SERVICE, 3.
5. **Burglary.** *See* BURGLARY, 6.
6. **Definition.** *See* INTENT, 49.
7. **Desertion.** *See* DESERTION.
8. **Drunkenness**—Effect of drunkenness on specific intent. *See* DRUNKENNESS, 49–52.
9. **Duelling.** *See* DUELS, 2.
10. **Embezzlement.** *See* EMBEZZLEMENT, 15, 16.
11. **Forgery.** *See* FORGERY, 1.
12. **Fraudulent enlistment.** *See* FRAUDULENT ENLISTMENT, 23, 27.
13. **Larceny.** *See* THEFT, 21.
14. **Murder.** *See* MURDER, 6, 13.
15. **Perjury.** *See* PERJURY, 15.
16. **Robbery.** *See* INTENT, 2; ROBBERY, 7, 8.
17. **Statute or common law**—Where by statute or common law a specific intent is essential to a crime, it must be proved. *See* COMMON LAW, 11; DESERTION, 77.
18. **Stealing.** *See* THEFT, 7, 21.
19. **Theft.** *See* THEFT, 21.

SPECIFICATIONS. *See* CHARGES AND SPECIFICATIONS.

SPECTATORS.
1. **Presence**—During trial by general court-martial. *See* COURT, 126.
2. **Warned**—By court not to talk of trial. G. C. M. Rec. 30485, p. 304.

Digitized by Google

SPEEDY TRIALS.

1. **Deck courts**—Whenever practicable, the trial shall take place within 48 hours after the offense is committed. Delay in the trial of the accused may be considered in adjudging sentence. (R–507.)
2. **General courts-martial**—The department is desirous of reducing by every practicable means the period of time between the arrest of an accused person for trial and the promulgation of his sentence. To this end, steps have been taken to reduce to a minimum delay in the various operations required in the department in such cases; and each successive step in handling cases before they arrive at the department should similarly be expedited.

   If it is decided by the competent officer that the accused shall be brought to trial before a general court-martial, "the court shall be assembled for that purpose as soon as the nature of the case and the interests of the public service will allow." (Navy Regulations, 1913, R–1408 (1).) General courts-martial should "meet as soon as practicable after each case is received and not delay the trial of any one person until a number of cases have accumulated." (File 26504–111.) Judge advocates should not construe the order of the Secretary of the Navy, dated May 4, 1911, requiring that "reports, with the reasons for delay of trial, be made in each case where the accused is not brought to trial within 10 days after the charges and specifications are received by the judge advocate" (File 26504–111), as authority to unnecessarily delay trials. (*See* C. M. O. 10, 1915, p. 6, with reference to "Speedy trials.") File 26504–111:329, Sec. Navy, May 4, 1915; C. M. O. 20, 1915, 7–8.
3. **Summary courts-martial**—In reviewing a summary court-martial record the senior officer present in his remarks, dated February 4, 1915, stated in part: "It is noted that the offense was committed on January 5, 1915, that the specifications were approved on January 12, 1915, the trial occurred on January 18, 1915, and the proceedings were approved by the convening authority on January 31, 1915. Two much time has been consumed in this case." The record, which was received at the department on February 25, 1915, disclosed the facts to be as above stated.

   The Navy Regulations provide that when an officer empowered to convene summary courts-martial decides after investigating an accusation against a petty officer or person of inferior rating that the accused should be tried by a summary court-martial, he shall refer the case to such court-martial, *with the least possible delay*. (Navy Regulations, 1913, R–602 (1).) Also, the accused shall, *as soon as practicable* after it has been decided to bring him to trial, be furnished with a copy of the specifications preferred against him. (Navy Regulations, 1913, R–607 (1).)

   From the above it will be seen that an accused should always receive a speedy trial and the record forwarded without undue delay. "The certainty of prompt punishment is more conducive to discipline than punishment deferred long after the offense." (Navy Regulations, 1913, R–1404 (3).) These regulations thus conform to the spirit of the constitutional provision for speedy trials. (Constitution, Art. VI of Amendments.) C. M. O. 10, 1915, 6.

SPIRITUOUS LIQUORS ON BOARD SHIP.

1. **Acting third assistant engineer**—Was found guilty of "Violation of the act of Congress prohibiting the introduction of spirituous liquors on board vessels of the United States Navy" by a general court-martial. G. O. 44, Dec. 7, 1864.

SQUADRON COMMANDERS.

1. **Convening authority**—Of a general court-martial. *See* CONVENING AUTHORITY, 28, 30.

"SQUEEZE."

1. **Defense**—"Squeeze" as a defense. C. M. O. 69, 1903, 2–3. *See also* G. C. M. Rec. 27960.

ST. ELIZABETH. *See* GOVERNMENT HOSPITAL FOR THE INSANE.

STABBING.

1. **Assault and battery.** *See* ASSAULT, 25.

STAFF OFFICERS.

1. **Command**—In other corps. *See* HOSPITAL SHIPS, 1.
2. **Same**—The staff is subordinate to the line in matters of command. *See* COMMAND, 18.
3. **Controversy**—Between line and staff. *See* COMMAND, 19.
4. **General court-martial**—Trial of staff officers. *See* COURT, 34.
5. **Marine officers**—Precedence of. *See* PRECEDENCE, 14–18.

Digitized by Google

6. **Same**—Promotion of. *See* PROMOTION, 180, 181.
7. **Naval officers.** *See* PROMOTION, 182–184.
8. **Professor of mathematics**—Rank of. *See* PROFESSORS OF MATHEMATICS.
9. **Promotion**—Advanced in rank but not in grade. *See* COMMISSIONS, 9.
10. **Same**—Promotion by selection. *See* PROMOTION, 172, 182, 183, 184; PROMOTION BY SELECTION, 10.
11. **Trial of**—By general courts-martial. *See* COURT, 34.
12. **Warrant officers**—Carpenters and chief carpenters, sailmakers and chief sailmakers, pharmacists and chief pharmacists are classed as staff officers. *See* COMMAND, 11, 21.

STARE DECISIS.

1. **Definition**—*Stare decisis et non quieta movere*—To adhere to decided cases and not disturb matters established. File 26260–1392, pp. 2–3. *See also* WORDS AND PHRASES.
2. **Law should be settled permanently**—It is almost as important that the law should be settled permanently as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly, unless clearly erroneous. Vacillation is a serious evil. File 5252–68, J. A. G., May 15, 1915, quoting Gilman *v.* Philadelphia (3 Wall., 724).
3. **Statutory construction**—According to the doctrine of *stare decisis*, where a statute has been construed by the Navy Department in a previous administration and such construction is not clearly erroneous, the matter should be regarded as settled so far as the law is concerned, and the previous construction should not be disturbed. File 5252–68, May 15, 1915.

STATE.

1. **Civil authorities.** *See* CIVIL AUTHORITIES; GENERAL ORDER No. 121, Sept. 17, 1914; JURISDICTION, 118.
2. **Decisions.** *See* SECRETARY OF THE NAVY, 39.
3. **Embezzlement**—State laws not applicable. *See* EMBEZZLEMENT, 28.
4. **General courts-martial of States**—Officers and enlisted men of naval service appearing before, as witnesses. *See* GENERAL ORDER No. 121, Sept. 17, 1914, 23.
5. **Same**—On board vessels of the Regular Navy. *See* NAVAL MILITIA, 38; JURISDICTION, 39.
6. **Interference**—With Federal instrumentalities. *See* CONSTITUTIONAL LAW, 5–8; JURISDICTION, 118.
7. **Statute**—Violation of by a Naval officer—"This accused, upon his own admission and the undisputed evidence, has been guilty of a serious offense, criminal libel, for which he may be tried in the civil courts [of the State] in addition to his offense against discipline, for which he has been brought to trial by court-martial. The jurisdiction of the State and Naval authorities over his offense is concurrent, and conviction by the one could not oust jurisdiction of the other." File 26251–12159, Sec. Navy, Dec. 9, 1916, p. 22. *See also* JEOPARDY, FORMER, 11, 24, 45, 46.
8. **Vote**—Jurisdiction over right to vote, etc. *See* VOTING.

STATE SECRETS.

1. **Privilege**—Privilege of refusing to divulge State secrets when testifying. *See* EVIDENCE, 82 (p. 223.)

STATEMENTS MADE IN PRESENCE OF ACCUSED.

1. **Evidence**—One of the witnesses for the prosecution, a chief master-at-arms, testified as to the unauthorized absence of the accused from said ship and his delivery on board by a police officer. He added "the police officer stated that the accused gave himself up." The record proceeds as follows:

"The court here objected to the admission of the last sentence, referring to the statement of the police officer, as hearsay evidence, and it was not allowed as part of the evidence."

In answer to a further question the above-named witness, who had testified that he "did not find any effects belonging to the accused," stated that such fact did not indicate to his mind that the accused had disposed of them before he left the ship, as on account of the large number of men on board, and the inadequate facilities for stowing bags, "It was very difficult to find any particular bag belonging to absentees."

While it does not certainly appear from the above-quoted evidence that the statement of the policeman in question was made in the presence of the accused, it would seem to be a reasonable inference therefrom that such was the case, and if so, said statement was clearly admissible and should not have been ruled out. C. M. O., 214, 1902.

Digitized by Google

STATEMENT OF ACCUSED.

1. **Accused as witness**—The accused, after pleading guilty to "Desertion," took the stand and stated that at the time he left the ship he was *mentally unbalanced*. This statement is obviously inconsistent with his plea of guilty. C. M. O. 49, 1910, 11. *See also* C. M. O. 2, 1905; DESERTION, 75.

   The accused, after pleading guilty to "Desertion," took the stand and stated that "the reason why I pleaded guilty [to "Desertion"] was because I have always known about after 10 days being desertion; so I pleaded to 'Desertion' that way." C. M. O. 10, 1912, 4.

   The accused after pleading guilty of being drunk on post after having been regularly posted thereon, took the stand and stated that he did not remember relieving the sentry, and that he did not remember being drunk on post. C. M. O. 5, 1911, 4.

   Where accused pleads "guilty" and then goes on the witness stand and gives testimony which is inconsistent with such plea of "guilty," the court should advise him to withdraw his plea of "guilty" and enter one of "not guilty." C. M. O. 6, 1908, 5.

2. **Accused should be informed**—That his statement is not evidence. *See* STATEMENT OF ACCUSED, 17.
3. **Affidavits**—Should not be included as part of the statement of the accused. *See* AFFIDAVITS, 7.
4. **Clemency**—If the court places credence in the statement of the accused (after he has pleaded guilty), as appears to be the case from the wording of a unanimous recommendation to clemency, then before arriving at a finding the defense should have been opened up and the accused called upon to produce witnesses to that effect or informed of his privilege of taking the stand and so testifying under oath, subject to a rigid cross-examination. C. M. O. 21, 1913, 5.

   The recommendation to clemency should not be inconsistent with the accused's plea of "guilty." C. M. O. 30, 1910, 5.

5. **Clerk or stenographer available**—When a clerk or stenographer is available the statement of the accused, undergoing trial by general court-martial, should be set forth in the record of proceedings *verbatim* and not recorded "in substance." C. M. O. 16, 1912, 3.
6. **Contents of written statement.** *See* STATEMENT OF ACCUSED, 35.
7. **Court**—Procedure of court when statement of accused is deemed inconsistent with his plea of "guilty." *See* STATEMENT OF ACCUSED, 25.
8. **Court should close to examine**—The court should close for the examination of the written statement of the accused, and the record should show that the court was closed therefor. C. M. O. 28, 1910, 6; 31, 1910, 3.
9. **Disapproval**—Of summary court-martial case because statement of accused was inconsistent with his plea of "guilty." *See* STATEMENT OF ACCUSED, 20.
10. **Same**—Of general court-martial case for same reason,. *See* STATEMENT OF ACCUSED, 16.
11. **Same.** *See* C. M. O. 12, 1897; 46, 1900; 53, 1901; 167, 1901; 182, 1901; 185, 1901; 23, 1904, 1; 2, 1905, 3; 22, 1905, 1; 23, 1905, 4.
12. **Disapproval though not inconsistent**—A statement submitted by accused who has pleaded "guilty" of desertion although not inconsistent with his plea may be of such a nature as to justify the rejection of the plea and a trial of the case on its merits. In this case the accused stated that he was suffering from a disease, and his father being a physician, he went home for treatment and surrendered in order that he might finish his enlistment and go home with a clean name. C. M. O. 54, 1905.
13. **Disrespectful**—The acccused "presented to the court a written defense so disrespectful that the court could not receive it." Accused was censured. G. O. 157, May 24, 1870.
14. **Evidence**—Statement of accused is not evidence. Any averments or facts embraced in the statement may, of course, be proved by testimony, but unless so proved it is not within the province of the court to take judicial cognizance of them in determining the culpability or innocence of the accused. (R–792(4).) C. M. O. 42, 1909, 9; 41, 1914.
15. **Evidence in extenuation**—Inconsistent with accused's plea of "Guilty"—The accused pleaded "guilty" to "Desertion." The testimony of a witness in extenuation was inconsistent with the accused's plea as was the statement of the accused and the recommendation of the members to the clemency of the revising power. The department accordingly disapproved the proceedings, findings, and sentence. C. M. O. 30, 1910, 4–5. *See also* CLEMENCY, 20.

Digitized by Google

16. **Evidence**—Inconsistent with plea of guilty—Upon the second charge, namely, "Drunkenness," the accused pleaded "Guilty." During the trial a witness, called by the accused with reference to the charge of "Robbery," was asked the question, "when the accused was up before you on the night in question, was he drunk, disorderly, or creating a disturbance." to which the witness answered "No." The judge advocate did not cross-examine this witness, and the record shows that the court did not desire to question him. The witness for the defense did not state at what hour the accused was brought before him, and his testimony was, therefore, not necessarily contradictory of the plea of the accused that he was guilty of "drunkenness" at the time specified. Nevertheless, this testimony, received without any attempt being made to reconcile it with the plea of the accused, was on its face sufficiently inconsistent with that plea to make it the duty of the court immediately to instruct the accused that he might withdraw his plea of "guilty" and substitute therefor the plea of "not guilty," and if he persisted in his plea of "guilty" to direct the entering of a plea of "not guilty" to the charge of "Drunkenness," and the proceeding with the trial by the introduction of evidence, which the judge advocate was informed existed, to prove the allegations set forth in the specification under that charge. (C. M. O. 30, 1910, p. 4; *see also* Index-Digest, 1914, p. 40.)

Inasmuch as the finding of "Guilty" on the charge of "Drunkenness" was disapproved by the convening authority because of the above irregularity and the ends of justice were thereby defeated through the failure of the court and judge advocate to properly conduct the trial, and without reference to the question of whether or not the above irregularity was properly regarded as a fatal defect, attention is directed in this connection to the special care which the members and judge advocate of a court should give to matters in which either the testimony or the statement of an accused may appear at variance with his plea. G. C. M. Rec. No. 31776; C. M. O. 9, 1916, 7–8.

17. **Ex parte**—The accused should be informed that the court can not attach evidentiary weight to the accused's *ex parte* statement; that he has the right to take the stand and testify under oath and also to produce witnesses in his behalf to testify as to the existence of the deplorable conditions alleged (destitution of family, desire to remain in service, etc.), and that he should call such witnesses whenever practicable. C. M. O. 10, 1913, 7.

18. **Inconsistent with accused's plea of guilty**—If the accused pleads guilty and then makes a statement inconsistent with his plea it becomes the duty of the court to instruct the accused in the premises that he might withdraw his plea of "Guilty" and substitute therefor the plea of "Not guilty," and if he persisted in his plea of "Guilty" to direct that the plea of "Not guilty" be entered and then proceed with the trial as if the plea had originally been "not guilty." C. M. O. 42, 1909, 8; 47, 1910, 8; 49, 1910, 7, 11; 14, 1910, 10–11; 23, 1910, 5; 30, 1910, 4; 5, 1911, 4–6; 10, 1912, 4; 1, 1914, 4–5; 5, 1914, 6; 9, 1914, 3; 25, 1914, 3–4; File 26287-2821, Sec. Navy, March 3, 1915.

19. **Same**—Where the accused pleads guilty and then makes a statement to the court setting forth facts incongruous with his plea (as in desertion, disclaiming the *intent* to abandon the service), the statement, rather than the plea, should be considered as the intelligent act of the accused, and in such a case the court will properly counsel the accused to plead not guilty or direct such plea to be entered, and proceed to a trial, the judge advocate introducing his proof precisely as under an ordinary plea of guilty. C. M. O. 42, 1909, 8. *See also* C. M. O. 158, 1897; 54, 1905, 2.

20. **Same**—The department disapproved the summary court-martial proceedings and sentence because the statement of the accused was inconsistent with his plea of guilty.

The accused pleaded guilty to having unlawfully in his possession one pair of trousers and later made the following statement: "* * * brought the pair of pants in the bungalow and *gave* them to me; they were too small for him. The pants were all dirty and I thought they were cast off, as * * * said that he found them on the dump."

Upon the submission of this statement, it became the duty of the court to instruct the accused in the premises that he might withdraw his plea of "guilty," and substitute therefor the plea of "not guilty," and if he persisted in his plea of "guilty" to direct that the plea of "not guilty" be entered and then proceed with the trial as if the plea had originally been "not guilty." C. M. O. 1, 1914, 4.

21. **Same**—The accused was charged with "Assaulting and striking his superior officer while in the execution of the duties of his office," the specifications alleging a *willful and malicious* assault. The accused pleaded "guilty," but in his statement alleged

Digitized by Google

in substance that he was so drunk that he did not know what he was doing when he made the assault charged against him. The department held that this statement was "apparently inconsistent with the plea of the accused." C. M. O. 47, 1910, 8.

22. **Same**—The accused pleaded guilty to the charge of "Theft." The specification alleged that he did feloniously take, steal, and carry away two rifles, and did then and there appropriate them to his own use. Later on in the proceedings he makes a statement which was unobjected to and received by the court, to the effect that he was so much under the influence of intoxicating liquor that he had no control over his actions, and that he had not the slightest intention of taking the rifles in question.

While the statement of the accused is not evidence, nor should it be considered as such, yet when contrary to his plea it devolves upon the court to instruct the accused in the premises that his plea be changed to conform to his statement.

The statement made by the accused in this case conflicted with his plea, he having pleaded guilty to having feloniously taken, stolen, and carried away two rifles and appropriated the same to his own use.

It thus became the duty of the court, when the accused in this case, after having pleaded guilty to "Theft," submitted a statement contradictory to this plea—at least contradictory to that portion embracing the gist of the offense, to have brought these conflicting elements to the attention of the accused, and then, if he held to the facts set forth in his statement, to have directed the judge advocate to substitute the plea of "not guilty" to the particular charge, and to have proceeded with the case by the introduction of evidence, if such existed, to prove the specification. C. M. O. 42, 1909, 9.

23. **Same**—The accused after pleading "guilty" to "Desertion," submitted a written statement the tenor of which was plainly inconsistent with his plea of "guilty," inasmuch as he expressly denied having intended permanently to remain away at the time he absented himself. The court accepted both the plea and the statement and found the accused guilty. In cases as this, the court, if it has reason to believe that the statement is made in good faith, should follow the procedure outlined in STATEMENT OF ACCUSED, 25. C. M. O. 107, 1899, 1.

24. **Same**—The accused having pleaded guilty to "Desertion" offered the following written statement which was read for him by the judge advocate:

"While admitting the offense of deserting, I do so only because I can find no evidence to bring before the court except my own statement to disprove the charge. I never had any intention of deserting the service permanently and absented myself as charged only because I wanted to get off the ship I was on, as I felt and knew that I would be in trouble continually by remaining on board the Columbia."

This statement was manifestly inconsistent with the plea of guilty made by the accused to the third charge, namely desertion, yet both were admitted by the court. No evidence was adduced before the court and the finding on each of the specifications in this case was "proved by plea," and on each of the charges was "guilty."

The finding on the charge of "Desertion" and specification thereunder was disapproved. C. M. O. 84, 1904, 3.

25. **Same**—Upon the submission of a statement which is deemed inconsistent with the accused's plea of "guilty," it becomes the duty of the court to instruct the accused that he might withdraw his plea of "guilty," and substitute therefor the plea of "not guilty," and if he persists in his plea of "guilty" to direct that the plea of "not guilty" be entered and then proceed with the trial as if the plea had originally been "not guilty." C. M. O. 1, 1914, 4–5; 5, 1914, 4–6; 9, 1914, 3; 25, 1914, 3–4.

26. **Investigation**—The accused should be informed by the judge advocate that before giving any credence to his statement (where accused states his family are destitute, etc., or he desires to continue in service) the department will cause a full investigation to be made into the actual conditions claimed.

The judge advocate should embody in the record the full names and addresses of the alleged dependent persons so as to facilitate as much as practicable the investigation which will be instituted by the department. C. M. O. 10, 1913, 5.

27. **Same**—An accused stated on the witness stand that he had attempted to surrender at the naval station, Honolulu, but was not taken up and claimed that the executive officer would not take him in and advised him not to surrender, but wait until he arrived at San Francisco.

The department, following its usual custom as announced in C. M. O. No. 10, 1913, caused an investigation to be made of the statements of the accused and found them to be false. C. M. O. 20, 1913, 5.

Digitized by Google

28. **Nature of**—The statement of the accused has a threefold function: (*a*) As a modification of the plea, which must be considered by the court; (*b*) As a summing up and closing argument for the defense, which may be considered by the court; (*c*) As a plea for leniency, which may not be considered by the court except in recommending the accused to the clemency of the revising authority. C. M. O. 41, 1914, 4.
29. **Same**—The accused shall be at liberty to make a statement in writing, or, if an official stenographer be present, orally, either in person or by counsel. This statement, if written, he shall submit to the court for inspection before it is publicly read, and, if it contains anything disrespectful, the court may prevent that part from being read; but the whole shall be appended to the proceedings, or recorded as a part thereof, if the accused desires it, and he shall be held responsible for the same. (R–792 (2).) *See* STATEMENT OF ACCUSED, 34, 39.
30. **Oral statement**—Only the substance of the oral statement of the accused is inserted in the record. If no stenographer qualified to take an oral statement is present, it should be reduced to writing and appended to the record of proceedings of the general court-martial. C. M. O. 26, 1910, 8.
31. **Out of court**—Statements made by accused out of court. C. M. O. 211, 1902. *See also* CONFESSIONS.
32. **Procedure of court.** *See* STATEMENT OF ACCUSED, 25. *See also* C. M. O. 22, 1905, 1.
33. **Record of proceedings**—Copy of statement of accused appended. *See* G. O. 44, Dec. 7, 1864; C. M. O. 1, 1894, 3.
    If written defense is made in general court-martial cases it is appended. In both summary and general court-martial cases oral defense may be entered in the body of the record or reduced to writing and appended.
34. **Right of accused to make a statement**—Since it is the right of the accused to make a statement, either orally or in writing, if he waives this right, the fact that it was accorded him, and not taken advantage of, should be affirmatively indicated upon the record of proceedings of the general court-martial. C. M. O. 49, 1910, 5.
35. **Scope of**—The court objected to certain parts of the written statement of accused "on the ground that they implied a criticism on the discipline and morale of the Oregon, which in the absence of witnesses, it was impossible to refute." The accused then "desired to omit the above mentioned paragraphs," and his statement was read aloud, excepting the paragraphs in question.
    "While the propriety of the subject matter and form of an accused man's written statement or defense is for the court to decide upon, in its discretion," the court should not be unduly severe in restricting the accused as above indicated. "Such action appears not to have worked injury, however, as the sentence imposed was the usual one awarded for the offense" of which the accused pleaded guilty. C. M. O. 223, 1902, 2.
36. **Set aside.** C. M. O. 12, 1897; 159, 1897, 2; 167, 1901.
37. **Summary court-martial**—Neither written defense nor argument nor any protracted oral defense should be admitted, but the substance of any oral statement may be entered on the record or appended.
38. **Sworn to**—It is irregular and improper to permit the statement of the accused to be sworn to and that it is an affidavit adds nothing to its legal effect. C. M. O. 22, 1896. *See also* AFFIDAVITS, 7.
39. **When submitted**—The statement of the accused should not be submitted until *after* the defense has closed. C. M. O. 23, 1910, 7. *See also* C. M. O. 75, 1898.
40. **Written statement**—Submitted to court. C. M. O. 47, 1910, 8; 49, 1910, 5; 23, 1910, 5. *See also* STATEMENT OF ACCUSED, 8, 13, 33, 34.

STATEMENT OF ACCUSED IN WRITING TO COMMANDING OFFICER PRIOR TO TRIAL BY GENERAL COURT-MARTIAL. *See* CONFESSIONS, 9.

STATEMENTS OF ACCUSED WHEN OFFENSE IS BEING INVESTIGATED. *See* CONFESSIONS, 24.

STATEMENTS OF COUNSEL.

1. **Evidence**—Statements of counsel should not be given weight as evidence. *See* COUNSEL, 51.

STATUTES.

1. **Advisory statutes.** *See* ADVISORY STATUTES.
2. **Breach of**—Alleging a breach of a statute in specifications. *See* CHARGES AND SPECIFICATIONS, 94.
3. **Common law**—Construction of statutes with reference to principles of common law, etc. *See* COMMON LAW, 9.

Digitized by Google

4. **Constitutionality of**—"To warrant a court in declaring unconstitutional a law passed by Congress, the defect of legislative power must be of the most plain and indisputable character," and that "the fact that a law of Congress has been in course of execution for many years, and has been acquiesced in during that time, is a strong reason why the courts, especially those of a subordinate character should not decide the same to be unconstitutional." (U. S. *v.* Mackenzie, 30 Fed. Cas. No. 18313, syllabi.) "Long acquiescence in the act is of itself sufficient evidence of the right of Congress to pass it." (Butler *v.* White, 83 Fed. Rep., 581.) File 26254–1451–11, J. A. G., April 12, 1915, p. 7.
5. **Construction of.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION.
6. **Criminal statutes.** File 26516–49, J. A. G., June 13, 1911. *See also* STATUTORY CONSTRUCTION AND INTERPRETATION, 15, 88–92.
7. **Definition**—"Congress has no right to enact as a law that which will be ineffectual. It can not enact advice or counsel. It must make laws that are rules of action, not 'expressions of will, that may or may not be followed.' Counsel is a matter of persuasion, law is a matter of injunction; counsel acts upon the willing, law upon the unwilling also. (Blackstone's Commentaries, 44.) If, then, this will be an injunction commanding the President to appoint, it is a usurpation; and if it be only counsel, it is without the essential element of a law; and Congress can enact nothing but that which is to have the full vigor and effect of a law." (18 Op. Atty. Gen. 27.) File 28687–4:1.
8. **Derogation of appointing power.** *See* OFFICERS, 96; STATUTORY CONSTRUCTION AND INTERPRETATION, 28.
9. **Drafting statutes**—"The drafting of legislation in apt language so that intent and result may harmonize is a special art acquired only by long experience in drafting and interpreting laws. In order that the draft may accurately express the desired meaning and, at the same time, not repeal or undesirably affect existing law, it is essential that the draftsman posses a thorough knowledge of all existing statutes which might be affected by the proposed law, an intimate knowledge of the subject matter with which he is dealing, and be thoroughly familiar with the accepted canons of statutory interpretation. Otherwise the result will most probably be incomplete and inadequate legislation, not infrequently involving a conflict with or repeal of important laws which it was not desired to modify. The necessity for a knowledge of the fundamental principles of the rules of interpretation and construction of statutes on the part of one drafting a bill needs no argument; if the construction which the draftsman of a proposed law places upon it can not be sustained by the established canons of statutory interpretation, it is manifest that his bill, if enacted into law, will not only not accomplish the object which he intended, but may even accomplish something which is actually very undesirable.
"Even the most skillful draftsman of legislation can not guarantee that his product will be free from doubtful questions, for written language is, at best, only an imperfect medium for the expression of ideas." An Rep., J. A. G., 1916, pp. 17, 18. *See also* File 28687–14, J. A. G., Dec. 14, 1916, p. 4.
10. **Judical notice**—A naval court-martial takes judical notice of the Constitution, public statutes, proclamations, the power of the President and executive departments, matters of public history, the Navy Regulations, general and special orders and circulars of the department. File 26251–12159, Sec. Navy, Dec. 9, 1916, p. 21. *See also* FRAUD, 5.
The particular provision of law violated by an accused is not properly to be "charged or proved" but must be judically noticed by courts-martial. File 26251–12150, Sec. Navy, Dec. 9, 1916, p. 21.
11. **Limitations**—Statute of Limitations. *See* STATUTE OF LIMITATIONS.
12. **Penal statutes.** *See* STATUTES, 6; STATUTORY CONSTRUCTION AND INTERPRETATION, 15, 88.
13. **Remedial statutes.** *See* REMEDIAL LAWS.
14. **Sentences.** *See* STATUTORY SENTENCES.

STATUTE OF LIMITATIONS.

1. **Absence from United States**—The question of a man's absence from the United States is pertiment in determining whether or not he is amenable to trial under A. G. N. 61. C. M. O. 27, 1913, 13, cited in File 26516–213, J. A. G., June 27, 1916. *See also* ABSENCE, 14.
2. **Burden of proof.** *See* STATUTE OF LIMITATIONS, 12, 20.

Digitized by Google

3. **Charges and specifications**—The time of the offense must be alleged so as to bring the offense within the statute. *See* CHARGES AND SPECIFICATIONS, 92; FINDINGS, 27, 32, 35.
4. **Defense**—Statute of limitations is a matter of defense. *See* STATUTE OF LIMITATIONS, 6, 12, 20.
5. **Desertion**—The statute of limitations is never a bar to the apprehension of a deserter from the naval service, nor is it a bar to his trial unless the deserter chooses to plead same; and in the latter event the question whether the statute applies, that is whether the accused has been absent from the United States at any time since his desertion and prior to the expiration of the statutory period, or whether there has been any other "manifest impediment" to his trial, is a question for determination in the first instance by a court-martial, the same as other questions of fact raised at the trial. (File 26516-206.) It would be difficult, perhaps impossible, to lay down any general rule whereby to determine in all cases under what facts and circumstances the accused may be deemed to be beyond the jurisdiction of a court-martial. This is a matter which must needs be left in each case, to the judgment of the court itself under the particular facts and circumstances appearing therein, subject to revision by the proper authorities. (*See* C. M. O. 27, 1913, 17.) File 26516-206, J. A. G., Mar. 29, 1916. *See also* C. M. O. 39, 1901, 2; 28, 1902; File 26516-197, J. A. G., Nov. 6, 1915.
6. **Same**—"As will be seen from a reading of the above quoted statute, it does not begin to run until the expiration of the term for which the deserter enlisted. The effect of this proviso is to make the period six years from the date of the deserter's enlistment. As will be further seen, the time a deserter may have been absent from the United States or not amenable to justice by reason of some other manifest impediment is excepted from the period of limitations. In view of those facts, and of the further fact that the plea of the statute of limitations is a plea in bar, which must be decided on its own facts, in each particular case, it is impossible for the department, in the absence of more specific data, to inform you whether or not the persons you have in mind are protected from prosecution by the statute of limitations. It may be stated, however, that the length of time which may have elapsed since a person deserted does not, in itself, protect such a person against arrest or the preferring of charges against him, the statute of limitations being simply a defense of which an accused may avail himself when brought to trial." File 26516-137, Sec. Navy, July 9, 1914.
7. **Same**—Officers. *See* DESERTION, 91; STATUTE OF LIMITATIONS, 15.
8. **Same**—Plea in bar sustained by court. *See* STATUTES OF LIMITATIONS, 16.
9. **Same**—Begins to run—"The limitation begins to run, in case of desertion by an enlisted man (unless the offender has previously surrendered himself or been apprehended, or unless, by reason of some manifest impediment, he is not then amenable to justice) from the last day of the term for which he enlisted." (15 Op. Atty. Gen., 162.) File 26287-458 (548), J. A. G., July 2, 1910, p. 3.
10. **Same**—An electrician first class, United States Navy, was charged with "Knowingly and willfully misappropriating and applying to his own use property of the United States furnished and intended for the naval service thereof" (between the dates of July 1, 1908, and Aug. 1, 1908); and with deserting from the Navy September 27, 1908 (remaining in desertion until delivered by the civil authorities Dec. 27, 1912).

The accused pleaded the statute of limitations and the president of the court transmitted to the department an extract from the proceedings of the court stating that the accused had submitted a plea in bar of trial under the statute of limitations which the court had decided was a valid one.

The department returned the extract from the proceedings to the court with the following remarks:

The accused in this case was charged with "Knowingly and willfully misappropriating and applying to his own use property of the United States furnished and intended for the naval service thereof," at the Navy wireless station, Cape Blanco, Oreg., between July 1 and August 1, 1908; and with deserting from the *Philadelphia* at the navy yard, Puget Sound, Wash., September 27, 1908, remaining in desertion until delivered by the civil authorities December 27, 1912. The accused pleaded the statute of limitations and in support thereof introduced only one witness, which witness testified that he knew nothing whatever of the whereabouts of the accused from July, 1908, to November 26, 1910, on which last named date the accused entered the employ of witness at Scotia, Calif., under the name of * * * and continued in witness's employ until taken into custody upon the above mentioned charges. Upon these facts the court sustained the plea of the accused as valid.

Digitized by Google

The following principles applicable to this case are well settled, and are briefly stated for the consideration of the court:

The limitation of prosecution under article 61, Articles for the Government of the Navy, commences to run in favor of an accused on the day that his offense is committed, and continues to run during a period of two years next ensuing, unless in the meantime the order for his trial is issued; or he flees from justice; or some other manifest impediment prevents his being amenable to justice during said period.

At the expiration of two years after committing an offense the accused becomes absolutely immune from prosecution, unless he waives the benefit of the statute, or one of the exceptions contained therein prevents its operation in his case. Exemption from prosecution once acquired under the statute can not be forfeited by subsequent conduct (Greene *v.* U. S. 154 Fed., 424); and on the other hand the running of the statute once having been stopped (as, for example, by fleeing from justice) its benefit is forever lost to the accused and can not be regained (U. S. *v.* White 5 Cranch (C. C.) 116; 28 Fed. Cas. 568, No. 16677).

Applying the foregoing principles to the present case, Charge I, the result would be that, immediately upon the expiration of two years from the date of the offense alleged therein (that is about July 1, 1910), the accused became absolutely and permanently entitled to the benefit of article 61, Articles for the Government of the Navy, unless he had in the meantime forfeited the benefit of said article, in which latter event he was deprived of its protection for all time. It will thus be seen that the whole question at issue refers to the status of the accused during the two years following the commission of the alleged offense. If during that period his conduct was such as to entitle him to the benefit of the statute he could not lose the exemption from prosecution so acquired by thereafter concealing himself or fleeing from justice; and, on the other hand, if at any time during that period he forfeited the benefit of the statute by concealing himself or fleeing from justice he could not thereafter regain its protection by any subsequent conduct.

In the present case, as above stated no evidence was introduced by the accused, concerning his whereabouts during the two years following the time alleged in the specification of Charge I, and accordingly he has failed to support the plea to that charge.

With reference to Charge II, it is noted that no evidence whatever was introduced to show the date on which the accused enlisted in the Navy, or the date on which his enlistment expired. Accordingly, as there was nothing to show the date on which the statute of limitations (art. 62, A. G. N.) commenced to run upon this charge, it was not practicable for the court to determine upon the evidence whether the order for the trial of the accused upon said charge was issued within a period of two years after the expiration of his enlistment. *A fortiori*, it could not be determined upon the evidence whether the accused was amenable to justice during the statutory period when it was not shown by the evidence on what date the statute commenced to run, or whether the period of limitation had expired.

The fact being that the accused failed to introduce any evidence whatever upon which the court could determine whether or not prosecution in this case is barred, the department directs that the court reconsider its finding upon the plea in bar interposed by the accused to both of the charges preferred against him; and, if it is decided by the court to revoke its finding and overrule the plea of the accused, it is further directed that the court proceed with the trial.

Should the court on reconsideration overrule the plea of the accused and proceed with the trial, the defense would be entitled to avail itself of the statute of limitations by evidence in support of the plea of not guilty, in which event the judge advocate would have the right to introduce evidence showing that the accused concealed himself or fled from justice at some time during the statutory period. (U. S. *v.* Cook, 17 Wall. 179.) There is accordingly no danger of any injustice being done to the accused by proceeding with the trial, but on the contrary he is afforded a further opportunity to show that he is entitled to the protection of articles 61 and 62, Articles for the Government of the Navy, if such is the case; and, if the court upon the trial should be of opinion that the evidence shows that he was amenable to justice during the entire statutory period, this would be sufficient grounds for an acquittal.

In its further consideration of this case, the court should take judicial notice of the fact that it is the official duty of officers of the Navy to take all practicable steps, for the apprehension of deserters, and of the requirements as to offering rewards notifying the civil authorities at the home of the deserter, etc. In the absence of evidence to the contrary, the law presumes that official duties are properly performed.

Digitized by Google

The court should also take judicial notice of the location of Scotia, Calif., or other place in which the accused may have resided while in desertion, the remoteness and inaccessibility of such place, transportation facilities between it and the outside world, and facts of a similar nature which may be of importance in connection with the question whether the accused endeavored to conceal himself or flee from justice, even though he may have been known under his true name in such out-of-the-way place which he selected as his residence in November, 1910. The court should also take into consideration the evidence showing that, when the accused went to work in Scotia, Calif., after expiration of the period of limitations provided by article 61, Articles for the Government of the Navy, he did not inform his employer that he had previously served in the United States Navy, and had never been discharged therefrom.

The court after consideration of the department's letter, decided to proceed with the trial. No evidence being available to prove the first charge, the court acquitted the accused of said charge; and further evidence being introduced with reference to the second charge, the court found that the statute of limitations applied to said second charge, and accordingly acquitted the accused thereof.

Article 62, Articles for the Government of the Navy, which fixes the limitation for proceedings in case of desertion as two years from expiration of enlistment, contains two exceptions: (*a*) Absence from the United States, (*b*) "Some other manifest impediment" by reason of which the accused "shall not have been amenable to justice within that period."

Article 61, Articles for the Government of the Navy, which fixes the limitation for proceedings in the cases of general offenses also contains two exceptions which it will be noted differ somewhat from article 62, viz: "Unless by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period."

With reference to the latter article, it will be noted that the absence which prevents the operation of the statute of limitations does not necessarily have to be an absence *from the United States*, but only such an absence as may render the accused not "amenable to justice." Construing a similar statute relating to offenses committed by persons in the Army, it has been held by the Judge Advocate General of the Army: "By the absence referred to in the original article in the term—'unless by reason of having absented himself'—is intended, not necessarily an absence from the United States, but an absence by reason of a 'fleeing from justice,' analogous to that specified in section 1045, R. S., which has been held to mean leaving one's home, residence, or known abode within the district, or concealing one's self therein, with intent to avoid detection or punishment for the offense against the United States." (U. S. *v.* O'Brien, 3 Dillon, 381; U. S. *v.* White, 5 Cranch C. C., 38, 73 (Fed. Cas., 16075); Gould & Tucker, Notes on Revised Statutes, 349.) "Thus held that, in a case other than desertion, it was not essential for the prosecution to be prepared to prove that the accused had been beyond the territorial jurisdiction of the United States in order to save the case from the operation of the limitation." A long list of departmental decisions will be found cited as supporting this statement in the Digest of Opinions of the Judge Advocates General of the Army, 1912 (p. 172, par. E).

In the Attorney General's opinion of September 1, 1876 (15 Ops., 163), it was said, "The language of the exception is 'unless, by reason of having absented himself, or by some other manifest impediment, he shall not have been amenable to justice,' etc. Absence, then, in order to bring the accused therein, must be such as to render him *not amenable to justice*. * * * Unquestionably, absence in a foreign land would place the accused beyond such jurisdiction, and thus make him not amenable; so, it has been thought, would absence within the limits of this country, if he were where the military authorities, by reasonable diligence, could not discover him. (*See* 14 Opin., 276.) It would be difficult, perhaps impossible, to lay down any general rule whereby to determine in all cases under what facts and circumstances the accused may be deemed to be beyond the reach and power of the military authorities to bring him to trial, or beyond the jurisdiction of a court-martial. This is a matter which must needs be left, in each case, to the judgment of the court itself upon the particular facts and circumstances appearing therein, subject to revision by the proper authorities."

From the record of proceedings it appears that the prosecution did not introduce any evidence to support the specification of the first charge, as the material witness as to the alleged offense specified therein could not be located. The court therefore acquitted the accused of this charge.

Digitized by Google

The facts brought forth with reference to the charge of desertion, as shown by the record, are as follows: The accused, while in arrest, left his ship and station, the U. S. S. *Philadelphia*, navy yard, Puget Sound, Wash., without authority on September 27, 1908. His commanding officer made special efforts to recapture him, by having the cities of Charleston and Bremerton searched by the ship's police, and by offering rewards which were sent to the police of all near-by cities, also to his home city, Oakland, Calif.

From the testimony introduced by the defense it appears that the accused arrived in Chicago, Ill., October 1, 1908 (only four days after his desertion from Puget Sound, Wash.) That he remained in Chicago from October 1, 1908, until the middle of November, 1908, when he went to the Pacific coast, visiting the towns of Portland, Los Angeles, and Oakland, and that he went to Scotia, Calif., where he remained from November, 1910, to December, 1912.

The term for which the accused was enlisted did not expire until July 1, 1910, and, accordingly, the statutory period of limitations for his offense of desertion could not, under any circumstances, expire prior to July 1, 1912. The question for the court to decide, therefore, was whether the accused fled from justice at any time between the date of his desertion, namely September 27, 1908, and July 1, 1912. The evidence shows distinctly that immediately upon deserting from the U. S. S. *Philadelphia* at the navy yard, Puget Sound, Wash., the accused fled to Chicago, Ill., more than half way across the country from his "home city," which was, as above stated, Oakland Calif. This was certainly a "fleeing from justice." Furthermore, the evidence shows that about 20 months before the expiration of the statutory period the accused went to work in Scotia, Calif., where he remained continuously until December, 1912, with the exception of infrequent visits to other places in California, and that he concealed from his employer, as also from relatives and friends, the fact that he was a deserter from the Navy.

Scotia, Calif., is a place of less than 500 inhabitants, and most inaccessible, being entirely off the line of usual travel. This fact should have been taken judicial notice of and should have been considered by the court in connection with all other facts which tended to show the absence of the accused was by reason of a "fleeing from justice." The accused introduced a *relative* and *personal friends* as witnesses whose testimony showed that they knew of the whereabouts of the accused during most of the period of his absence.

From all the facts in this case it is the opinion of the department that, during his separation from the service, the accused was a fugitive and was not amenable to justice; and that the conclusions of the court on the second charge are not supported by the evidence. To hold otherwise would mean that the Navy Department is required to institute a thorough search for deserters, not only in the vicinity of the place at which they deserted and the place of their last known residence, but also throughout the United States in every city or town, large or small, and in this specific case that it was the duty of the Navy Department to make search for the accused in Chicago, Ill., in the cities on the Pacific coast, and even in Scotia, Calif., which appears to have been the smallest and most out-of-the-way place in which the accused could find employment, and an ideal place for a deserter to conceal himself. And the court's holding, if approved by the department, would further mean that where a deserter from the Navy succeeds in concealing himself, either in a large city or in a small and inaccessible place, neither of which had been known as his home, he is, nevertheless, entitled to profit by his successful evasion of the law and escape punishment on the ground that prosecution was barred by the statute of limitations. However, the purpose of such statutes is merely to require reasonable diligence on the part of public officers in apprehending offenders and bringing them to justice and not to place a premium on the ingenuity of such offenders as succeed in concealing their whereabouts and escaping apprehension for a limited period.

In view of the foregoing remarks and of the reasons set forth in the department's letter directing the court to reconsider its action in sustaining the plea of the statute of limitations, the department approved the proceedings and the findings and acquittal on the first charge and disapproved the findings and acquittal on the second charge. C. M. O. 27, 1913, 13–18.

11. **Desertion in time of war.**—No statute of limitations applicable to desertion in time of war. File 26516–137, Sec. Navy, July 9, 1914. *See also* DESERTION, 132–137.

Digitized by Google

12. **Fraudulent enlistment**—The accused was brought to trial by general court-martial by order of the commander in chief United States Asiatic Fleet, on the charge of "fraudulent enlistment," preferred on January 6, 1912, the specification alleging that the offense was committed on June 21, 1909, "more than two years before the issuing of the order for such trial." (Art. 61, A. G. N.)

Upon arraignment the accused, by his counsel, pleaded the statute of limitations as contained in article 61 of the Articles for the Government of the Navy, which article reads as follows:

"No person shall be tried by court-martial or otherwise punished for any offense, except as provided in the following article, which appears to have been committed more than two years before the issuing of the order for such trial or punishment, unless by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period. (The following article contains the limitation with respect to desertion.)"

It will be observed that the statute only runs in favor of an accused party when he has not, "by reason of having absented himself or of some other manifest impediment," placed himself beyond the jurisdiction of a court-martial; in other words, when he has not been within the "exceptions" of the statute.

It was said in a memorandum of the Judge Advocate General (26262–1034), dated November 15, 1910, after a review of the numerous cases, that—

"The bar of the statute may be interposed by a special plea, or it may be put in evidence upon the general issue. In either case, of course, it would be the duty of the court, if it found that the offender had not been outside the jurisdiction of a court-martial, to sustain his plea in the one case or to find in the other that, even though guilty of the offense, he is not amenable to punishment."

With respect to the burden of the proof in pleading a statute of limitations, while the procedure varies, in the Federal courts such burden is upon the party pleading the statute. (25 Cyc., 1425.) Thus, in Borland *v.* Haven (37 Fed., 394, 413) it is said:

"Besides the defense is an affirmative one set up by the defendants themselves, and it devolves upon them to show affirmatively that the bar has attached and to what part."

In the accused's case the defense merely alleged that the statute of limitations was relied on without showing affirmatively that the accused had at all times since he committed the offense with which he was charged been within the jurisdiction of a court-martial. This should have been affirmatively proved, as might have been done from the copy of his professional and conduct record, which was in the hands of the judge advocate of the court. As was said in United States *v.* Cook (117 Wall., 168, 179):

"Accused persons may avail themselves of the statute of limitations by special plea or by evidence under the general issue, but courts of justice, if the statute contains exceptions, will not quash an indictment because it appears upon its face that it was not found within the period prescribed in the limitation, as such a proceeding would deprive the prosecution of the right to reply or give evidence, as the case may be, that the defendant fled from justice and was within the exception."

To the same effect see United States *v.* White (28 Fed. Cas., No. 16, 676) and In re Davison (21 Fd., 618, 621).

From the argument made by the counsel for the accused in this case in presenting the plea of the statute, it appears that his remarks were directed principally to the fact that it was erroneous to bring the accused to trial at all. In this he was, of course, mistaken, as above indicated. He should have offered to show that the accused was not within the exceptions. This technical accuracy in pleading, it is believed, should not be fully insisted upon, particularly as it is not customary, under the circumstances existing in this case, to bring the man to trial. As stated in the memorandum of the Judge Advocate General (26262–1034) of November 15, 1910, referring to such a situation and to the department's practice:

"If from the facts of the case it appears that the offense was committed more than two years before, the offender is not brought to trial.

"Certainly if the prosecution is not prepared to prove that the accused is within the exceptions of the statute of limitations there would be no good reason ordinarily in trying an accused person under those circumstances where the bar could be pleaded and the proceeding summarily ended." *See also* C. M. O. 31, 1910, 5; 14, 1911.

Consequently, although the plea of the accused was overruled by the court, yet after he had pleaded guilty and was allowed to introduce in evidence a copy of his

Digitized by Google

professional and conduct record, from which it necessarily appeared that he had been continuously in the Marine Corps from three days subsequent to the date of the fraudulent enlistment with which he was charged until the date of his trial, it was within the sound discretion of the court to have reversed its decision upon the plea and to have ended the trial. (25 Cyc., 1404.)

The accused was found guilty and sentenced to confinement for one year and dishonorable discharge, with the usual forfeitures. Clemency was recommended by six of the seven members of the court.

The reviewing authority disapproved the proceedings, findings, and sentence, on the ground "that the offense with which the accused is charged was committed more than two years prior to the date that he was brought to trial."

While, as shown above, the disapproval was proper, yet the ground upon which it is placed was incorrect. It is hardly necessary to repeat that the statute does not bar the trial of the accused but must be pleaded by him specially or shown by him under the general issue. C. M. O. 10, 1912, 8–10.

Policy of department not to bring offenders to trial for "Fraudulent enlistment" unless the prosecution is prepared to prove that the accused was not amenable to justice within a period of two years after the commission of that offense by reason of having absented himself or for some other manifest impediment. C. M. O. 31, 1910, 5. *See also* FRAUDULENT ENLISTMENT, 87–90; STATUTE OF LIMITATIONS, 10.

13. **Legal impediment to trial.** *See* STATUTE OF LIMITATIONS, 10.

14. **Offense dated**—So as to bring offense within statute of limitations. C. M. O. 23, 1913, 14.

15. **Officers**—In view of the language of A. G. N. 62 it might not be sufficient to draw up charges and specifications and hold them in the department until the deserter should be apprehended, but it would appear necessary to issue the order for his trial within two years; that is to say, the charges and specifications should be transmitted to a general court-martial with an order directing that the accused be brought to trial at the earliest practicable date, and that a copy of the charges and specifications be delivered the accused, etc., in the usual form. This would constitute a commencement of the proceedings within the statutory period, and the delay which might subsequently occur would be due to the fact that the accused was a fugitive from justice and thereby himself prevented further proceedings.

It should not be lost sight of that, in computing the statutory period of limitations, the time during which the accused was absent from the United States or other manifest impediment existed to his trial should be excluded. File 26516–82, J. A. G., May 31, 1912. *See also* DESERTION, 91.

16. **Plea in bar of trial**—In the case of an electrician first class the court sustained the plea of the accused to the charges of "Desertion" and "Knowingly and willfully misappropriating and applying to his own use property of the United States furnished and intended for the naval service thereof," although the judge advocate had evidence which he failed to introduce showing that the accused deserted after discovery of the shortage in Government property for which he was responsible; that "all efforts" were made to recapture him; that "Bremerton and Charleston were searched by ship's police;" and that "rewards were offered and sent to the police of all near-by cities, also to his home city, Oakland, Cal.," etc. The department directed "that the court reconsider its finding upon the plea in bar interposed by the accused to both charges; and, if it is decided by the court to revoke its finding and overrule the plea of the accused, it is further directed that the court proceed with the trial. Should the court on reconsideration overrule the plea of the accused and proceed with the trial, the defense would be entitled to avail itself of the statute of limitations by evidence in support of the plea of not guilty," etc. File 26251–7158:4, Sec. Nav. May 13, 1913.

17. **Policy of the department**—In "Fraudulent enlistment" cases. *See* FRAUDULENT ENLISTMENT, 87–90; STATUTE OF LIMITATIONS, 12, 20.

18. **Prevent running of**—In order to prevent the running of the statute of limitations the order for the trial of an Assistant Paymaster upon certain charges was issued by the department prior to the preparation of the specifications. When the charges and specifications were subsequently put in due form it was directed that the previous order be made a part of the record. Although the accused was represented by civilian counsel, no plea of the statute of limitations was interposed. File 26251–6822; G. C. M. Rec. 26451. *See also* DESERTION, 91; STATUTE OF LIMITATIONS, 15.

19. **Rule of procedure**—The statute of limitations as contained in A. G. N. 61 is "a rule of procedure for the benefit of the accused," etc. C. M. O. 31, 1910, 5. *See also* STATUTE OF LIMITATIONS, 20.

Digitized by Google

20. **Run**—Statute of limitations having run—It is observed that the accused was tried under the second charge, that of "Fraudulent enlistment," which offense was committed more than two years before the issuing of the order for trial. Although "fraudulent enlistment" is not, like desertion, a continuing offense (File No. 5256-04), and although the statute of limitations as contained in article 61 of the Articles for the Government of the Navy is "a rule of procedure for the benefit of the accused," and does not prevent the jurisdiction of the court-martial from attaching in proper cases (In re Bogart, 3 Fed. Cas., No. 1596; In re Davidson, 4 Fed. Rep., 507, 21 Fed. Rep., 618; In re White, 17 Fed. Rep., 723; In re Zimmerman, 30 Fed. Rep., 176; Ex parte Townsend, 133 Fed. Rep., 74; note to U. S. *v.* O'Brian, 27 Fed. Cas., No. 15908), and as such must be by him pleaded (In re Bogart, 3 Fed. Cas., No. 1596; Johnson *v.* U. S., 3 Fed. Cas., No. 7418), yet it is the policy of the department not to bring offenders to trial for "fraudulent enlistment" unless the prosecution is prepared to prove that the accused was not amenable to justice within a period of two years after the commission of that offense by reason of having absented himself or for some other manifest impediment.

From the record it appears that the accused in this case first enlisted July 8, 1907, deserted November 18, 1907, and fraudulently enlisted February 26, 1908. During all the period between the last-mentioned date and the expiration of two years therefrom, i. e., February 25, 1910, the accused was within the jurisdiction of the naval authorities, and could, if the facts had been known, have been brought to trial. But lack of knowledge or necessary evidence did not prevent the statute from running in his favor (14 Op. Atty. Gen., 266), and had he pleaded the bar thereof before the court, the plea should properly have been sustained.

As the accused did not plead the statute it must be held that he waived its benefits (Johnson *v.* U. S., 3 Fed. Cas., No. 7418), but as already stated it is the policy of the department not to bring an accused to trial under the circumstances of this case. The sentence of the court has already been reduced by the reviewing authority from two years' to one year's confinement with corresponding reduction in loss of pay, and as that would represent the sentence for desertion alone, the proceedings, findings, and sentence, as mitigated, were approved. C. M. O. 31, 1910, 5.

21. **Specifications**—Laid to cover offenses within. C. M. O. 69, 1903, 2.

22. **Suggested**—Statute of limitations proposed. An. Rep. J. A. G., 1894, p. 8.

23. **Trial of enlisted men by courts-martial who have absented themselves more than two years subsequent to date of expiration of enlistments**—"While the statute of limitations is a matter of defense which should be entertained and determined by the court like any other question involving an adjudication upon the merits of the case, there would be no good reason ordinarily in trying an accused person where the statute could be pleaded in bar and the proceedings summarily ended. Accordingly the established practice should be continued of not bringing offenders to trial where such period of time has elapsed as to *prima facie* constitute a bar to trial, unless the prosecution is in possession of facts indicating that the accused is within the exceptions of the statute of limitations. (File 26262-103:3. *See also* C. M. O. 27, 1913, 13.) To this may be added that, as the accused may waive his right to plead the statute of limitations, if the commandant should for any reason deem it advisable to bring him to trial, and the accused should stipulate that in such event he would not avail himself of the statute, his trial may be ordered if so recommended by the commandant, although there may be no evidence available to the prosecution to indicate that the accused falls within the exceptions of the statute." File 26516-214, Sec. Navy, July 22, 1916.

24. **Waived**—The statute of limitations must be pleaded, otherwise it is waived. C. M. O. 31, 1910, 5; 14, 1911, 3. *See also* G. C. M. Rec. 21479. *See also* STATUTE OF LIMITATIONS, 20.

25. **War**—No statute of limitations applicable for desertion in time of war. *See* DESERTION, 132; STATUTES OF LIMITATIONS, 11.

26. **Warrant officer (boatswain)**—"The records of the department show numerous complaints from the creditors of Boatswain * * * [the accused] concerning the nonpayment of his debts, many of which have extended over such a period of time that prosecution thereof is barred by the Statute of Limitations." C. M. O. 34, 1916, p. 3.

27. **When statute begins to run**—The department in reviewing the record of proceedings in the case of a private, United States Marine Corps, observed that an offense was alleged to have been committed by the accused more than three years prior to the date the specification was preferred against him.

Digitized by Google

Section 1624 of the Revised Statutes and amendments, covering the statute of limitations, as set forth in article 61, Articles for the Government of the Navy, provides as follows:

"ART. 61. No person shall be tried by court-martial or otherwise punished for any offense, except as provided in the following article, which appears to have been committed more than two years before the issuing of the order for such trial or punishment, unless by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period."

In view of the above-quoted law it might appear that the operation of the statute of limitations would invalidate the proceedings in this case. It has been held, however, that the bar of the statute of limitations is a matter of defense, and that by failing to use it as such, the defendant waives it.

In the case of In re Bogart (3 Fed. Case No. 596) the court held:

"As to the alleged former conviction, and the bar of the statute of limitations, these are matters of defense, and are questions for the determination of the tribunal having jurisdiction to try the charge.

The latter may involve an inquiry as to whether the petitioner has absented himself, or whether other legal impediment to the trial has existed. These are matters that will arise in the exercise of jurisdiction, as in this opinion before distinguished from the fact of the existence of jurisdiction, to hear and determine the charge. They are matters to be pleaded as a defense. (Johnson *v.* U. S., Case No. 7418); U. S. *v.* Cook, 17 Wall., 84 U. S., 168.)"

In the case of Johnson *v.* U. S., referred to in the foregoing ruling, the opinion of the court was as follows:

"* * * And it is insisted that the act prohibits the punishment of the offender, where the prosecution is not commenced within two years, the proceedings were null and void and not merely erroneous; and that on this ground the prisoner should be discharged. Where there is a want of jurisdiction apparent upon the record the proceedings of the court are not valid. But there is no want of jurisdiction in this case. The court had jurisdiction of the offense, and if there was a bar under the statute it should have been pleaded. No such plea was interposed. * * * By failing to set up the defense the defendant waived it."

While it is probable that the specification should have alleged the offense to have been committed in the year 1911, the department considered that the error would not invalidate the proceedings in the case, as the jurisdiction of the court being undoubted, the time laid in the indictment is not material in this aspect of the case.

Furthermore, the accused having pleaded guilty to the specification, no injustice was supposed to have been done. C. M. O. 14, 1911, 3.

STATUTORY BOARDS. *See* BOARDS, 1.

STATUTORY CONSTRUCTION AND INTERPRETATION.

1. **Advisory statutes.** *See* ADVISORY STATUTES.
2. **Ambiguous and doubtful statutes**—"In the construction of a doubtful and ambiguous law the contemporaneous construction of thdse who were called upon to act under the law, and were appointed to carry its provisions into effect," should not be disregarded. (Edwards *v.* Darby, 12 Wheat. 206, cited with approval in Atkins *v.* Disintegrating Co., 18 Wall. 272, 301; Smythe *v.* Fiske, 23 Wall. 374, 382; U. S. *v.* Pugh, 99 U. S. 265; U. S. *v.* Moore, 95 U. S. 760, 763.) 15 J. A. G. 294–295, May 31, 1911.
3. **"Avowals of framers"**—"It is the duty of the court to construe a law or ordinance, and gather its intention *from the law itself*, and not from contemporaneous avowals of individual framers of it." (Barnes *v.* Mayor, etc., of Mobile, 19 Ala. 707). File 24432–34, J. A. G., May 1, 1911, p. 18.
4. **Cases arising hereafter**—Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms. *See* File 8627–189, May 12, 1915. *But see contra* 7 Comp. Dec. 844.
5. **Common law**—Construction of statutes intended to be declaratory of the common law. *See* COMMON LAW, 9; STATUTORY CONSTRUCTION AND INTERPRETATION.
6. **Common sense as a guide.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 117.
7. **Conditions at time of enactment**—It is an established rule that statutes are to be construed in the light of conditions which existed at the time of their enactment. File 27231–63, J. A. G., May 27, 1915, p. 2.

Digitized by Google

The court should endeavor to place itself as far as possible in the light that the legislature enjoyed, to look at things as they appeared to it, and to discover the purpose of the law from the language used in connection with attending circumstances. File 26260-1392, June 29, 1911, p. 5.

8. **Congress**—Proceedings and debates. *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 17, 18.
9. **Same**—Proceedings other than debates. *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 18.
10. **Constitutionality of a statute.** *See* STATUTES, 4.
11. **Contemporaneous construction**—The contemporaneous construction of a statute by those charged with its administration, "should not be disregarded or overturned except for cogent reasons and unless it be clear that such construction is erroneous." (U. S. *v.* Johnston, 124 U. S. 236.) File 26260-1392, 26260-697, J. A. G., June 29, 1911, p. 5. *See also* STATUTORY CONSTRUCTION AND INTERPRETATION, 2.

Contemporaneous and long continued construction of the law by the administrative officers charged with its execution is controlling, for in such case it is not so important to determine whether the original construction of the law was correct, as that a construction acted on for such a period of time should be upheld. (20 Op. Atty. Gen. 362.) File 26521-144:1, Sec. Navy, July 10, 1916, p. 3.

12. **Same**—"The contemporaneous construction of the law by the department, which, according to the Supreme Court, is entitled to great weight and 'in a case of doubt ought to turn the scale.' (Brown *v.* U. S., 113 U. S. 568.)" File 27213, J. A. G., Apr. 24, 1909, p. 4.
13. **Contemporaneous and uniform interpretation**—"This contemporaneous and uniform interpretation is entitled to weight in the construction of the law, and in a case of doubt ought to turn the scale. (Brown *v.* U. S., 113 U. S. 571.)" File 11 130-2b, J. A. G., July 31, 1909, p. 5.
14. **Context.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 56.
15. **Criminal statutes**—"Whether the construction of a civil statute of limitations is to be strict or liberal—a question on which there is no absolute harmony of opinion—*that of a criminal one is plainly in principle to be liberal;* because it is a provision in favor of the accused and we have seen that this sort of provision is to receive a highly liberal construction. And such is the doctrine—at least the better doctrine—of the courts." (Bishop on Statutory Criminal Law, sec. 259.) File 26516-47, J. A. G., May 18, 1911, p. 4. *See also* STATUTES, 6; STATUTORY CONSTRUCTION AND INTERPRETATION, 88, 92.
16. **Date**—The general rule is that laws speak from the date of their enactment. File 13707-38:9. *See also* 25 Op. Atty. Gen. 299.
17. **Debates in Congress**—Are frequently referred to in confirmation of a construction otherwise arrived at by the court. (Hepburn *v.* Griswold, 8 Wall. 610.) File 26255-14/A, J. A. G., May 4, 1909, p. 4. *See also* File 26253-114, J. A. G., Aug. 19, 1910, p. 14.
18. **Same**—"While a statute must ordinarily be construed from the language used therein, it is not inadmissible to revert to the actual proceedings in Congress, apart from the opinions expressed in debates, to assist in the determination of the construction of a statute of doubtful import, and the Supreme Court has thus interpreted a badly expressed enactment. (Blake *v.* National Banks, 23 Wall. 307.)" File, 14818-4, J. A. G., p. 17.
19. **Definition**—Of statutory construction and interpretation. *See* WORDS AND PHRASES (CONSTRUCTION OF STATUTES).
20. **Departmental circulars**—The courts in construing statutes involved, in cases of doubt, attach considerable weight to the provisions of departmental circulars as indicating the administrative construction. (*See for example* Plummer *v.* U. S., 224, U. S. 143, involving circular of the surgeon general with reference to the pay of Acting assistant surgeons in the Navy.) File 13707-48, J. A. G., Aug. 2, 1915.
21. **Departmental construction**—The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without the most cogent reasons. (U. S. *v.* Moore, 95 U. S. 760, 763.) The officers concerned are usually able men and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret. (Reports of J. A. G., 1895, 1896, 1897; U. S. *v.* Moore, 95 U. S. 763; Brown *v.* U. S., 113 U. S. 571; Heath *v.* Wallace, 138 U. S. 582; File 26255-14/A, etc., J. A. G., May 4, 1909.) File 26260-1294, J. A. G., June 10, 1911, p. 7; 15 J. A. G., 294-295, May 31, 1911; 26260-1392, 26260-697, J. A. G., June 29, 1911, p. 5. *See also* File 26260-396e, J. A. G., Feb. 24, 1910, p. 10.

Digitized by Google

22. **Same**—"It is now settled that the construction and practice of the executive department charged with the administration of a statute is controlling in cases of doubt." File 26251-2993, J. A. G., Mar. 10, 1910, p. 9.

23. **Same**—"When an act of Congress has for a considerable period of time received a uniform departmental construction, and this construction was known to Congress, and a subsequent act *in pari materia* is enacted without change of language, there is a presumption of considerable force that the new language is intended to receive the same construction as the old." (21 Op. Atty. Gen. 339.) File 3980-1075, J. A. G., Apr. 6, 1915.

24. **Same**—The Supreme Court has held that the substantial reenactment of a statute which has received departmental construction is not merely "indicative of legislative approval of the departmental construction," but that "Congress will be held to have adopted that construction." (U. S. *v.* Falk, 204 U. S. 143.) The case cited related to the construction of a law by the Attorney General which was followed by the executive officers charged with its administration.

In United States *v.* Hermanos (209 U. S. 327) this principle was extended to the construction of a statute by the Treasury Department and its subsequent reenactment by Congress: the court there stating: "We have said that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution. (Robertson *v.* Downing, 127 U. S. 607; U. S. *v.* Healey, 160 U. S. 136.) And we have decided that the reenactment by Congress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction. (U. S. *v.* Falk, 204 U. S. 143, 152.)"

In this connection attention is invited to the decision of the Court of Claims in the case of Falk *v.* United States (28 Ct. Cls. 242) that "where a jurisdictional act adopts the language of a previous statute which had been interpreted for several years in a certain way by an executive department, it must be inferred that Congress intended to use the language as thus interpreted;" the Court of Claims stating in its opinion, with reference to the interpretation of the later act, that "Congress intended to use therein the words 'citizens of the United States,' in the sense that had been given by the Interior Department to the same words in the act of 1885 for the past six years, which, it must be presumed, was known to Congress."

The Comptroller of the Treasury has also recognized and applied this principle in the interpretation of statutes. (See for example 2 Comp. Dec. 100.)

Reference may also be made to the decision of the Court of Claims in Carlinger *v.* United States (30 Ct. Cls. 476) in which it was held that the interpretation given to the laws by executive regulations which have "received the tacit, if not express, approval of Congress," will not be disturbed by the court even though it "may well be doubted" whether such regulations were in fact authorized by law.

Furthermore, it has repeatedly been held by the Attorney General that the reenactment of a law which has received executive construction is equivalent to the adoption by Congress of such construction. (21 Op. 410; *id.* 339; *id.* 352; 15 *id.* 646.)

In this connection it may also be remarked that the Supreme Court in Wilkes *v.* Dinsman (*supra*), in holding that enlisted men of the Marine Corps were embraced by the statute providing for active duty, after expiration of enlistment, of persons "enlisted for the Navy," added, as strengthening its conclusion: "Such was the construction put on this section at the time by the Navy Department and navy officers on board * * * ." File 26280-61, Sec. Navy, July 10, 1915.

"When an act of Congress has, by actual decision or by continued usage and practice, received a construction at the proper department, and that construction has been acted on for a succession of years, it must be a strong and palpable case of error and injustice that would justify a change in the interpretation to be given it. (2 Op. Atty. Gen. 558. *See also* 11 Op. Atty. Gen. 558.) File 313-42, J. A. G., Mar. 3, 1908, p. 5; 26255-14-A, etc., J. A. G., May 4, 1909, p. 2.

25. **Departmental practice**—"The long continued practice of a department of the Government, if not clearly illegal, will be recognized by the courts in the construction of a statute as entitled to great weight." File 26516-38, J. A. G., Dec. 3, 1910, p. 4.

26. **Departmental precedents**—Where the department's precedents establish a uniform practice it was held by the Supreme Court of the United States that the contemporaneous and uniform interpretation of a statute by an executive department charged with its administration is conclusive even though the true construction of the law might be open to doubt were the question a new one. (Brown *v.* U. S., 113 U. S. 568.) File 17789-20, J. A. G., Dec. 18, 1913.

27. **Departmental usage.**—*See* STATUTORY CONSTRUCTION AND INTERPRETATION, 24.

Digitized by Google

28. **Derogation of the appointing power**—"Statutes in derogation of the appointing power must be strictly construed, and not extended any further than is required by the plain import of the words used." File 5252-36, J. A. G., May 5, 1910, p. 9. *See also* OFFICERS, 96.
29. **Difficulty of construction**—"Even the most skillful draftsman of legislation can not guarantee that his product will be free from doubtful questions, for written language is, at best, only an imperfect medium for the expression of ideas. As the Supreme Court has stated, there have not been wanting 'illustrious instances of great minds which, after they had, as legislators or commentators, reposed upon a short and hasty opinion, have deliberately withdrawn from their first impressions when they came upon the judgment seat to reexamine the statute or law in its full bearings.' [Mitchell *v.* Great Works Milling etc. Co. (2 Story 653).]" An. Rep., J. A. G., 1916, p. 18. *See also* STATUTES, 9; STATUTORY CONSTRUCTION AND INTERPRETATION, 30-31.
30. **Draftsman**—"What is known as the 'legislative intent' may be, and very frequently is, quite a different thing from the intention of the individual who *drafted* the bill." 14 J. A. G., 62, Nov. 3, 1908.
31. **Same**—"The intention of the draftsman of the act or the individual members of the legislature who voted for and passed it has nothing to do with its construction. The only just rule of construction, especially among a free people, is the meaning of the law as expressed to those to whom it is prescribed, and who are to be governed by it. (City of Richmond *v.* County of Henrico, 2 S. E. 26, 30.) File 244:2-34, J. A. G., May 1, 1911, p. 17.

"It is not understood by many who irresponsibly draft proposed laws that statutes are interpreted not by what the draftsman intended to say, but by what the words used do actually say as determined by the ordinary canons of statutory construction." Am. Rep. J. A. G., 1916, pp. 17-18. *See also* STATUTES, 9, with reference to importance of drafting proposed laws.
32. **Directory statutes.** *See* MANDATORY REGULATIONS AND LAWS; C. M. O. 27, 1898, 1; File 2-550-3, J. A. G., May 12, 1915, p. 4.
33. **Effect to be given every word.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 65, 123.
34. **Ejusdem generis.** *See* EJUSDEM GENERIS.
35. **Evil statute is designed to remedy**—The object which the legislative body sought to attain and the evil which it was endeavoring to remedy may always be considered for the purpose of ascertaining its intention. (U. S. *v.* Ninety-Nine Diamonds, 139 Fed. 961, 965.) File 26253-200-1, J. A. G., Feb. 17, 1912, p. 8.
36. **Same**—"Another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and *as it was pressed upon the attention of the legislative body.*" (Holy Trinity Church *v.* U. S., 143 U. S., 457, 465.) File 26253-200:1, J. A. G., Feb. 17, 1912, pp. 8-9; 26260-1392, 26260-697, J. A. G., June 29, 1911, p. 8.

"A construction of a statute which would go beyond the evil intended to be remedied and produce apparently unforeseen and untoward results should be avoided." (28 Op. Atty. Gen. 78.) File 26516-38, J. A. G., Dec. 3, 1910, p. 4.
37. **Expressio unius est exclusio alterius**—"Where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others; there is then a natural inference that its application is not intended to be general. (Sutherland, sec. 327.) File 27213, J. A. G., Apr. 24, 1909, p. 4.
38. **Extension by implication.** *See* OFFICERS, 96.
39. **Flexible language**—"By such a reading and consideration of a statute its object or general intent is sought for and the consistent auxiliary effect of each individual part. Flexible language which may be used in a restrictive or extensive sense will be construed to make it consistent with the purpose of the act and the intended modes of its operation as indicated by such general intent, survey, and comparison." (Sutherland on Statutory Construction, p. 285.) File 11130-2b, J. A. G., July 31, 1909, p. 5.
40. **General act repealing a previous particular act.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 115-117.
41. **General words**—May be restricted by context. *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 56; WORDS AND PHRASES (*Noscitur a sociis*).
42. **General and special provisions.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 115-117.
43. **"Hereafter."** *See* "HEREAFTER."
44. **Implied repeals never favored.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 109.

Digitized by Google

45. **In pari materia.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 23; WORDS AND PHRASES.

46. **Inconvenience, injustice, or prejudice to public interests**—It is only where the proper construction is otherwise doubtful that arguments based on the inconvenience, injustice, or prejudice to the public interests resulting from a proposed construction may be considered. File 26521-30, Jan. 25, 1912. *See also* 26 Op. Atty. Gen., 537.

47. **Increase of personnel by implication**—It has repeatedly been held that legislation relating to the Navy should not be construed as impliedly increasing the officers authorized by law, where no such result was intended by Congress; that when Congress has seen fit to make increases in the number of officers in the Navy, either generally or in particular corps or grades, it has generally used specific and apt language to accomplish that object. (*See* 28 Op. Atty. Gen. 526; *see also* File 27215-3, May 6, 1913.) File 5460-81, J. A. G., May 12, 1916.

48. **Individual legislators.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 3, 53.

49. **Injustice to public interests.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 46.

50. **Intent of legislature**—It is the *intent* of the legislature as expressed in *the law itself*, and apparent upon its face, that must govern its construction if that intent can reasonably be gathered from its terms. (U. S. *v.* Goldenberg, 168 U. S., 95, 102.) File 26253-200:1, J. A. G., Feb. 17, 1912, p. 8. *See also* File 26253-114, Aug. 19, 1910, p. 14.

"Faults in expression were disregarded in order to carry out the manifest intention of the lawmakers." File 26521-144:1, Sec. Navy, July 10, 1916, p. 3.

"The intent of the present laws can only be gathered from the intent of the legislature *as expressed in the laws themselves.*" File 28687-14, J. A. G., Dec. 14, 1916, p. 4.

51. **Same**—It is the duty of the courts to say that, however broad the language of statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore can not be within the statute. (Holy Trinity Church *v.* U. S., 143 U. S., 457, 472.) File 26253-200:1, J. A. G., Feb. 17, 1912, p. 8.

52. **Same**—The modern doctrine is that to construe a statute liberally or according to its equity is nothing more than to give effect to it according to the intention of the lawmaker, as indicated by its terms and purposes. (Sutherland on Statutory Construction.) 14 J. A. G. (Solicitor), 18, May 26, 1908.

53. **Same**—"The legislative intent is an uncertain guide of interpretation and the opinions, motives, or purposes of individual legislators, remarks made in debate, or the intention of the draftsman of the statute are too uncertain to be considered in its construction." (Tennant *v.* Kuhlemeier, 120 N. W. 689.) File 24482-34, J. A. G., May 1, 1911, p. 18.

54. **Same**—The intent of the legislature is to be ascertained from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or the other (36 Cyc., 1157). File 26260-1244, J. A. G., Apr. 14, 1911, p. 2.

55. **Same**—"A legislative act is to be interpreted according to the intention of the legislature *apparent upon its face.* (U. S. *v.* Fisher, 109 U. S., 145.) The Supreme Court have also said, 'We must take it to be true that the legislature intend precisely what they say, and to the extent which the provisions of the act require for the purpose of securing their just opinion and effect.' (2 Story, U. S., 653.)." File 26253-114, J. A. G., Aug. 19, 1910, p. 14.

56. **Same**—"The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and *promotes in the fullest manner the policy and objects of the legislation.* The rule of strict construction is not violated by permitting the words of a statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, *as will best manifest the legislative intent.*" (U. S. *v.* Hartwell, 6 Wall., 385, 395, construing a penal statute.) File 26260-1302, 26260-697, J. A. G., June 29, 1901, pp. 18-19. *See also* BOARDS, 1.

It is established by the authorities that the intention of the individual by whom a statute was framed can not be considered in determining the meaning of such statute. File 24482-34, May 1, 1911.

57. **Same**—"As a general rule, where an act is prohibited and made punishable by statute, the statute is to be construed in the light of the common law, and the existence of a criminal intent is essential. The legislature, however, may forbid the doing of an act and make its commission criminal without regard to the intent of the doer, and if such an intention appears the courts must give it effect though the intention may have been innocent. Whether or not in a given case a statute is to be so construed is to be determined by the court by considering the subject matter of the prohibition as well as the language of the statute and thus ascertaining the intention of the legislature." (12 Cyc., 148.)

Digitized by Google

"The legislature may enact laws for the mere violation of which, irrespective of the criminal intent, penalties are attached; as for selling liquors to minors, selling adulterated food and drugs, allowing minors to frequent saloons, changing and obstructing public roads, maintaining a nuisance, disposing of mortgaged property." (8 A. & E. Ency. of Law, p. 291.) C. M. O. 5, 1912, 7.

"Where it can be shown that a Government has once adopted a certain rule of justice for its conduct, it is fair to infer, that in legislating afterwards upon the same subject, it intended to pursue the same rule, unless the contrary shall be clearly expressed." (U. S. *v.* Heth, 3 Cranch 399, 409.) File 26521-169, J. A. G., Nov. 14, 1916, p. 4.

58. **Intention of individual who framed statute.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 3, 53, 57.

59. **"Interpretation clauses"**—"Clauses of the same character (known in England as 'interpretation clauses') are frequently added to single acts, and are confined to the interpretation of the acts to which they are attached." (26 A. & E. Ency. Law, 636, 637.) File 26254-78, J. A. G., July 1, 1908, p. 3.

60. **Judge Advocate General**—Construction of "Statutes relating to personnel" of naval service is part of duties of Judge Advocate General. *See* JUDGE ADVOCATE GENERAL, 14, 20, 32.

61. **Judicial decisions of a former act.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 69.

62. **Language clear and unambiguous**—There is no safer or better settled canon of the interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expressed, and no room is left for construction. (Swarts *v.* Sigel, 117 Fed. Rep., 13, 18.) File 3980-575:17, J. A. G., Aug. 19, 1911, p. 13.

63. **Language used**—"In construing an act of Congress we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influences them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used." (U. S. *v.* Union Pacific R. R. Co., 9 U. S., 79.) File 24482-34, J. A. G., May 1, 1911, p. 18.

64. **Language and apparent objects**—"In truth, courts of justice are not at liberty to look at considerations of this sort. We are bound to interpret the act as we find it, and to make such an interpretation as its language and its apparent objects require. We must take it to be true that the legislature intend precisely what they say, and to the extent which the provisions of the act require for the purpose of securing their just opinion and effect. Any other course would deliver over the court to interminable doubts and difficulties; and we should be compelled to guess what was the law, from the loose commentaries of different debates, instead of the precise enactments of the statute." (Mitchell *v.* Great Works Milling, etc., Co., 2 Story, 653.) File 24482-34, J. A. G., May 1, 1911, p. 18.

65. **Law must be construed as a whole**—It may be necessary to consider every part of an act in its effect upon other parts in order to arrive at a construction that will be effective. File 11130-2b, July 31, 1909, p. 5. *See also* STATUTORY CONSTRUCTION AND INTERPRETATION, 123.

66. **Law should be settled permanently**—But it is almost as important that the law should be settled permanently as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly, unless clearly erroneous. Vacillation is a serious evil. File 5252-68, May 15, 1915, quoting Gilman *v.* Philadelphia (3 Wall., 724). *See also* STARE DECISIS, 1.

67. **Legislative construction**—"While an expression of the legislative view as to the proper construction of another law is of no judicial force, it is nevertheless entitled to some weight in the construction of doubtful statutes." (26 A. & E. Ency. of Law, 636, 637.) File 26254-78, J. A. G., July 1, 1908, p. 3.

68. **Legislative intent.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 50-58.

69. **Legislature presumed to know**—"It is a general rule of interpretation that the legislature is presumed to know decisions of the courts construing its language, so that if the tribunals have given a certain construction and the legislature in a new law uses the same or practically the same language, without negativing the construction adopted by the courts, it will be presumed that the legislature means what the courts have said." (25 Op. Atty. Gen., 309.) It is well settled that "words in a subsequent act are to be given the recognized meaning they had in a former act *in pari materia* in the absence of anything to show a contrary intent, and judicial decisions construing one of such acts forms a sound rule of construction for the other." (26 A. & E. Ency. of Law, 611.) File 26254-50, J. A. G., July 1, 1908, p. 2.

Digitized by Google

70. **Letter of statute**—It is the duty of courts to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore can not be within the statute. (Holy Trinity Church *v.* U. S., 143 U. S., 457, 472.) File 26253-200:1, J. A. G., Feb. 17, 1912, p. 8.

71. **Same**—The spirit and purpose of a statute are not to be lost sight of in a strict adherence to its letter. *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 106.

72. **Literal sense of the law not necessarily its true sense**—"But the literal sense of the law is not necessarily its true sense, for if, by taking the law by its four corners or by looking at it in the light of the circumstances in which it was passed, or by doing both, it appears that its meaning should be restricted or enlarged in order to carry out the intention of the legislature, it is the duty of the expounder to limit or amplify that meaning, as the case may require." (19 Op. Atty. Gen., 616.) File 26280-61, Sec. Navy, July 10, 1915; 15252-66, J. A. G., May 13, 1915, p. 7.

73. **"Making law"**—It is the province of the courts to construe and interpret laws, not to make them—"It is the business of courts to decide what the law is, and not by consideration or surmises as to the policy of the Government have the effect to adjudge that to be law which has not been so enacted by the legislature." (White *v.* U. S., 191 U. S., 551, 552.) File 28550-3, J. A. G., May 12, 1915, p. 1.

Under the strict rules of statutory construction a statute should not be so construed or interpretated as to have the effect of "enacting law." File 28687-14, J. A. G., Dec. 14, 1916, p. 3.

74. **Same**—"It is the duty of the legislature to enact laws, not to expound or interpret them." (26 A. & E. Ency. of Law, 636, 637.) File 26254-78, J. A. G., July 1, 1908, p. 3.

"The department was, of course, *not making*, but was administering the statute." 23 J. A. G., 142.

75. **Mandatory statutes**—The question whether or not a statute is mandatory or directory depends upon the intention of the legislature, to be ascertained from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or another. (File 26260-1244, J. A. G., Apr. 14, 1911. *See also* 8 Op. Atty. Gen. 112.

76. **"May"**—Use of "may" in statute. *See* File 28550-3, J. A. G., May 12, 1915.

77. **"May" and "shall"**—Under certain circumstances the words "may" and "shall" have an identical mandatory meaning. File 26253-114, J. A. G., Aug. 19, 1910, p. 12.

"Shall" will be construed "may" where no public or private interest is impaired by such construction; but where the public are interested, or where the public or third persons have a claim *de jure* that the act shall be done, it is imperative, and will be construed to mean "must." (City of Madison *v.* Daley, 58 Fed. Rep., 751, 753.) File 26260-1244, J. A. G., Apr. 14, 1911, p. 2.

"'May' should be construed in a statute to mean 'shall' wherever the rights of third persons or the public good requires." (48 Mo., 390, 8 Am. Rep., 108.) 14 J. A. G., 62, Nov. 3, 1908.

"The conclusion to be deduced from the authorities is that where power is given to public officers, * * * whenever the public interest or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory. *What they are empowered to do for a third person the law requires shall be done. The power is given not for their benefit but for his.* * * * In all such cases it is held that the intent of the legislature, *which is the test*, was not to devolve a mere discretion, but to impose a positive and absolute duty." (71 U. S., 4 Wall., 435; 113 Fed., 232, 237.) 14 J. A. G., 62, Nov. 3, 1908.

"Where a statute declares that a public officer or public body '*may*' have power to do an act which concerns the public interests or the rights of third persons, '*may*' means '*shall*,' and the execution of the power may be insisted on as a duty." (Sedgwick, p. 439.) 14 J. A. G., 62–63, Nov. 3, 1908.

Congress provided that "the Secretary of the Navy is hereby authorized" to furnish clothing bounty to apprentices upon enlistment. Question considered was "whether that language is mandatory or permissive." The Attorney General said (25 Op. Atty. Gen., 272): "In a number of cases decided in the Federal courts, the word 'may,' which is practically synonymous with the word 'authorize,' has been held to be mandatory and not permissive when embodied in a statute." "The general rule is that where Congress confers a power upon an executive officer which involves the rights or interests of private individuals or the general public, the language used by Congress is considered as *imposing a duty rather than a discretion.*" "In the case of the Supervisors *v.* United States (4 Wall., 435, 445), in which 'may', if deemed advisable, was under consideration, the court said: 'The counsel for the respondent

Digitized by Google

insists, with zeal and ability, that the authority thus given involves no duty; that it depends for its exercise wholly upon the judgment of the supervisors; and that judicial action can not control the discretion with which that statute has clothed them. We can not concur in this view of the subject." The Attorney General concluded: "In my opinion the language used by Congress in the act here under consideration is to be construed as imposing" upon the Secretary "*an imperative obligation* and *not merely* discretionary power." 14 J. A. G., 62–63, Nov. 3, 1908.

78. **Motives of members voting for act.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 84.
79. **"Must."** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 77.
80. **"Noscitur a sociis."** *See* WORDS AND PHRASES.
81. **Object of construction**—Is to ascertain the legislative intent. *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 82, 83, 88.
82. **Object to be accomplished by the statute**—"A construction of a statute which would go beyond the evil intended to be remedied and produce apparently unforseen and untoward results should be avoided." (28 Op. Atty. Gen., 78.) "The object to be accomplished at the time of its enactment is of paramount importance in giving effect to an act." (43 Ct. Cls., 7.) File 26516–38, J. A. G., Dec. 3, 1910, p. 4. *See also* STATUTORY CONSTRUCTION AND INTERPRETATION, 106.
83. **Same**—In one case it was stated by the Judge Advocate General: "After careful consideration of the 'object and purpose' of this paragraph of the act, its legislative history, including letters on the subject addressed by the department to the Committees on Naval Affairs of the House and Senate, the committee hearings thereon, the debates and the reports of the committees on conference, in connection with established principles of statutory interpretation applicable thereto, I am of oponion * * * ." File 2855–3, J. A. G., May 12, 1915, p. 1.
84. **Opinions**—"The opinions of individual legislators as to the object and effect of a statute are of little or no weight on questions of construction, and are generally inadmissible. Nor may the intention of the draftsman nor the motives of members who voted for the act be taken into consideration in its construction." (26 A. & E. Ency. of Law, 638, 639.) File 24482–34, J. A. G., May 1, 1911, p. 17.
85. **"Or otherwise"**—The words "or otherwise" in law, when used as a general phrase, following an enumeration of particulars, are commonly interpreted in a restricted sense, as referring to such other matters as are kindred to the classes before mentioned. This phrase when used as above should receive an *ejusdem generis interpretation.* File 4924–435, J. A. G., June 20, 1916. *See also* EJUSDEM GENERIS.
86. **Paramount duty**—"The paramount duty of the judicial interpreter is to put upon the language of the legislature, honestly and faithfully, its plain and rational meaning, and to promote its object." (Maxwell on the Interpretation of Statutes, 2d ed., p. 318, quoted approvingly in U. S. *v.* Lacher, 134 U. S., 624.) File 26260–1392, 26260–697, J. A. G., June 29, 1911, p. 19.
87. **Pari materia.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 125, 126; WORDS AND PHRASES.
88. **Penal statutes**—"'The object in construing penal, as well as other statutes, is to ascertain the legislative intent,' as was said by the Supreme Court of the United States (U. S. *v.* Hartwell, 6 Wall., 385, 395) with reference to a statute defining and punishing embezzlement by public officers." File 26260–1392, 26260–697, J. A. G., June 29, 1911, p. 18. *See also* STATUTES, 6; STATUTORY CONSTRUCTION AND INTERPRETATION, 15 89–92.
89. **Same**—"Penal statutes are to be strictly construed." File 26260–1392, 26260–697, J. A. G., June 29, 1911, p. 19.
It is a well settled rule of law that penal statutes and fines and forfeitures imposed pursuant thereto should be strictly construed. C. M. O. 17, 1910, 8.
90. **Same**—"But though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature." (U. S. *v.* Wiltberger, 5 Wheat., 76; U. S., *v.* Morris, 14 Pet., 464; Am. Fur Co. *v.* U. S., 92 Pet., 358, 367.) * * *
"To the same effect is the statement of Mr. Sedgwick, in his work on Statutory and Constitutional Law, 2d ed., 282: 'The rule that statutes of this class are to be construed strictly, is far from being a rigid or unbending one; or, rather, it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the courts refusing, on the one hand, to extend the

Digitized by Google

punishment to cases which are not clearly embraced in them, and on the other, equally refusing by any mere verbal nicety, forced construction, or equitable interpretation to exonerate parties plainly within their scope.' * * *

"And the reason for the less rigorous application of the rule is well given in Maxwell on the Interpretation of Statutes, 2d ed., p. 318, thus:

"'The rule which requires that penal and some other statutes shall be construed strictly was more rigorously applied in former times, when the number of capital offenses was 160 or more; when it was still punishable with death to cut down a cherry tree in an archard, or to be seen for a month in the company of gypsies. But it has lost much of its force and importance in recent times, since it has become more and more generally recognized that the paramount duty of the judicial interpreter is to put upon the language of the legislature, honestly and faithfully, its plain and rational meaning, and to promote its object.'" (U. S. *v.* Lacher, 134 U. S., 624, construing a criminal statute.) File 26260-1392, 26260-697, J. A. G., June 29, 1911, pp. 19-20.

91. **Same**—In construing a statute, such as the one under consideration, which is substantially a statutory penalty, the statute must receive a strict—that is, a literal—construction." (Tiffany *v.* National Bank of Missouri, 18 Wall., 410.)
92. **Same**—"The statute under consideration being penal in its nature must be strictly construed, which means in effect that the language is not to be extended so as to include persons or things not clearly within its terms." (U. S. *v.* Lacher, 134 U. S., 624.)" A statute "in the nature of a penal statute * * * must be construed strictly." (20 Comp. Dec., 69.) File 7657-398:1, J. A. G.
93. **Permanent legislation**—No clause, phrase, or section of an appropriation act ought to be construed as permanent legislation, unless such words are used therein as make that purpose clear. *See* File 24501-26, July 11, 1911.
94. **Same**—"Hereafter." *See* "HEREAFTER."
95. **Permissive**—"It has also been said that statutes which clothe a public body or officer with power to perform acts which concern the rights of individuals, even though the language of such statutes is *permissive* merely, will be construed as being mandatory." (36 Cyc. 1159.) File 26260-1244, J. A. G., Apr. 14, 1911, p. 2.
96. **Plain and unambiguous language.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 62.
97. **Prejudice to public interests.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 46.
98. **Presumption that legislature acted advisedly.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 124-127. *See also* File 28550-3, J. A. G., May 12, 1915, p. 2.
99. **Prior enactments on same subject**—What is to be determined is the will of the legistature, and that will as expressed in the latest enactment is paramount; but on all matters in which the will of the latest legislature has not been clearly manifested that of all former legislatures must stand. File 13707-38:9. *See also* Wilcox *v.* U. S. (12 Ct. Cls., 495, 502); Mills *v.* Scott (99 U. S., 25, 28).
100. **Proceedings in Congress**—"As was said in the case of United States *v.* Burr (159 U. S., 85), if the ambiguity were only caused by the meaning of some part or the other of the law, it might then be possible to refer to the proceedings in Congress for assistance in determining the proper construction. Of course, in adopting such a method we are not at liberty to disregard any part of the language of the law as it was passed." File 26253-114, J. A. G., Aug. 19, 1910, p. 14.
101. **Prohibitive statutes.** *See* File 26516-49, J. A. G., June 13, 1911, p. 5.
102. **Prospective operation**—"In the construction of statutes it is a familiar rule that a prospective operation is to be given in every instance unless the legislative intent to the contrary is expressed in clear and unambiguous terms or the intent is clearly implied from the language used. Every reasonable doubt should be resolved against rather than in favor of the retroactive operation of the statute." (Jasper *v.* U. S., 43 Ct. Cls., 371, citing U. S. *v.* Heth, 3 Cranch, 399, 413; Chew Heong *v.* U. S., 112 U. S., 536, 559; White *v.* U. S., 191 U. S., 545.) File 11789-25, Sec. Navy, Sept. 9, 1916.
103. **Purpose of interpretation**—"The main purpose of interpretation is to ascertain and carry into effect the object and purpose of the legislature in making the given law as expressed in the language used." (White *v.* U. S., 191 U. S., 545, 552.) File 5252-66, J. A. G., May 13, 1915, p. 8.
104. **Reading into the law by construction**—"The department is without authority to read into the law by construction something not within its terms." File 26260-3663:2, Sec. Navy, Oct. 9, 1916.

Digitized by Google

105. **Reasons for enacting the law.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 82, 106.

106. **Reason or spirit will prevail over letter**—The rule is that the reason or spirit of a statute will prevail over its letter; "general terms may be restrained by the spirit or reason of the statute." (36 Cyc., 1109.) File 26253-200:1, J. A. G., Feb. 17, 1912 p. 8.

The court in Wilkes *v.* Dinsman (7 How. 88) "considered the *spirit and reason* of the law in its opinion and held it to include marines because in the body of the act the language was 'any person enlisted for the Navy' and not 'seamen,' or other term which would necessarily be limited to the Navy proper." File 5252-66, J. A. G., May 13, 1915, p. 2.

"It is always permissible to consider the purpose and the spirit of the law and the object which it was intended to accomplish as indicated not only by the language used in the statute, but by other recognized aids to interpretation." File 5252-66, J. A. G., May 13, 1915, p. 6.

107. **Reenactment of words.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 125-128.

108. **Repeal**—The general principle to be applied to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together. (Thorpe *v.* Adams, L. R. 6 C. P., 135.) Approved by the Supreme Court of the United States in Ex parte Crew Dog (109 U. S., 370), and finds expression in the well-established rule of statutory construction, *generalia specialibus non derogant.* File 4051-3, J. A. G., July 1, 1909, p. 2. *See also* STATUTORY CONSTRUCTION AND INTERPRETATION, 115.

109. **Repeal by implication**—"The conclusion that a statute is repealed by implication is only reached where there is irreconcilable conflict, and when the two statutes can not by reasonable construction stand together." (21 Op. Atty. Gen., 184; 24 Op. Atty. Gen., 562; 25 Op. Atty. Gen., 113.)

"Implied repeals of laws are not favored, and where the true construction of the later legislation is doubtful, the doubt should be resolved against any construction which revolutionizes existing systems of administration." (23 Op. Atty. Gen., 411.)

"It is a fundamental and familiar rule that a repeal by implication is never held to take place unless there is an irreconcilable repugnancy between the earlier and later acts, and that if by any permissible construction, both may stand and be enforced, there is no such repeal." (29 Op. Atty. Gen., 110.) [File 28687-14, J. A. G., Dec. 14, 1916, p. 3.]

"Statutes which apparently conflict with each other are to be reconciled, as far as may be, on any fair hypothesis." (Beals *v.* Hale, 4 How., 37, 51.)

"If both can exist, the repeal by implication will not be adjudged." (Johnson *v.* Brown, 205 U. S., 321.)

"Every doubt should be resolved against a construction which would work an implied repeal, and it is not to be admitted unless the implication is so clear as to be equivalent to an explicit declaration." (Osborn *v.* Nicholson, 13 Wall., 654, 662.) [File 28687-14, J. A. G., Dec. 14, 1916, p. 3.]

"The general presumption is that if a repeal was intended, it would have been expressly declared; and such is the usual practice of legislation." (U. S. *v.* Clothes, Crabeb, 370, 28 Fed. Cas. No. 16, 563; 9 Op. Atty. Gen., 47.)

"Where two acts are in apparent conflict, and one of the acts is general and the other special, the rule is that the special act will be construed as an exception to the provisions of the general, and both acts thus given effect." (36 Cyc., 1151, 1152.) File 28687-1.

The rule is well settled that repeals by implication are not favored and will never be sustained if it is possible to give the legislation a different interpretation. File 3973-106, J. A. G., Feb. 8, 1915.

110. **Retroactive construction**—"It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated, looks forward, not backwards; and are never to be construed retrospectively, unless the language of the act shall render such construction indispensable." (Reynolds *v.* McArthur, 2 Pet., 434.) File 7657-399:4, Oct., 1916. *See also* STATUTORY CONSTRUCTION AND INTERPRETATION, 102.

Digitized by Google

111. **Same**—"Whereas statutes generally are not to be construed retroactively unless the intention that such construction be given them is very apparent, a prospective operation is to be given to a statute unless the legislative intent to the contrary is unambiguously expressed or is clearly implied. (Jasper *v.* U. S., 43 Ct. Cls., 368, and cases there cited; 19 Comp. Dec. 487.)" File 7657-399:4, Oct. 1916.

112. **Revision of statutes**—In a revision of statutes all the different parts must be construed together with a view to harmonizing them if possible, and giving effect to each. The different sections should be regarded, not as prior and subsequent acts, but as simultaneous expressions of the legislative will. (36 Cyc., 1167; Groff *v.* Miller, 20 App. D. C., 353.) 16 J. A. G., 73.

113. **Several statutes relating to same subject**—They are all to be considered together and one part compared with another in the construction of any one of the material provisions. If the language will reasonably admit of it the acts, or sections in this case, are to be construed so as to permit both to stand together and remain in full force (Pollard *v.* Kibbee, 14 Pet., 353, 366; *The Strathairly*, 124 U. S., 558, 579; Nobles *v.* Georgia, 168 U. S., 398, 404; Cherokee Intermarriage Cases, 203 U. S., 76.)" 16 J. A. G., 72, Nov. 2, 1911.

114. **"Shall" and "may."** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 76, 77.

115. **Special and general provisions**—To the extent of any necessary repugnance between a special and a general provision, the special will prevail over the general. And where the general is later, the special will be construed as remaining an exception to its terms. (30 Cyc., 1151.) 16 J. A. G., 73.

"It is * * * one of the best settled rules of construction that a prior specific statute is not to be treated as repealed by a later general law unless the two can not possibly be construed so as to stand together." File 28687-1, J. A. G., Aug. 18, 1916, p. 3. *See also* STATUTORY CONSTRUCTION AND INTERPRETATION, 108.

116. **Same**—Where one statute conferred a limited jurisdiction over offenses generally and another a larger jurisdiction as to certain specified ones, the two could stand together, one as the law of the general subject and the other the law of the particular offense. (State *v.* Stanley, 82 Vt., 37.) 16 J. A. G., 73.

117. **Same**—That the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act, are among the plain rules laid down by common sense for the exposition of statutes. (2 Cranch, 52.) File 11130-2b, J. A. G., July 31, 1909, p. 5.

118. **Spirit and purpose of statute**—Should not be lost sight of in a strict adherence to its letter. *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 106.

119. **Stare decisis.** *See* STARE DECISIS; STATUTORY CONSTRUCTION AND INTERPRETATION, 66; WORDS AND PHRASES.

120. **Strict construction.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 15.

121. **Title of a statute**—The title of a statute although not properly a part of the law may be resorted to in case of doubt as a source of information in interpreting language used in the act. File 5621, Nov. 17, 1906. *See also* File 5252-66, J. A. G., May 13, 1915, p. 7.

122. **Uniform construction.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 13.

123. **Whole, law must be construed as a whole**—"We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'; this rule has been repeated innumerable times." (Washington Market Co. *v.* Hoffman, 101 U. S., 115.) File 26253-114, J. A. G., Aug. 19, 1910, p. 13.

"Where possible to do so effect must be given to all the provisions of a law." File 28687-9, J. A. G., Oct., 1916.

124. **Words, meanings of**—"Where the language of a statute is unambiguous the popular, or ordinary, meanings of words should be employed." File 5252-27, J. A. G., June 23, 1909, p. 2.

"Authority is found in decisions of the Supreme Court for giving a different meaning to the same word in different parts of a statute where such appears to have been the legislative intent. (*See* Cherokee Nation *v.* Georgia, 5 Pet. 1, 19.)" File 26521-144:1, Sec. Navy, July 10, 1916, p. 4.

125. **Words reenacted**—Words in a subsequent act are to be given the recognized meaning they had in a former act *in pari materia* in the absence of anything to show a contrary intent, and judicial decisions construing one of such acts form a sound rule of construction for the other. (A. & E. Ency. Law, vol. 26, p. 611.) File 26254-60, J. A. G., July 1, 1908, p. 2.

Digitized by Google

In the absence of any indication of a contrary intent, must be given the same construction as they received in the former act. File 26521-144:1, Sec. Navy, July 10, 1916, p. 4.

126. **Same**—"If it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." File 26220-61.

127. **Same**—Congress is presumed to have known what construction has been placed upon language used by it in a statute and when the same language is used again in a subsequent statute on the same object, without any indication of a contrary intent, it should be given the same construction as it received in the former act. (18 Wall., 553, 584.) This rule applies to language which has been construed in decisions of the Supreme Court and the Court of Claims (95 U. S., 416), and also to the construction placed upon a law in practice by the proper administrative officers. *See* 21 Op. Atty. Gen., 410, where the Attorney General said in part:

"The weight to be given to a departmental practice is greatly increased when Congress, in reenacting the law, fails to indicate in any way its disapproval of the settled construction, to which it is thus regarded as giving an implied approval. (18 Opin., 532; 20 Opin., 721; 2 Comp. Dec., 100.) The opinions just cited are those of executive officers only and the first of them has been referred to with apparent approval by the Supreme Court." File 3980-1075, J. A. G., Apr. 9, 1915.

128. **Same**—"The construction placed upon this statute is presumed to have been known to Congress and adopted by that body in its enactment of the Navy law in almost the identical language with the prior Army law on the same subject without any indication of a contrary intent, and it should be given the same construction as it received in the former act. (Sewing Machine Co.'s case, 18 Wall., 553; 21 Op. Atty. Gen., 339, 352, 410; 15 Op. Atty. Gen., 646; Valk *v.* U. S., 28 Ct. Cls., 241; Jonas *v.* U. S., 50 Ct. Cls., 281; U. S. *v.* Hermanos, 209 U. S., 337; U. S. *v.* Falk, 204 U. S., 143.)" File 7657-399:4, Oct., 1916.

129. **Same—There is always a presumption that the legislature in enacting a statute is familiar with the provisions of existing law.** File 26251-169, J. A. G., Nov. 28, 1916, p. 8.

130. **Same—Congress is presumed to know what construction has been placed on language used by it in a statute, and when the same language is used again, in a subsequent statute on the same subject, without any indication of a contrary intent, it should be given the same construction as it received in the former act. (Sewing Machine Co.'s case, 18 Wall., 553, 584.)** File 26510-1022:4, J. A. G., Dec., 1916.

STATUTORY INTENT. *See* INTENT, 50.

STATUTORY SENTENCES.

1. **Conform to**—It is a general rule, where the punishment for a crime is fixed by statute the punishment inflicted must conform thereto, and a judgment which does not so conform is erroneous, and this whether the crime is a statutory one or a common-law offense for which the punishment has been changed by statute. According to the prevailing doctrine, this is so though the departure from the provisions of the statute is a mitigation of the prescribed penalty. C. M. O. 21, 1910, 17; 1, 1911, 3.
2. **Deck courts.** *See* DECK COURTS, 51, 56. *See also* STATUTORY SENTENCES, 4, 5.
3. **Mandatory**—In all cases where the statute has designated a penalty for a particular offense, none other than that particular penalty may be imposed, and the court must pronounce the sentence which the law requires whenever the fact is proved. (R-814.)
4. **Summary courts-martial**—And deck courts can not legally impose sentences which are not specifically provided for by statute. C. M. O. 2, 1912, 4-11; 33, 1914, 4.
5. **Same**—The Cyclopedia of Law and Procedure (v. 12, p. 783), under the subject of erroneous sentences, after discussing various forms of error, states that "other cases hold that any departure in the sentence from the express terms of the statute, whether as to the form or the extent of the punishment, is error; and such is the uniform rule in the Federal courts."

A number of State, Federal, and English cases are cited in support of the foregoing statement, from which cases the following extracts may be given:

In the case of In re Johnson (46 Fed. Rep., 477, 481) the petitioner sought release on a writ of habeas corpus, and alleged, among other things, an erroneous sentence. The statutory punishment for the offense—perjury—was (sec. 5392, R. S.):

"A fine of not more than $2,000, and by imprisonment at hard labor, not more than five years."

Digitized by Google

The sentence was for six months and without hard labor, and with respect to this matter the court said:

"It was held by the Supreme Court in Ex parte Karstendick (93 U. S., 396) that in cases where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in the sentence. "* * * Here hard labor was not made a part of the sentence, though expressly required by the statute." There was another error in the sentence which, however, is not material here, and upon the whole matter the court concluded as follows:

"It is impossible to escape the conclusion that the district court exceeded its authority in sentencing the prisoner to the reformatory prison for six months only, without hard labor, and that she is entitled to be discharged from imprisonment under the sentence."

The next case is that of Harman *v.* United States (50 Fed. Rep., 921). In that case the defendant was convicted and sentenced to "be imprisoned in the Kansas State penitentiary for five years and that he pay a fine of $300."

With respect to this sentence the court said (*ib.*, 922):

"The act of Congress provides that persons convicted of its violation 'shall be deemed guilty of a misdemeanor, and shall for each and every offense be fined not less than $100 nor more than $5,000 or imprisonment at hard labor not less than one year nor more than 10 years, or both, at the discretion of the court.' It will be observed that where the punishment, or any part of it, is imprisonment, it must be 'at hard labor.' The plaintiff in error was sentenced 'to be imprisoned in the Kansas State penitentiary for five years,' and hard labor is not made a part of the punishment, as the statute requires shall be done, where imprisonment forms any part of the sentence. When the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence. * * * In the courts of the United States the rule is that a judgment in a criminal case must conform strictly to the statute, and that any variations from its provisions, either in the character or extent of the punishment inflicted, renders the judgment absolutely void."

In Woodruff *v.* United States (58 Fed. Rep., 766, 767) the court said:

"It will be observed that the act under which the defendant was indicted declares that one convicted of the offense therein charged shall 'be imprisoned for not less than six months nor more than 10 years, and be fined in a sum equal to the amount embezzled.' The sentence in this case was one of imprisonment only, and not imprisonment and fine, as required by the statute. In the courts of the United States the rule is well settled that a judgment in a criminal case must conform to the requirements of the statute, and that any variation therefrom, either in the character or extent of the punishment inflicted, avoids the judgment."

The case of United States *v.* Harman (68 Fed. Rep., 472) discloses the further proceedings, taken in that case in accordance with law, after the case had been remanded by the circuit court in Harman *v.* United States (*supra*). The lower court pronounced sentence as follows:

"That he be imprisoned, at hard labor, in the penitentiary of the State of Kansas for one year and one day from this date."

It will be seen that the court in resentencing the defendant was careful to include the requirement that the confinement should be performed at hard labor, as the statute required.

The foregoing cases were such as involved the omission of a material part of the lawful sentence, but the case of In re Mills (135 U. S., 263) is one in which the sentence imposed included more than could lawfully be adjudged. In that case the accused was indicted under two different statutes of the United States, pleaded guilty to both offenses, and was sentenced in one case "to be prisoned in the Ohio State prison, at Columbus, for the term and period of one year, and pay to the United States a fine of one hundred dollars, and its costs expended."

In the other case it was adjudged that the accused "be imprisoned in the same penitentiary for the period of six months, and pay to the Government a fine of $50, together with its costs; also, that this term of imprisonment commence and date from the expiration of the term of one year, for which he was sentenced in the other case."

After reviewing the statutes bearing upon the matter the court said (*ibid*, 270):

"A sentence simply of 'imprisonment,' in the case of a person convicted of an offense against the United States—where the statute prescribing the punishment does not require that the accused shall be confined in a penitentiary—can not be executed by confinement in a penitentiary, except in cases in which the sentence is

Digitized by Google

'for a period longer than one year.' In neither of the cases against the accused was he sentenced to imprisonment for a period longer than one year. In one case, the imprisonment was 'for the term and period of one year;' in the other, 'for the term and period of six months.' There is consequently no escape from the conclusion that the judgment of the court sentencing the petitioner to imprisonment in a penitentiary, in one case for a year and in the other for six months, was in violation of the statutes of the United States. The court below was without jurisdiction to pass any such sentences, and the orders directing the sentences of imprisonment to be executed in a penitentiary are void. This is not a case of mere error, but one in which the court below transcended its powers."

In Ex parte Lange (18 Wall., 163) the petitioner was indicted for certain offenses against the Post Office Department; he was found guilty and the punishment for his offense as provided by statute was "imprisonment for not more than one year or a fine of not less than $10 nor more than $200." The petitioner, under such conviction, was sentenced "to one year's imprisonment and to pay $200 fine." Later, at the same term of court and the same judge presiding, the prisoner was brought before the court on a writ of habeas corpus and an order was rendered vacating the former judgment and the prisoner was again sentenced to one year's imprisonment from that date.

The petitioner sued out a writ of habeas corpus, alleging that he was unlawfully imprisoned. At the hearing the writ was discharged and Lange was remanded, whereupon he sued out a petition for writs of habeas corpus and certiorari in the Supreme Court. In the court's opinion the cases were reviewed at length and it held, quoting from the syllabus:

"When a court has imposed fine and imprisonment, where the statute only conferred power to punish by fine or imprisonment, and the fine has been paid, it can not, even during the same term, modify the judgment by imposing imprisonment instead of the former sentence."

The court said (*ibid.*, 176):

"We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone. That the principle we have discussed then interposed its shield and forbid that he should be punished again for that offense. The record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case and for that very offense the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offense and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offense was at an end. Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist."

In the case of In re Bridgeon (57 Fed., 200) the petitioner was indicted for horse stealing in Indian Territory. He was tried, convicted, and sentenced "to be imprisoned in the penitentiary at Columbus, Ohio, at hard labor for the term of five years and to pay the cost of prosecution."

The statute applicable in that case provided than any person convicted of horse stealing in the said Territory should be punished "by a fine of not more than $1,000 or by imprisonment not more than 15 years, or by both such fine and imprisonment at the discretion of the court."

It will be noted that the statute here does not provide for imprisonment at hard labor and that the sentence was "imprisonment at hard labor for five years," while the statute provides for "imprisonment not more than 15 years." In granting a writ of habeas corpus the court said:

"The general rule, as stated by Justice Field In re Graham (138 U. S., 462; 11 Sup. Ct. Rep., 363), is 'that a judgment rendered by a court in a criminal case must conform strictly to the statute, and that any variation from its provisions, either in the character or the extent of punishment inflicted, renders the judgment absolutely void.' Accordingly, it was held in Harman *v.* United States (50 Fed. Rep., 921) that where the penalty provided by a statute was imprisonment at hard labor and

Digitized by Google

the sentence was imprisonment, hard labor not being made part of the punishment, the sentence was void. (*See also* Ex parte Karstendick, 93 U. S., 396; In re Mills, 135 U. S., 263, 10 Sup. Ct. Rep., 762; and In re Johnson, 46 Fed. Rep., 477.)"

The last several cases as stated above are such as involve punishment in excess of that authorized to be adjudged.

In Whitworth *v.* United States (114 Fed. Rep., 302, 304) the court said:

"The penalty prescribed by section 4046, Revised Statutes, for the commission of the crime charged in the first count of the indictment was that the culprit should 'be imprisoned for not less than 6 months nor more than 10 years and be fined in a sum equal to the amount embezzled.' The judgment against the defendant for this offense was that he should be imprisoned for three years, that he should pay a fine equal to the amount embezzled and also the cost of the prosecution of this case, and that he should stand committed until the fine and costs were paid. This judgment was erroneous. The statutes gave to the court below no power to add to the fine prescribed by the act of Congress the cost of the prosecution of the case. In many instances where, as in the case at bar, the amount embezzled was small the costs would far exceed the amount of the fine fixed by law. In the national courts a judgment in a criminal case must conform strictly to the act of Congress which authorizes it. Any departure from the statute in the extent or character of the punishment adjudged constitutes an error which is fatal to the judgment." (Citing cases.)

(*See also* In re Christian, 82 Fed. Rep., 199; Gardes *v.* United States, 87 Fed. Rep., 172; Haynes *v.* United States, 101 Fed. Rep., 817; Jackson *v.* United States, 102 Fed. Rep., 473; In re Bonner, 151 U. S., 242.)

The following decisions of the State courts also bear upon the subject:

On a conviction of grand larceny, or knowingly receiving stolen goods of value greater than $100 (Rev. Code, secs. 3706, 3710), the court has no authority to sentence the prisoner to imprisonment in the county jail, since the statute only prescribes imprisonment in the penitentiary. (De Bardelaben *v.* State, 50 Ala., 179.)

Under an ordinance providing that any person carrying concealed weapons shall be fined or imprisoned in the city prison, or both fined and imprisoned, a judgment that an offender pay a fine, and, in case of its nonpayment, be imprisoned in the county jail, is void as to the imprisonment, as the ordinance does not authorize imprisonment in the county jail. (In re Sylvester, 81 Cal., 199; 22 Pac.)

A municipal ordinance which provides that a person convicted of a certain offense shall be fined not exceeding $500, and may be imprisoned for a period not exceeding 60 days, or both, does not authorize a sentence to "pay a fine of $100, or perform 60 days' work on the public streets" of the city.

The latter clause of the sentence is not authorized by the imprisonment clause of such ordinance, nor by an ordinance authorizing the mayor or president of the municipality to commit to the city prison or workhouse or place of correction, for a period to be determined by such mayor or president, but not to exceed 60 days, any convict failing to pay a fine, penalty, or forfeiture imposed under any city ordinance. (Ex parte Martini, 23 Fla., 343; 2 South., 689.)

Under Revised Statutes, 1879, section 1262, which fixes the punishment at imprisonment in the penitentiary for a period not exceeding 10 years, a defendant can not be awarded a less degree of punishment than that of imprisonment in the penitentiary. (State *v.* Jones, 86 Mo., 623.)

Jails and workhouses are, and in the State legislation are treated as, entirely distinct in their origin, object, and government. Therefore, authority to a justice of the peace to commit to the workhouse will not authorize a commital to the common jail. (State *v.* Ellis, 26 N. J. Law (2 Dutch.), 219.)

Within the act June 10, 1879, "to prescribe, apprehend, and punish disorderly persons," sentence to imprisonment in the county jail is illegal and void, for the statute provides only for imprisonment in the workhouse. (Fairbanks *v.* Sheridan, 43 N. J. Law (14 Vroom.), 494.)

Where the statutory penalty for murder in the first degree is death, and the jury return a verdict of guilty, the trial court has no power to pass sentence of imprisonment. (Territory *v.* Griego, 42 Pac., 81—N. Mex.)

Where a new offense is created by statute, and a penalty provided for it, no other punishment can be imposed. (Renwick *v.* Morris, 7 Hill, 575—N. Y.)

Acts 1885, chapter 248, providing that one convicted of seduction under promise of marriage "shall be fined or imprisoned," at the discretion of the court, does not authorize the imposition of both fine and imprisonment. (State *v.* Crowell, 116 N. C., 1052; 21 S. E., 502.)

Digitized by Google

Where the statute provides for imprisonment and fine, or for imprisonment without fine, fine without imprisonment is not authorized. (Johnson *v.* State, 18 Tex. App. 7.)

A sentence, different from that intended by statute, is error, even if less severe than the sentence prescribed. (Haney *v.* State, 5 Wis., 529.)

Under constitution, 1868, article 1, section 19, which limits the jurisdiction of justices in criminal cases to offenses in which the punishment does not exceed a fine of $100, or "imprisonment" for 30 days; and act December 24, 1892 (21 Stat. L., p. 93), which limits the punishment for the offense of carrying a concealed deadly weapon to a fine not exceeding $100, or "imprisonment" not exceeding 30 days—a trial justice has no power to require a person convicted of such offense to be imprisoned and perform hard labor for 30 days. (State *v.* Williams, 40 S. C., 373; 19 S. E., 5.)

Under General Statutes, section 4697, providing that one guilty of a misdemeanor not enumerated by statute shall be punished by imprisonment, a court can not require a defendant guilty of forcible entry to give bond to keep the peace and in default thereof to adjudge that he be imprisoned. (Ex parte Webb, 51 Pac., 1027; 24 Nev., 238.) C. M. O. 2, 1912, 5–11.

STEALING. *See* THEFT.

STEALING AND UNLAWFULLY SELLING PROPERTY OF THE UNITED STATES, FURNISHED FOR THE NAVAL SERVICE THEREOF, IN VIOLATION OF ARTICLE 14 OF THE ARTICLES FOR THE GOVERNMENT OF THE NAVY.

1. **Warrant officers**—Charged with. C. M. O. 34, 1909; 35, 1909.

STEALING PROPERTY OF THE UNITED STATES FURNISHED AND INTENDED FOR THE NAVAL SERVICE THEREOF.

1. **Enlisted men**—Charged with. C. M. O. 25, 1914, 3.

STEERAGE STEWARD.

1. **General court-martial**—Tried by. C. M. O. 42, 1883.

STENOGRAPHERS.

1. **Oaths**—Stenographer should be sworn at the proper time. C. M. O. 21, 1910, 9; 23, 1910, 7.
2. **Statement of accused.** *See* STATEMENT OF ACCUSED, 5.

STEPSON.

1. **Stepfather**—Stepson does not necessarily take the name of stepfather. *See* NAME, CHANGE OF, 11, 15.

STOLEN OR PAWNED PROPERTY OF THE UNITED STATES.

1. **Recovery of.** *See* PUBLIC PROPERTY, 7.

STORAGE BATTERIES OF SUBMARINES. C. M. O. 41, 1915.

STRAGGLERS. *See* C. M. O. 153, 1897, 2; 10, 1907; 37, 1909.

STRIKE OUT.

1. **Charges and specifications**—By Court. *See* CHARGES AND SPECIFICATIONS, 95.

STRIKING ANOTHER PERSON IN THE NAVY.

1. **Officer charged with.** C. M. O. 29, 1890.

STRIKING IS AN ASSAULT. *See* ASSAULT, 26.

STUBBORN COURT. C. M. O. 104, 1897, 5–6. *See also* CRITICISM OF COURTS-MARTIAL, 35, 43.

STUDENT FLYERS. *See* File 28687–9, J. A. G., Oct., 1916.

SUBIG BAY NAVAL RESERVATION. *See* JURISDICTION, 94–96; APPEALS, 20.

SUBMARINES.

1. **Death gratuity**—Paid when submarine submerged for two and one-half months. *See* DEATH GRATUITY, 24.
2. **Inspection of**—Officer tried by general court-martial for neglect of duty. C. M. O. 41, 1915.
3. **Precautions**—Against accident in handling gasoline. C. M. O. 26, 1908.

Digitized by Google

"SUBMERGED AND UNMARKED WRECK." C. M. O. 29, 1916.

SUBPŒNAS. *See also* SUMMONS.

1. **Civil authorities**—Service of subpœna by civil authorities on persons in the naval service. *See* GENERAL ORDER No. 121, Sept. 17, 1914, 23.
2. **Civil court**—Officer arrested by civil authorities for disregarding subpœna. Tried by general court-martial on charge of "Scandalous conduct tending to the destruction of good morals." C. M. O. 24, 1880.
3. **Marshal, United States**—Obligation of United States marshal to serve subpœnas for witnesses before general court-martial on request of judge advocate. Department of Justice complied with request and Navy Department agreed to pay any expenses involved, fees, etc. File 26251-12193:3, Aug. 16, 1916.

SUFFERING A PRISONER TO ESCAPE.

1. **Enlisted man**—Charged with. C. M. O. 50, 1889.

SUFFERING A VESSEL OF THE NAVY TO BE HAZARDED, IN VIOLATION OF SECTION 11, ARTICLE 8, OF THE ARTICLES FOR THE GOVERNMENT OF THE NAVY.

1. **Officer**—Charged with. C. M. O. 76, 1895.

SUFFERING A VESSEL OF THE NAVY TO BE RUN UPON A SHOAL AND HAZARDED.

1. **Officer**—Charged with. C. M. O. 80, 1905; 82, 1905.

SUFFERING A VESSEL OF THE NAVY TO BE STRANDED, ETC.

1. **Specific intent**—Not required. *See* INTENT, 2.

SUFFICIENCY OF EVIDENCE. *See* CRITICISM OF COURTS-MARTIAL, 14.

SUICIDE.

1. **Attempted suicide**—Charged under "Scandalous conduct tending to the destruction of good morals." C. M. O. 9, 1916, 3; G. C. M., Rec. 28659.
2. **Indexing**—Assigned as a cause of suicide. *See* INDEX, 8.
3. **Line of duty and misconduct.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 89-100.
4. **Nostalgia**—Suicide caused by. *See* NOSTALGIA.
5. **Threatening suicide.** *See* C. M. O. 60, 1888, 2.

SUMMARY COURTS-MARTIAL.

1. **Accused**—Because the summary court-martial sentence involving extra police duties was considered illegal by the senior officer present and set aside by the Secretary of the Navy, does not relieve the accused from responsibility when he refuses to obey the order of his superior officer. C. M. O. 37, 1896.
2. **Army summary court**—No jurisdiction over Marines on an Army transport. *See* ARMY, 7.
3. **Arraignment.** *See* ARRAIGNMENT, 32.
4. **Authentication**—The sentence of the court shall be signed by all the members and by the recorder. (R-620 (1).)

   After the proceedings in a trial have been completed and recorded they shall be signed by the senior member and the recorder. (R-620 (2).) *See* COURT, 149.

   A record of proceedings of a summary court-martial was returned for the second signature of the senior member. File 31078-S. C. M., J. A. G., May 16, 1902; 20 J. A. G. 210.

   A record of proceedings was returned for the signature of the recorder. File 31395-S. C. M., J. A. G., June 27, 1902; 20 J. A. G. 396.
5. **Bad conduct discharges.** *See* BAD CONDUCT DISCHARGE, 10, 11.
6. **Binding of records.** *See* BINDING OF COURT-MARTIAL RECORDS.
7. **Boatswain**—Actually in command of a naval vessel may convene, but he is not eligible to sit as a member of a summary court-martial. *See* BOATSWAINS, 10, 11.
8. **Bread and water.** *See* BREAD AND WATER.
9. **Challenges.** *See* CHALLENGES, 20.
10. **Charges**—The accused was tried by summary court-martial. The alleged offenses were set forth as charges with specifications thereunder, similar to the method used in general courts-martial.

Digitized by Google

When an accused is tried by summary court-martial, charges should not be used. The offense should be set forth in one specification and, if there is more than one offense, separate specifications should be used to set forth each offense. (Navy Regulations, 1913, R-608 (1); Forms of Procedure, 1910, pp. 156, 166–172.)

In view of the fact that the error in this case is one of procedure and does not render the trial illegal, the department did not disapprove the proceedings and sentence. File 26287-2996, Sec. Navy, June 14, 1915; C. M. O. 22, 1915, 6.

11. **"Commandant of marine barracks"**—Doubtless the word "commandant" is used in the statute (art. 26, sec. 1624, R. S.) in a broad sense, as the equivalent of "commanding officer"; the meaning of the two forms being substantially the same; and it is appropriate to employ, in signing summary court-martial specifications, the title "commandant, marine barracks," such being the precise language of the statute. File 1192-1, Sec. Navy, Mar. 21, 1905.
12. **Commanding officers**—May convene only summary courts-martial and deck courts for trial of enlisted men under their command. *See* COMMANDING OFFICERS, 42.
13. **Conduct records**—If the court finds the specifications proved, or proved in part, and the recorder has stated that he has evidence of previous convictions, it shall, after arriving at such finding, open and, the accused being present, the recorder shall introduce evidence of previous convictions, and also the conduct record, if the latter is desired by the court. (R-617 (1).)

The conduct record of the accused during his current enlistment may be received in evidence between the finding and sentence under the same conditions as those prescribed for evidence of previous convictions. (R-616 (3).) *See* C. M. O. 96, 1898.
14. **Confinement.** *See* CONFINEMENT, 40, 41.
15. **Constitution of**—A summary court-martial shall consist of three officers not below the rank of ensign, as members, and of a recorder. The commander of a ship may order any officer under his command to act as such recorder. (A. G. N. 27.) C. M. O. 14, 1911, 8.
16. **Contempt of court.** *See* CONTEMPT OF COURT, 5, 6.
17. **Convening authority**—May reprimand members or bring them to trial by court-martial. *See* CRITICISM OF COURTS-MARTIAL, 35, 36.
18. **Convening authority as member**—It is decidedly improper, through not illegal, for a convening authority to detail himself as a member of a summary court-martial and then subsequently to act upon the case in the capacity as convening authority. Case disapproved where this was done. File 26287-389; 26287-963. *But see* File 26287-1185, where department did not disapprove.
19. **Convening authority disapproves**—Necessary action of senior officer present—The convening authority disapproved the proceedings and sentences and stated in his action that the accused "will be released and restored to duty." This action was contrary to Navy Regulations, 1913, R-1830 (Navy Regulations, 1913, R-622 (8), which reads, "In cases where the accused has been acquitted by the court, or where the sentence has been disapproved by the convening authority, the record of proceedings shall be submitted to the senior officer present in the same manner as though a sentence requiring action still remained." This action of the convening authority in releasing the accused from arrest was improper, since by so doing he deprived his superior officer of the right secured to him by the Navy Regulations of dealing with the case. Had he not released the accused and restored him to duty, the senior officer present might have returned the record to the court for revision or reconsideration of the sentence. File 1192-1, Sec. Navy, Mar. 21, 1905.
20. **Convening authority's power over sentence**—The convening authority can not dictate what sentence shall be imposed, nor can he add to the punishment adjudged. If he deems the sentence inadequate his power over it is limited to disapproval. *See* CRITICISM OF COURT-MARTIAL, 35, 36.
21. **Convening of**—Summary courts-martial may be ordered upon petty officers and persons of inferior ratings, by the commander of any vessel, or by the commandant of any navy yard, naval station, or marine barracks to which they belong, for the trial of offenses which such officer may deem deserving of greater punishment than such commander or commandant is authorized to inflict, but not sufficient to require trial by a general court-martial. (A. G. N. 26.) File 3900-1075, J. A. G., Apr. 6, 1915.
22. **Same**—Summary courts-martial may be ordered upon enlisted men in the naval service under his command by the commanding officer of any brigade, regiment, or separate or detached battalion, or other separate or detached command, and, when empowered by the Secretary of the Navy, by the commanding officer or officer in charge of any command not specifically mentioned in the foregoing: *Provided*, That

Digitized by Google

when so empowered by the Secretary of the Navy to order summary courts-martial the commanding officer of a naval hospital or hospital ship shall be empowered to order such courts and deck courts, and inflict the punishments which the commander of a naval vessel is authorized by law to inflict, upon all enlisted men of the naval service attached thereto, whether for duty or as patients.

No sentence of a summary court-martial shall be carried into execution until the proceedings and sentence have been approved by the officer ordering the court, or his successor in office, and by his immediate superior in command: *Provided*, That if the officer ordering the court, or his successor in office, be the senior officer present such sentence may be carried into execution upon his approval thereof. (Act of Aug. 29, 1916, 39 Stat. 586.) C. M. O. 36, 1916. *See also* SUMMARY COURTS-MARTIAL, 38, for definition of "IMMEDIATE SUPERIOR IN COMMAND."

"Hereafter all officers of the Navy and Marine Corps who are authorized to order either general or summary courts-martial may order deck courts upon enlisted men under their command, and shall have the same authority to inflict minor punishments as is conferred by law upon the commander of a naval vessel." (Act of Aug. 29, 1916, 39 Stat. 586.)

23. **Same**—An enlisted man of the Marine Corps attached to a ship of the Atlantic Fleet was a member of a detachment temporarily camping ashore and committed an offense. The commander of this detachment, in bringing the man to trial by summary court-martial, signed the precept and specification as follows: "Commanding Officer, Fourth Division, Atlantic Fleet Battalion, U. S. Marine Corps." The proceedings and sentence were approved without comment by the "Commander Fourth Division, U. S. Atlantic Fleet," as senior officer present. As the officer convening this summary court-martial was not such an officer as is empowered under the provisions of A. G. N. 26 to convene summary courts-martial, the department disapproved the proceedings and sentence. File 26287-2857, Sec. Navy, Mar. 15, 1915; C. M. O. 12, 1915, 6.
24. **Criticism**—Of senior member by name in court-martial order. *See* CRITICISM OF COURTS-MARTIAL, 62.
25. **Same**—Members censured and entry made on reports of fitness as to manner of performing duty. *See* CRITICISM OF COURTS-MARTIAL, 36.
26. **Deck courts**—When an enlisted man is brought before the deck court for trial, he shall signify his willingness to be so tried by affixing his signature to a statement to that effect in the record. If he does so object to such trial, he shall be tried for the offense by a summary court-martial. (R-506.)

In case a man refuses trial by deck court and is brought to trial before a summary court-martial, no mention concerning such refusal should be made in the record of the summary court-martial. C. M. O. 24, 1909, 3. *See also* DECK COURTS, 50.
27. **Designation**—The proper designation of a summary court-martial is "summary court-martial" not "summary court." *See* C. M. O. 9, 1908, 3; 24, 1909, 3; 14, 1911, 8-9; 33, 1914, 5, where improper designation was erroneously used.
28. **Disapproval of proceedings**—And approval of sentence by senior officer present. *See* REVIEWING AUTHORITY, 38.
29. **Execution of sentences.** *See* SUMMARY COURTS-MARTIAL, 91.
30. **Excessive sentences.** *See* EXCESSIVE SENTENCES, 5.
31. **Final disposition of records.** *See* RECORD OF PROCEEDINGS, 59.
32. **Findings**—The word "finding" is not used in actions on summary courts-martial. C. M. O. 36, 1914, 5. *But see* C. M. O. 15, 1910, 11, where the word "finding" was used. At the present time the word "finding" is used. (NAVAL COURTS AND BOARDS, 1916, p. —.)

Findings when there are two or more specifications. *See* FINDINGS, 86.
33. **Fraudulent enlistment**—Should not be tried by summary courts-martial. *See* FRAUDULENT ENLISTMENT, 91.
34. **General court-martial**—General courts-martial are empowered by statute to inflict any of the punishments authorized for summary courts-martial. (R. 619). *See* C. M. O. 153, 1902; 162, 1902; 233, 1902.
35. **Same**—Charges and specifications withdrawn and accused tried by summary court-martial. *See* NOLLE PROSEQUI, 15.
36. **Guilty in a less degree than charged**—From the record of proceedings in the case of quartermaster third class, United States Navy, who was tried by summary court-martial, it was noted that the accused pleaded "Guilty" to that part of the specification alleging absence from his ship, station, and duty without leave from proper authority, but "Not guilty" to that part of the specification alleging his return to the ship in an intoxicated condition. The court found "the specification proved by

Digitized by Google

plea except the words 'under the influence of some intoxicating liquor' thirteenth and fourteenth lines; which words were proved." Such a finding is improper. If the court found the entire specification proved, the proper recording of such finding would be "the specification proved," notwithstanding the fact that part of the specification was proved "by plea" and the remainder proved by evidence adduced.

In this connection, however, attention is invited to the last clause of the paragraph headed "Rejection of plea," on page 23 of Forms of Procedure, 1910, which states that "save in exceptional cases, a court-martial should try the accused for the offense as charged."

Furthermore, when an accused pleads guilty, except to certain words of a specification, it devolves upon the court to either accept or reject this plea as a whole. If accepted, the findings of the court should accord therewith; and if rejected, the prosecution is put to the proof of every allegation contained in the specification, and not simply to those portions which may have been excepted in the plea of the accused. C. M. O. 15, 1910, 11.

37. **Hospitals.** *See* HOSPITALS, 2; SUMMARY COURTS-MARTIAL, 22.

38. **"Immediate superior in command"**—Whenever a *convening* authority places his indorsement upon the record of a summary court-martial, the title of his rank and office appearing therein should clearly show that he is legally empowered to take the action designated in his indorsement. The convening authority should sign thus:

A—— B——,
Colonel, U. S. Marine Corps.
Commanding —— Regiment, U. S. Marine Corps.
C—— D——,
Commander, U. S. Navy,
Commanding U. S. S. ——.

In accordance with the terms of the act of August 29, 1916 (39 Stat., 586), the sentence does not go into effect until approved by the "immediate superior in command," except in case the officer ordering the courts is the senior officer present, in which event the approval of the officer ordering the court is alone necessary to give effect to the sentence; but *in such case* he should always sign his indorsement as "Senior Officer Present" in addition to signing as convening authority, thus:

A—— B——,
Colonel, U. S. Marine Corps,
Commanding —— Regiment, U. S. Marine Corps, and Senior Officer Present.
C—— D——,
Commander, U. S. Navy,
Commanding U. S. S. ——, and Senior Officer Present.

The term "Immediate superior in command," as used in the above act, is construed as meaning that officer present who, in the chain of command of the forces immediately present, is next above the officer ordering the summary court-martial. Thus the officer present commanding a division is next above each of the commanding officers of the ships of that division present; the officer present commanding a brigade is next above each of the commanding officers of the regiments of that brigade present; and when ships are present which are not attached to a unit under the command of an officer present junior to the senior officer present, the commanding officers of such ships are next below the senior officer present, which latter officer is the immediate superior in command of such commanding officers. If the officer who orders the summary court-martial is in the presence of an "immediate superior in command," he should sign and forward the record to such superior in command for the latter's final action, and the latter should sign thus:

E—— F——,
Rear Admiral, U. S. Navy,
Commander Battleship Division ——, U. S. Atlantic Fleet.
Immediate Superior in Command.
G—— H——,
Captain, U. S. Navy, Commanding U. S. S. ——,
Immediate Superior in Command.

From the above it will be seen that in acting upon summary court-martial records in the future the term "Senior Officer Present" is to be used only when the officer

Digitized by Google

convening the court in is fact the senior officer present. A revising authority, whose action is essential to validate the sentence of a summary court-martial, will in every case indicate the fact by using the term "Immediate superior in command," even though such revising authority be in fact the senior officer present. C. M. O. 30, 1916, 7-8. *See also* SUMMARY COURTS-MARTIAL, 22.

39. **Irregularities.** *See* RECORD OF PROCEEDINGS.
40. **Joinder, trial in.** C. M. O. 13, 1916, 5. *See also* JOINDER, TRIAL IN, 9.
41. **Jurisdiction**—Summary courts-martial have jurisdiction only of enlisted men and shall try only such offenses as are not sufficient to require their trial by general court-martial. C. M. O. 7, 1914, 12. *See also* A. G. N. 26.
42. **Las Animas Naval Hospital**—Department's policy with reference to summary courts-martial at said hospital. File 26287 15:44, Sec. Navy, July 3, 1913, quoted in File 26836, 16 J. A. G., Dec. 9, 1913. *But see* SUMMARY COURTS-MARTIAL, 22, for the law and present policy. *See also* SUMMARY COURTS-MARTIAL, 51.
43. **Limitations of punishments.** *See* SUMMARY COURTS-MARTIAL, 86.
44. **Limited jurisdiction.** *See* SUMMARY COURTS-MARTIAL, 40.
45. **Lost records**—Sentence may be carried into effect if approved before being lost. *See* RECORD OF PROCEEDINGS, 70.
46. **Marine Barracks.** *See* SUMMARY COURTS-MARTIAL, 22.
47. **Members**—Failing to sign record. *See* MEMBERS OF COURTS-MARTIAL, 12.
48. **Same**—Obtaining where not attached to vessel of convening authority—When a trial by summary court-martial is decided upon, and a sufficient number of officers of the proper rank to compose the court are not under the command of the convening authority, the latter shall request the senior officer present to detail the additional officers necessary. (R 603 (1).)

    The senior officer present shall, if practicable, comply with such request, in which case he shall orally or in writing notify the officers detailed. (R-603 (2).) C. M. O. 6, 1915, 6.
49. **Multiplicity of specifications for same offense.** *See* CHARGES AND SPECIFICATIONS, 62.
50. **Multiplicity of trials**—The accused was tried by summary court-martial three separate and distinct times on the same date for offenses which might have been disposed of at one trial. Upon a careful review of these records, no irregularity was found which would invalidate the proceedings. One trial should have been held, the accused having three specifications preferred against him as is provided for in Forms of Procedure, 1910, page 156, thereby saving the time of the accused and the members of the court and avoiding the clerical work involved in preparing a multiplicity of records. File 26287 3303, J. A. G., Feb. 12, 1916; C. M. O. 5, 1916, 6.
51. **Naval hospital, Las Animas, Colo.**—"In accordance with the authority vested in me by the act approved August 29, 1916 (39 Stat., 586) I hereby authorize the commanding officer of the United States naval hospital, Las Animas, Colo., to order summary courts-martial." File 26287 1981:4, sec. Navy, Sept., 1916.

    The above commanding officer, if he is the senior officer present, would properly sign his approval on court-martial records as such and the sentences could then be carried into execution without further approval. It would not be necessary for the Secretary of the Navy to specifically authorize the sentence to be carried into execution upon such approval. File 26287-1981:4, J. A. G., Sept. 15, 1916. *See also* HOSPITALS, 2; SUMMARY COURTS-MARTIAL, 22, 42.
52. **New court**—*See* CONFINEMENT, 5; SUMMARY COURTS-MARTIAL, 80, 82; File 32557-58-S. C. M., J. A. G., Nov. 7, 1902; 21 J. A. G., 331.
53. **Nolle prosequi**—General court-martial charges and specifications withdrawn and the accused tried by summary court-martial. *See* NOLLE PROSEQUI, 15.
54. **Oaths.** *See* OATHS, 47, 54.
55. **Pay**—The record of proceedings of a summary court-martial was returned with the following remarks: "This record fails to show that checkage of pay has been made" as required by Navy Regulations, 1913, R 626, and Forms of Procedure, 1910, page 166. C. M. O., 34, 1913, 3.

    In both summary courts-martial and deck courts records, the pay officer should show over his signature the *amount*, of checkage made in each case. C. M. O. 24, 1909, 3.

    Summary courts-martial and deck courts are authorized by the act of February 16, 1909, section 8 (35 Stat., 621), to award a loss of pay by itself, without confinement. C. M. O. 24, 1909, 3. *See* in this connection, G. O. 129, June 14, 1869.

Digitized by Google

56. **Same**—Loss of pay in summary courts-martial and deck courts should be checked upon approval by the senior officer present or convening authority, respectively, and no notation should be made as to the loss of pay being "Subject to the approval of the Secretary of the Navy." Such reference is no longer necessary, as is evident from section 17 of the act of February 16, 1909 (35 Stat., 622), embodied in General Order No. 12, of 1909. C. M. O. 24, 1909, 3. *See also* DECK COURTS, 36.
57. **Same**—Loss of pay for both summary and deck courts should be expressed in dollars and cents—not days' pay—and should be based upon the actual pay, not including extras for mess cook, gun pointer, acting coxswain, etc., *See* DECK COURTS, 35.
58. **Same**—The reason for stating the pay account status of the accused in a summary court-martial record is to prevent an excessive sentence. *See* ACCUSED, 54.
59. **Same**—Loss of pay checked upon approval of the "immediate superior in command." *See* SUMMARY COURTS-MARTIAL, 22, 38.
60. **Pay officers**—Notations on records. C. M. O. 36, 1914, 5. *See also* 164 S. and A. Memo-3405.
61. **Precept**—The original order convening the court, and all orders altering the same, together with the original specification approved and signed by the officer ordering the court, must be prefixed to the record. (R–610 (1).)

If, however, more than one case is to be tried by the same court, the order shall be referred to in each case subsequent to the first to show that the proceedings are continuous, and the record of each case must be made up separately. (R–610 (2).)

The precept for a summary court-martial shall specify the personnel of the court and the time and place of meeting. (R–604 (1).)

The convening authority shall deliver the precept to the senior member and, orally or in writing, notify the other members and recorder of their appointment. (R–604 (2).)

62. **Reconvening by senior officer present.** *See* RECONVENING, 16.
63. **Reconvening of itself.** *See* COURT, 149.
64. **Record of proceedings**—"After the proceedings and trial have been completed and *recorded*, they shall be signed by the senior member and the recorder, and the senior member shall transmit the record to the convening authority. (R–620 (2).) C. M. O. 15, 1910, 12.
65. **Same**—If the convening authority approves the whole or any part of the sentence adjudged, he shall transmit the record to the commander in chief, or in his absence to the senior officer present. Should no officer senior to himself be present, he shall, in subscribing his action upon the record, add to his title the words "Senior Officer Present." (R–620 (4).) *See also* SUMMARY COURTS-MARTIAL, 38.
66. **Same**—In cases where the accused has been acquitted by the court, or where the sentence has been disapproved by the convening authority, the record of proceedings shall be submitted to the senior officer present in the same manner as though a sentence requiring action still remained. (R–622 (8).)
67. **Same**—Records of proceedings of summary courts-martial shall be kept and made up in the manner hereinafter prescribed for records of general courts-martial and in accordance with the instructions contained in the authorized forms of procedure. They shall be transmitted direct to the Judge Advocate General. (R–624 (1).) C. M. O. 1, 1913, 7.

Record of proceedings in revision should be prefixed, not appended. *See* REVISION, 37: SUMMARY COURTS-MARTIAL, 81.
68. **Same**—Proceedings and sentence approved by the convening authority, but senior officer present disapproved proceedings and approved sentence. *See* SUMMARY COURTS-MARTIAL, 28; REVIEWING AUTHORITY, 20.
69. **Same**—Where record is lost after approval sentence may be carried into effect. *See* RECORD OF PROCEEDING, 70.
70. **Recorder**—Such procedure was irregular and indicated a lack of preparation of the case by the recorder and carelessness on the part of the court in not noticing the error referred to at the proper time and before reaching its finding and rendering judgment. Navy Regulations, 1909, R–1694 (2) [Navy Regulations, 1913, R–620 (2)] provides that after the proceedings and trial have been completed and *recorded*, they shall be signed by the senior member and the recorder, and transmitted to the convening authority. Paragraph 1 of the above article states that the sentence of the court shall be signed by all the members and the recorder. (*See also* art. 1776, U. S. Navy Regulations, 1909.)

Digitized by Google

On page 2 of the record it is shown that the only witness called was duly warned and withdrew after having verified his testimony. On page 4 it appears that, although the court had "reconvened," this witness was recalled, permitted to recorrect his testimony, which he had previously pronounced to be correct, and to give additional testimony. Furthermore, it is observed that, after this irregular procedure, the court allowed the accused to question this witness, but the question having been propounded and the answer thereto given, the court decided that "the question by the accused and the answer were irregular and should not have been allowed, and also decided not to consider such question and answer in its finding and sentence."

Article 1685 (10), United States Navy Regulations, 1909, provides that no evidence except evidence of previous conviction, shall be admitted after the court arrives at its finding. As the court has reached its finding (as shown on p. 2), this procedure was not only irregular, but violated the aforementioned article.

Although the court had previously reached its finding (p. 2), it is observed (p. 4) that the court, without revoking its former finding, directed the recorder to record an additional finding. C. M. O. 15, 1910, 12.

71. **Same**—The recorder is a constituent part of the summary court-martial. C. M. O. 14, 1911, 8.

72. **Same**—Difference between recorders of deck courts and summary courts-martial described. *See* DECK COURTS, 58.

73. **Same**—An accused either has counsel, or waives such assistance, but even then, the recorder is required to safeguard the interests of the accused. C. M. O. 31, 1911, 6.

74. **Same**—Criticised by the department for neglecting his duty. C. M. O. 42, 1909, 15–16.

Criticised for trying case out of court. *See* ACQUITTAL, 30.

Record returned for signature of recorder. File 31395–S. C. M., J. A. G., June 27, 1902; 20 J. A. G., 396.

75. **Reduction in rating**—In response to an inquiry as to the maximum forfeiture of pay a summary court-martial could adjudge in the case of a man reduced by sentence of the court to the next inferior rating, the department held (File 26287–1372:1):

"The department considers that the intent of article 30, Articles for the Government of the Navy, which limits the loss of pay that a summary court-martial may adjudge, to the loss of three months' pay, is to limit the loss to three months' pay based on the pay of the accused in the rating to which he has been reduced." C. M. O. 1, 1913, 7. *See also* REDUCTION IN RATING, 30.

76. **Rejection of accused's plea**—Of guilty in a less degree than charged. *See* GUILTY IN A LESS DEGREE THAN CHARGED, 9–11.

77. **Reports on fitness**—Members censured and manner of performing duty entered on reports of fitness. *See* CRITICISM OF COURTS-MARTIAL, 36.

78. **Restriction**—Convening or reviewing authority may mitigate "confinement" to "restriction." *See* CONFINEMENT, 8; RESTRICTION, 1, 4; SUMMARY COURTS-MARTIAL, 92.

79. **Same**—"To be restricted to the limits" of the ship, etc., may not be adjudged by a summary court-martial. *See* RESTRICTION, 5, 6. *See also* SUMMARY COURTS-MARTIAL, 92.

80. **Revision**—The convening authority may submit the case to the same or to another summary court-martial. (R–621 (2).)

If a new court be ordered, it is restricted in its action to a reviewal of the record of the former trial and a redetermination of the sentence. No further testimony is to be admitted. (R–621 (3).) [*See* REVISION, 14.]

Revision by a new court can be ordered only in a case where the sentence of the original court would be detrimental to the health of the accused. File 26287–1507; 26287–1508.

81. **Same**—Record in revision should be prefixed to record of which it is a part, not appended. C. M. O. 29, 1914, 3. *See also* REVISION, 32.

82. **Same**—A summary court-martial case was returned to court by the senior officer present to the convening authority for correction regarding the introduction of a previous conviction not admissible.

A new and different court was ordered by the convening authority which court eliminated from consideration that part of the enlistment record questioned, and adhered to former sentence.

Department disapproved entire proceedings and sentence because of above irregularity and also the fact that a new court for revision can be ordered only in a case where the sentence of the original court would be detrimental to health of accused. File 26287–1507, Sec. Navy, Feb. 20, 1913.

Digitized by Google

83. **Secretary of Navy**—No express action is taken by the Secretary of the Navy, after a summary court-martial record has been approved by the convening authority, and the senior officer present, unless it is decided to "set aside the proceedings, or remit or mitigate, in whole or in part, the sentence imposed" by any summary court-martial; and in such case the record is acted upon by the Secretary of the Navy, or acting Secretary of the Navy, in person in accordance with the provisions of section 9 of the act of February 16, 1909 (35 Stat., 621).

Where no express action is taken by the Secretary of the Navy, or acting Secretary of the Navy, the sentence of the court-martial is permitted to be carried into effect in accordance with section 17 of said act of February 16, 1909 (35 Stat., 622), which provides "that all sentences of summary courts-martial may be carried into effect upon the approval of the senior officer present." File 27210-183, Apr. 22, 1913.

Special action by Secretary of Navy. C. M. O. 5, 1914, 4; 33, 1914, 6-8.

84. **Senior member**—Criticized and name published in Court-martial Order. *See* CRITICISM OF COURTS-MARTIAL, 62.

85. **Senior officer present.** *See* SENIOR OFFICER PRESENT; SUMMARY COURTS-MARTIAL, 28, 92.

86. **Sentences**—Summary courts-martial may sentence petty officers and persons of inferior ratings to any one of the following punishments, namely:

(1) Discharge from the service with bad-conduct discharge; but the sentence shall not be carried into effect in a foreign country.

(2) Solitary confinement, not exceeding 30 days, on bread and water, or on diminished rations.

(3) Solitary confinement not exceeding 20 days.

(4) Confinement not exceeding two months.

(5) Reduction to next inferior rating.

(6) Deprivation of liberty on shore on foreign station.

(7) Extra police duties, and loss of pay, not to exceed three months, may be added to any of the above-mentioned punishments.

"The courts authorized to impose the punishments prescribed by article 30 of the 'Articles for the Government of the Navy' may adjudge either a part or the whole, as may be appropriate, of any one of the punishments therein enumerated: *Provided*, That the use of irons, single or double, is hereby abolished except for the purpose of safe custody, or when part of a sentence imposed by a general court-martial." (Act Feb. 16, 1909, 35 Stat., 621.) A. G. N. 30. C. M. O. 2, 1912, 5. *See also* CONFINEMENT, 12, 40, 41.

87. **Same**—Summary courts-martial are restricted in their sentences to the punishments specifically authorized in article 30 of the Articles for the Government of the Navy, R-30, but all courts empowered to impose the punishments prescribed by the above-mentioned article may adjudge either a part or the whole, as may be appropriate, of any one of the punishments therein enumerated. Care must be taken, therefore, not to include parts of two or more punishments in a sentence. Hence, sentences to "extra duties" instead of "extra police duties," and to "dishonorable" instead of "bad-conduct" discharge are illegal, as imposing a punishment differing in nature from those authorized. Also, sentences involving confinement on bread and water or on diminished rations are illegal unless it is expressly provided that such confinement is to be "solitary," although solitary confinement may be adjudged by itself. (R-619 (1).) C. M. O. 2, 1912, 5.

88. **Same**—Should conform to an established schedule in order to secure uniformity. *See* SENTENCES, 111, 112.

89. **Same**—Must adhere to statutory form of sentences. *See* CONFINEMENT, 41; STATUTORY SENTENCES, 1, 3-5.

90. **Same**—Where the legal term of confinement is limited to "30 days," the exact phraseology should be employed in adjudging a sentence involving confinement for such maximum period. A sentence of "solitary confinement not exceeding one month," for example, would be irregular and improper, as A. G. N. 30, prescribes "30 days" as the maximum, while 1 month might be in excess of the limit so fixed. C. M. O. 2, 1912, 5.

91. **Same**—All sentences of summary courts-martial may be carried into effect upon the approval of the senior officer present. (Act Feb. 16, 1909. 35 Stat., 623; A. G. N. 32.) C. M. O. 31, 1911, 3-4; File 3960-1075, J. A. G., Apr. 6, 1915. *See in this connection* SUMMARY COURTS-MARTIAL, 38.

"No sentence of a summary court-martial shall be carried into execution until the proceedings and sentence have been approved by the officer ordering the court, or his

Digitized by Google

successor in officer, and by his immediate superior in command: *Provided*, That if the officer ordering the court, or his successor in officer, be the senior officer present, such sentence may be carried into execution upon his approval thereof." (Act, Aug. 29, 1916, 39 Stat., 586.) C. M. O. 30, 1916, 6. *See also* SUMMARY COURTS-MARTIAL, 38.

92. **Same**—"To the limits of the garrison"—A record of a recent summary court-martial shows that the court adjudged the following sentence: "To be confined to the limits of the garrison for two (2) months and lose pay amounting to thirty (30) dollars."

The question thus appears to be whether the court properly phrased its sentence in requiring that the confinement for two months should be restricted "to the limits of the garrison," or whether it should have simply made the sentence read as phrased in the law, i. e., "confinement for two (2) months and to lose pay amounting to thirty (30) dollars." *Held*, That the court inserted in its sentence a provision for which the law contains no authority, and made the sentence one which merely deprived the offender of liberty for two months. It was not intended that the statute should cover punishments which the commanding officer himself was authorized to inflict, one of which is deprivation of liberty. Article 26 of the Articles for the Government of the Navy specifically provides that summary courts-martial are intended "for the trial of offenders which such officer may deem deserving of greater punishment than such commander or commandant is authorized to inflict."

One of the punishments which a summary court-martial is authorized to inflict is "deprivation of liberty on shore on foreign station," and the fact that article 30, Articles for the Government of the Navy, so provides, also tends to exclude the theory that a summary court-martial can adjudge a sentence which amounts only to a deprivation of liberty on shore in this country.

It appears to be evident, therefore, that the punishment of "confinement not exceeding two months" authorized by article 30, Articles for the Government of the Navy, was intended to be a different punishment from mere deprivation of liberty, which the commanding officer himself could adjudge. Indeed, if the convening authority, after reviewing the proceedings of a summary court-martial, deems that the ends of justice will be subserved by so doing, he is authorized to mitigate a sentence of "confinement not exceeding two months" to "confinement to the limits of the garrison," but no such power is given to the court itself, which must strictly adhere to the statutory form of sentence. Therefore, not only upon the authority of the cases hereinbefore cited, but also upon principle, the court had no authority to make "any departure in the sentence from the express terms of the statute, whether as to the form or the extent of the punishment."

The sentence is therefore void and of no effect. C. M. O. 2, 1912, 4-11.

93. **Service records**—Transcripts for. *See* SERVICE RECORDS, 19.

94. **Setting aside.** *See* SETTING ASIDE.

95. **Solitary confinement.** *See* BREAD AND WATER, 4; CONFINEMENT, 5, 12; SOLITARY CONFINEMENT; SUMMARY COURTS-MARTIAL, 86.

96. **Specifications**—A single specification should set forth only one offense—Accused was tried under one specification which alleged "his return to said ship from special liberty, drunk and disorderly;" and that he did "while being placed in confinement * * * forcibly resist arrest." Thus two distinct offenses were set forth in a single specification, whereas "each offense of a different kind shall be the subject of a distinct charge and specification." (Forms of Procedure, 1910, p. 83.)

It has been noted during the past month in the review of summary court-martial cases that in a number of cases several offenses have been set forth in the same specification. This error is most commonly committed in joining "absence over leave" with such offenses as "drunk and disorderly," "returning on board drunk and unfit for duty," and "breaking arrest." Each of the latter offenses is distinct in itself, notwithstanding its causal connection with the offense of "absence over leave," and should be set forth in a separate specification. (Navy Regulations, 1913, R-608. *See also* R-712 (2).) C. M. O. 16, 1916, 6-7. *See also* CHARGES AND SPECIFICATIONS, 45, 62.

97. **Speedy trials.** *See* SPEEDY TRIALS, 3.

98. **Statutory sentences.** *See* STATUTORY SENTENCES.

99. **Testimony.** *See* EVIDENCE, 88.

100. **Titles**—It was recommended that certain commanding officers be authorized to use the title of "commandant" when convening summary courts-martial and deck courts. File 26287-1183, J. A. G., May 4, 1912.

Digitized by Google

101. **Trying case out of court**—The recorder should not usurp the functions of the court by "trying the case out of court." C. M. O. 42, 1909, 15. *See also* JUDGE-ADVOCATE, 123, 124.
102. **Uniformity of sentences.** *See* SENTENCES, 111, 112.
103. **Usurpation**—Of court's functions by recorder. *See* COURTS, 186; C. M. O. 42, 1909, 15.
104. **Warrant officers**—May not, if not commissioned, sit as member; but otherwise if a commissioned warrant officer. *See* CHIEF BOATSWAINS, 2; SUMMARY COURTS-MARTIAL, 105.
105. **Same**—The fact that a boatswain who is a commanding officer may be junior to all of the members of a summary court-martial convened by him is immaterial. A case of this nature occurred at the Philadelphia Navy Yard in reference to the acting commandant convening a summary court-martial for the trial of men attached to the receiving ship at that yard, because the commanding officer of the receivng ship was junior to the senior member of the proposed summary court-martial. The department in this case stated:

"Since, however, the inflicting of minor punishments, on board ships in commission including the ordering of the trial by summary court-martial of men attached thereto, concerns internal discipline, and since the uniform practice on board receiving ships at other yards is and has been for the commanding officer of such receiving ships to exercise the prerogatives of convening authority, the commandant acting as senior officer present, as prescribed by the regulations, it is considered advisable in future that the same practice be followed at the navy yard under your command, and it is directed that it be done." File 26287—1873.

106. **Witnesses**—Summons for. *See* WITNESSES, 59, 107.

SUMMONS. *See also* SUBPOENAS.

1. **Enlisted men and others**—As witnesses before naval courts-martial. *See* WITNESSES, 59, 107.

SUNDAY. *See also* SABBATH DAY.

1. **General courts-martial**—Adjourning over Sundays. *See* ADJOURNMENT OF COURTS-MARTIAL.
2. **Laws.** *See* SUNDAY LAWS.

SUNDAY LAWS.

1. **Base ball on Sundays**—"It is not illegal *per se* to play ball on Sunday. However, where it is played in such a manner as to interrupt the repose and religious liberty of the community, or when the game is public and an admission is charged directly or indirectly, it becomes unlawful under statutes prohibiting sporting or public sport, but does not under statutes prohibiting games." (37 Cyc., 551.) It has also been judicially stated that physical exercises and games are not forbidden on the Sabbath in the Ten Commandments; and that in the Christian Church there have never been any rules prohibiting physical games and exercises on Sunday. (37. Cyc. 550, citing People *v.* Poole, 89 N. Y. S., 773.) File 5103-164:4, Sec. Navy, Sept 9, 1915. *See also* File 3355-145, July 2, 1907.

SUPERIOR OFFICERS.

1. **Definition**—"Officer" as defined in R-64. *See* OFFICERS, 33.

"An officer whose rank is higher in comparison with another. A senior officer." (Hamersly's Naval Encyc.) File 26251-12159, p. 13.

"Of more excellent rank or dignity; belonging to a higher grade; as a superior court; superior studies * * * Locally higher; more elevated; upper * * *. A person of more exalted rank or dignity than another or others * * *." (Stand. Dict.) File 26251-12159, p. 13.

"By the term 'superior,' as used in this part of the Article [Art. of War 21], is clearly meant an officer of rank superior to that of the offender—or, where an enlisted man is the offender, any commissioned officer whatever—whether or not such officer be, properly speaking, a commanding officer." (Winthrop, 880.) File 26251-12159, p. 14.

In 1909 the question was presented whether the senior Civil Engineer was the *official superior* of other officers in the Corps of Civil Engineers with whom he was not associated on duty and who desired to present him with a testimonial. It was contended that "the meaning of *superior* is one whose position places him over and in charge or control of those contributing to or presenting him with a gift, and that a *senior* naval officer is not necessarily a *superior* under this clause. Thus an officer in command of a ship would be a *superior* of the junior officers serving on that ship under him, but would be a *senior* and not a *superior* to officers on other ships not under

Digitized by Google

his command. Similarly, a Chief of Bureau would be the *superior* of the officers serving under him under the Bureau, and would be a *senior* but not a *superior* to officers serving under other Bureaus or upon detached duty independent to that Bureau." The department's decision, November 9, 1909, was as follows:

"The interpretation in question depends upon a definition of the words *superior official* in which the department can not concur, as it is considered that an officer *superior in rank* is a *superior official* within the intention of the Regulation [R-1520], which is section 1784 of the Revised Statutes, with a paragraph added to prevent indirect presents to officers of the Navy * * *. The department, therefore disaffirms the interpretation of Civil Engineers * * * and * * *." File 26806-33, Sec. Navy, Nov. 9, 1909, quoted with emphatic approval in file 26251-12159, Sec. Navy, Dec. 9, 1916, pp. 13-14. *See also* C. M. O. 5, 1917.

2. **Master-at-arms.** *See* MASTER-AT-ARMS, 1.
3. **Mates.** *See* MATES, 8.
4. **Petty officers**—The accused was charged with "Assaulting and striking his superior officer while in the execution of the duties of his office," the specification alleging that he did "assault and strike" a master-at-arms, etc. The court found the specification proved but not guilty of the charge as worded on the grounds that a "petty officer" is not a "superior officer" to a man not rated. The department did not sustain the contention of the court, and the finding was disapproved. C. M. O. 31, 1908, 3.
5. **Public reprimand**—Right of superior officers to reprimand subordinates. *See* PUBLIC REPRIMAND, 17.

SUPERVISORY NAVAL EXAMINING BOARDS. *See* PROMOTION, 190-192.

SUPREME COURT.

1. **Officer**—Commissioned officer of Marine Corps acted as counsel before. *See* COUNSEL, 52.
2. **Rules of evidence.** *See* EVIDENCE, 107.
3. **Solicitor**—Acted as counsel before. *See* COUNSEL, 49, 52.

SURGEONS. *See also* MEDICAL OFFICERS OF THE NAVY.

1. **Acting assistant surgeons.** *See* ACTING ASSISTANT SURGEONS.
2. **Dental surgeons.** *See* DENTAL SURGEONS.
3. **Unprofessional conduct.** C. M. O. 59, 1882. *See also* C. M. O. 1, 1882, 3.

SURGEON GENERAL.

1. **Promotion of.** *See* NAVAL EXAMINING BOARDS, 24.

SURGICAL OPERATIONS.

1. **Amputation of arm.** *See* AMPUTATION, 1.
2. **Capital operation.** *See* SURGICAL OPERATIONS, 6; WORDS AND PHRASES.
3. **Hernia**—Not compellable—An officer of the Marine Corps will not be required to submit to a capital operation for the removal of a physical disability which involves risk of life. The department so held in the case of an officer whose disability consisted of "probable intestinal obstruction which originated in the line of duty, following an operation for irreducible right inguinal hernia." File 26253-98, J. A. G., May 17, 1910.
4. **Major operation.** *See* SURGICAL OPERATIONS, 6; WORDS AND PHRASES.
5. **Minor operation.** *See* SURGICAL OPERATIONS, 6; WORDS AND PHRASES.
6. **Refusal to take**—It was held that the findings of a retiring board in the case of an officer that "the present incapacity of * * * is due to the fact that he will not submit to an operation recommended by responsible medical officers of the Navy, and is therefore not the result of an incident of the service" should be disapproved.

There is nothing by which one in the naval service can be compelled against his will to undergo a major or capital operation. But it is otherwise if the operation be a minor one, or if treatment is proposed.

An Army officer was given the choice of resigning or submitting to a radical operation for hernia. The Navy Department has held otherwise in the case of hernia. File 26253-98, J. A. G., May 17, 1910.

SURRENDER OF DESERTERS. *See* DESERTION, 102, 128-130.

SUSPENSION FROM DUTY.

1. **Bar to trial**—Suspension from duty, not imposed as a court-martial sentence, does not bar further disciplinary proceedings. *See* JEOPARDY, FORMER, 41, 42.
2. **Breach of arrest.** *See* SUSPENSION FROM DUTY, 6.
3. **Full pay.** *See* SUSPENSION FROM DUTY, 11.

Digitized by Google

4. **Leave of absence**—The department does not consider favorably a part of a sentence consisting of "three months' leave of absence" with the full pay corresponding to that status, particularly as such action would necessitate the detail of another officer to perform his duty while he was permitted to remain idle. The granting of such leave is a privilege which would not, except under extraordinary circumstances, be accorded by the department to any officer during a tour of sea service. C. M. O. 103, 1896, 1–2. *See also* ADEQUATE SENTENCES, 15.
5. **Leave pay**—As extended periods of severance from active duty are calculated to impair the efficiency of an officer, and are detrimental to the interests of the naval service, the department remitted that part of a general court-martial sentence of an officer involving suspension from duty on leave pay. C. M. O. 73, 1896, 2.
6. **Limits assigned**—"An officer suspended from duty shall confine himself to the limits assigned him at the time of his suspension or afterwards, and his failure to do so shall be regarded as a breach of arrest." (Navy Regulations, 1913, R–1418.) J. A. G., June 7, 1915.
7. **Midshipmen**—Suspension without pay. *See* MIDSHIPMEN, 62.
8. **Reduced pay.** *See* SUSPENSION FROM DUTY, 12.
9. **Sentences**—The accused was sentenced "to be suspended from rank and duty." "In view of the fact that suspension from rank and duty for three months as provided in the sentence would operate to give * * * full pay during that time" it was remitted. C. M. O. 34, 1907, 3, 4. *See also* C. M. O. 8., 1909; ADEQUATE SENTENCES, 15.
10. **Same**—On the general subject of suspension from duty the department has held that it is not a substantial punishment and contrary to the policy of the department. (C. M. O. 73, 1905; 75, 1905; 31, 1912; 32, 1912; 25, 1913; 7, 1914, p. 13.) C. M. O. 13, 1915, 1. *See also* An. Rep. J. A. G., 1893, p. 8.
11. **Same**—As to suspension from duty without reduction in pay, the department has stated that this is not a substantial punishment; and that it "has repeatedly held that its effect is merely to relieve the officer from duty without consequent reduction in pay, thereby causing a positive loss to the Government. (*See* C. M. Order No. 25, 1913, and precedents cited therein.) Under the Navy Regulations an officer suspended from duty on board ship is not placed in confinement, but has the freedom of practically the entire vessel, unless greater restraint should be necessary for the safety of the ship or otherwise. (R–1419.) In the present case, therefore, the suspension of * * * from duty was rather a punishment to other officers of the vessel, who had to perform his duty in addition to their own, while, on the other hand, he received full pay from the Government, although rendering no services whatever in return therefor." (C. M. O. 7, 1914, p. 13.) C. M. O. 13, 1915, 2.
12. **Same**—As to suspension from duty with reduction in pay, the department has also held that it "is an undesirable form of punishment, prejudicial to the best interests of the service, and contrary to the policy of the department" (C. M. O. 73, 1905; 25, 1913); and again, "Neither does the department deem it desirable to impose upon an officer a sentence providing for suspension from duty, as such a sentence is detrimental to the interests of both the officer and the Government, since the officer is probably left without employment and the Government loses his services" (C. M. O. 31, 1912; 32, 1912; 25, 1913). "The sentence as adjudged would cause a positive loss to the Government, inasmuch as the Government would receive no services from the accused in return for the money paid him during the operation of the sentence." (C. M. O. 25, 1913, p. 2.) C. M. O. 13, 1915, 2.
13. **Same**—The sentence of "to be suspended from rank and duty * * * to receive during said period one-half of shore pay" is "inappropriate, since it relegates to idleness for two years an officer whose services are needed, and throws his work on others." C. M. O. 67, 1902. *See also* C. M. O. 21, 1910, 17; 1, 1911, 3.
14. **Same**—"To be suspended from rank and duty for a period of six months, on one-half of the pay he would receive if performing duty at sea, to retain his present number in his grade while so suspended; and to be publicly reprimanded by the Secretary of the Navy." C. M. O. 101, 1906; *See also* C. M. O. 90, 1903.
15. **Same**—"To be suspended from duty for a period of * * * (*) months on one-half (½) shore-duty pay." C. M. O. 31, 1912; 32, 1912.
16. **Same**—"Suspended from duty on three-quarters shore-duty pay." C. M. O. 25, 1913.
17. **Same**—Sentences of officers including suspension must state distinctly whether from rank or from duty only. (R–816(1); FORMS OF PROCEDURE, 1910, p. 43.)
18. **Sword**—When an officer is placed under suspension it is not necessary or proper that he be required to deliver his sword to his commanding officer. *See* ARREST, 26, 39.

Digitized by Google

SUSPENSION FROM PROMOTION. *See* ADMINISTRATION, 4; COMMISSIONS, 40; PROMOTION, 194–207.

SUSPENSION FROM RANK AND DUTY. *See* SUSPENSION FROM DUTY, 9, 13, 14, 17.

SUSPENSION OF CIVIL EMPLOYEES.

1. **Without pay.** *See* File 26283–968, Sec. Navy, Dec. 16, 1915; 26283–961, Sec. Navy, Dec. 21, 1915.

SWEARING FALSELY. C. M. O. 47, 1910, 5. *See also* FALSE SWEARING; PERJURY.

SWEAT BOXES.

1. **Confinement in**—"No rooms hitherto called 'sweat boxes' will be allowed on board any vessel of the Navy, but each ship will have a proper place in which to secure persons sentenced to be confined according to law.

"No room for this purpose will be smaller than a stateroom allowed a wardroom officer in a sloop-of-war." Circular, Sec. Navy, Mar. 3, 1870.

Prisoners shall not be confined in any other spaces than those which have been designated by the Navy Department as prisons or spaces proper to be used as such. In case of necessity, extra spaces may be authorized by a commander in chief on a foreign station, by a senior officer present, or by the commanding officer of a ship acting singly, and the medical officer of the ship shall be called upon to report whether such spaces are fit for prison use. (R–1431(1).)

SWIMMING. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 18, 19, 21, 25, 28, 40, 41, 60, 103.

SWINDLING. *See* DEBTS, 16.

SWORD.

1. **Arrest of an officer**—Delivery of sword. *See* ARREST, 26, 39.
2. **Debts**—Officers tried by general court-martial for leaving his sword in payment of debts. *See* DEBTS, 28.
3. **Suspension from duty**—Not necessary that officer should deliver his sword to his commanding officer. *See* ARREST, 26; SUSPENSION FROM DUTY, 18.

SYSTEM OF DISCIPLINE.

1. **Baron Steuben**—Adopted by Congress, March 29, 1779. File 8124–55, J. A. G., Oct. 17, 1916. *See also* DISCIPLINE, 21.
2. **Naval militia**—The act of August 29, 1916 (39 Stat., 599), provides "That the Naval Militia shall be subject to the *system of discipline* prescribed for the United States Navy and Marine Corps, * * *." In construction of the words "system of discipline" as used therein, the Judge Advocate General of the Navy rendered an opinion to the effect that these words extend to the Naval Militia of the States the provisions of the Regulations, Articles for the Government of the Navy, and other laws relating to the Navy, which provide for training and general rules of conduct, but do not extend to the Naval Militia the provisions of Regulations, Articles for the Government of the Navy, and other laws which relate to the administering of punishment. In other words, the expression "system of discipline" in this connection refers to matters of substantive law—that is, "the positive law of duties and rights"—as distinguished from adjective law, or "rules of procedure," intended for the enforcement of such duties and rights. Accordingly, the laws and regulations of the Navy which prescribe the system of training, the duties and rights, and the general rules of conduct of persons in the Navy, apply to the Naval Militia under the above clause of this statute; but not the laws and regulations of the Navy which provide for the enforcement of discipline by means of punishment. File 8124–55, J. A. G., Oct. 17, 1916; C. M. O. 37, 1916, 11. *See also* DISCIPLINE, 20.

TACTICAL SIGNAL BOOKS. *See* BATTLE, 1; BOOKS, 6; CONFIDENTIAL PUBLICATIONS, 3.

TARGET PRACTICE.

1. **Within marine league of the coast of Japan**—The commanding officer of a naval vessel was tried by general court-martial under the charge of "Neglect of duty" for holding target practice within the marine league of Japan without securing permission from the Japanese Government. Fired at a target erected within 50 yards of shore without ascertaining whether such firing would endanger lives. He also departed without being certain that the shells had all exploded. Accused was acquitted, but department commented in strong language, disagreeing with the court. C. M. O. 41, 1888.

Digitized by Google

2. **Same**—In the above case the department stated, in part: "The department can not assent to the view that a naval officer may, without blame, hold his target practice upon the soil of a friendly power without consulting such power, and, where he actually imperils life by the flight of the projectiles, without the previous examination which would have disclosed such peril, and that he may sail away, with this full duty discharged, leaving six unexploded projectiles to endanger innocent lives." C. M. O. 41, 1888, 10.

TARGET RAFTS.

1. **Adrift**—An officer was tried by general court-martial for negligently permitting a target raft to get adrift and not making raft visible by means of signals or lights. C. M. O. 11, 1911, 1.

TAXATION.

1. **"Office"**—The "office" of an officer of the United States can not be taxed. File 9212-22, J. A. G., Feb. 21, 1912.
2. **Personal property**—Of naval officers at Naval Proving Ground, Indianhead, Md. File 9212-72, J. A. G., Apr. 19, 1916.
3. **Poll taxes.** *See* POLL TAXES.
4. **Property taxes.** *See* File 26252-33:a and b.
5. **Service pensions.** *See* JURISDICTION, 127.
6. **United States property**—Taxation by States of automobiles owned by the Federal Government. *See* AUTOMOBILE, 3.

TECHNICAL "BREAKING ARREST." *See* BREAKING ARREST, 11.

TECHNICAL DEFENSE.

1. **Department**—States that the defense of the accused was entirely technical. It carefully, and upon unsound pretexts, evaded an issue which the accused should have hastened to face, if he had been guiltless of offenses which so seriously affected his character as an officer and a gentleman. Although its sophistries would not for a moment have embarrassed the decision of an ordinary court of justice in the case, they seem to have prevailed before the court-martial; and its judgement is characterized by extraordinary leniency. C. M. O. 20, 1881. *See also* C. M. O. 22, 1883; OFFICERS, 88, 116; TECHNICAL PLEAS.

TECHNICAL EMBEZZLEMENT. *See* EMBEZZLEMENT, 25, 30.

TECHNICAL ERRORS.

1. **Charges and specifications.** *See* CHARGES AND SPECIFICATIONS, 33, 34; DEMURRER, 6.

TECHNICAL PLEAS.

1. **Officer's defense**—Officer criticized. *See* OFFICERS, 88, 116; TECHNICAL DEFENSE.

TECHNICALITIES. *See also* WORDS AND PHRASES.

1. **Court of inquiry**—Technical irregularities in. File 4865-19, Sec. Navy, July 8, 1907.
2. **Court-martial procedure**—Technicalities should not be introduced into naval court-martial procedure, etc. *See* COMMON LAW, 12; CORPUS DELICTI, 2.
3. **Defeat justice**—Technicalities should never be used to defeat justice or confuse procedure. *See* COMMON LAW, 12; CORPUS DELICTI, 2.

TECHNICALLY GUILTY.

1. **Fraudulent enlistment, of.** C. M. O. 12, 1911, 5.

TELEGRAMS.

1. **Desertion**—Evidence in proving "Desertion." C. M. O. 110, 1896, 3.
2. **Evidence, as.** C. M. O. 110, 1896, 3; G. C. M. Rec. 30684, p. 303.
3. **Member of a general court-martial**—Appointed by telegram, which was read and appended. C. M. O. 56, 1897, 2.
4. **Nolle prosequi**—Entered by telegram. *See* NOLLE PROSEQUI, 8.

TELEGRAPHY, WIRELESS. *See* WIRELESS TELEGRAPHY, 1.

TEMPER, LOSS OF, BY OFFICER. *See* OFFICERS, 117.

Digitized by Google

TEMPORARY APPOINTMENTS.
1. **Acting assistant dental surgeon.** *See* ACTING ASSISTANT DENTAL SURGEONS.
2. **Major general commandant.** *See* MARINE CORPS, 48.

TEN COMMANDMENTS. *See* SUNDAY LAWS.

TENURE OF OFFICE. *See* "OFFICE," 3.

TERRITORIES.
1. **Jurisdiction of the courts in.** File 3818, June 27, 1906. *See also* 26 Op. Atty. Gen., 91.

TESTIMONY. *See* EVIDENCE.

TEXTBOOKS.
1. **Arguments**—Use of textbooks in arguments before naval courts-martial. *See* G. C. M. Rec. 23037, p. 89; ARGUMENTS, 1; EVIDENCE, DOCUMENTARY, 57.

THANKS OF CONGRESS. *See* CONGRESS, 8-10.

THEFT. *See also* LARCENY; WORDS AND PHRASES (LARCENY).
1. **Aiding and abetting.** *See* AIDING AND ABETTING, 5, 6.
2. **Burden of proof.** *See* BURDEN OF PROOF, 9; THEFT, 17.
3. **Corpus delicti.** *See* CORPUS DELICTI, 1, 2.
4. **Drunkenness as a defense.** *See* DRUNKENNESS, 20, 22, 26, 49, 51, 52, 56, 88; STATEMENT OF ACCUSED, 16.
5. **Embezzlement and theft**—Distinguished. G. O. 143, Oct. 28, 1869.
6. **Enlisted man**—Charged with. C. M. O. 42, 1909, 3, 9; 49, 1910, 6; 1, 1913, 5; 20, 1913, 4; 9, 1914, 3; 49, 1915, 21.
7. **"Feloniously"**—Meaning of "feloniously" in a statute defining larceny. *See* FELONIOUSLY.
8. **Haitian**—Native Haitian held on a charge of theft. *See* MANSLAUGHTER, 9.
9. **Intent**—Necessary to prove *specific intent* in theft, which is same as larceny and stealing. *See* DRUNKENNESS, 49, 88, 89; INTENT, 5, 42, 49.
10. **Larceny**—Same as "Theft." *See* THEFT, 9.
11. **Officer**—Charged with. C. M. O. 50, 1914.
12. **Ownership of stolen property**—Either legal owner or one in possession may be named as owner in a specification. *See* THEFT, 22.
13. **Paymaster's clerk**—Charged with. C. M. O. 14, 1907.
14. **Prima facie**—Cases of theft. C. M. O. 42, 1909, 3; 49, 1910, 6; 1, 1913, 6.
15. **Same**—Proof of possession of stolen articles establishes a *prima facie* case of theft. C. M. O. 49, 1910, 6.
16. **Same**—The possession of stolen property or articles recently after the commission of the theft is *prima facie* evidence of guilty possession, and if unexplained either by direct evidence or by the attending circumstances, or by the character and habits of the possessor or otherwise, it is taken as conclusive. C. M. O. 1, 1913, 6.
17. **Proof of**—Where it was proved that the accused was in possession of stolen property a short time after it was stolen, *Held*, *prima facie* case against him of theft, and the burden of proof was shifted to the accused to show that the possession was not unlawful, and upon failure to do so court should find him guilty. A continued possession of stolen property and no effort made to return same to owner shifts burden of proof to defense to show that possession was an innocent one, and where such was not done the department held that the court should have found accused guilty of theft. C. M. O. 42, 1909, 3-4; 49, 1910, 6. *See also* G. C. M. Rec. No. 22342; C. M. O. 17, 1910, 11.
    Without an asportation, there can be no larceny. This asportation consists in removing the property from the place where it was before—it need not be actually carried away—and the slightest asportation is all that is necessary (12 A. & E. Ency, Law 763). File 7879-02, J. A. G., Sept. 20, 1902; 21 J. A. G., 105.
18. **Restitution.** C. M. O. 20, 1913, 4.
19. **Restitution of money stolen, from pay of thief who deserted**—Where a deserter absconded with a considerable sum of money belonging to the ship's cook, and intended for the purchase of provisions, it was held that there is no legal authority under which pay due the deserter at the time he absconded could be used to reimburse the persons who suffered loss by the theft. *See* File 10988-02; 3852-02. *See also* Compt. Dec., Apr. 22, 1902.
20. **Robbery**—Theft distinguished from robbery. *See* ROBBERY, 9.

Digitized by Google

21. **Specific intent.** *See* DRUNKENNESS, 49, 88, 89; INTENT, 7, 42, 49; THEFT, 9.
22. **Specifications**—Allegations of title—In certain specifications under a charge of "Theft" in a recent case, the ownership of the property alleged to have been stolen was laid in the persons in whose possession the property was at the time it was stolen. The court in its findings made certain exceptions and substitutions so that the specifications as thus amended showed the legal ownership of the property. The rule is well settled that the ownership may be laid in indictments in the person who was in peaceable possession of the property, and whose possession was unlawfully disturbed by the taking; that the actual condition of the legal title is immaterial to the thief; that even a thief in possession may be described as owner when goods have been stolen from him by a second thief. (25 Cyc., 89, 90.) However, it is optional to name the true owner as such in the indictment, although the property was in the possession of another. (25 Cyc., 91.) These principles apply equally to the allegations of ownership in specifications tried by courts-martial, and were observed in preparing the charges and specifications in this case. However, the action of the court in making the exceptions and substitutions referred to, while not necessary, is not objectionable and conduces to accuracy by amending the specifications so as to conform precisely to the actual facts disclosed by the evidence. G. C. M. Rec. No. 29422; File 26251-9280; C. M. O. 51, 1914, 9-10.
23. **Thief**—Should not be retained in naval service. *See* THIEF, 1.
24. **Same**—Tagged "Thief"—No former jeopardy. *See* JEOPARDY, FORMER, 43.
25. **Title**—Allegations of title of stolen goods in specification. *See* THEFT, 22.

THEFT, IN VIOLATION OF CLAUSE 1 OF ARTICLE 8 OF THE ARTICLES FOR THE GOVERNMENT OF THE NAVY.

1. **Officer**—Charged with. C. M. O. 15, 1908, 2.

THEFT, IN VIOLATION OF ARTICLE 14 OF THE ARTICLES FOR THE GOVERNMENT OF THE NAVY.

1. **Gunner**—Charged with. C. M. O. 8, 1879.

THIEF.

1. **Naval service**—Should not be retained in—The best interests of the naval service demand that, whatever the mitigating circumstances, a man who has been found guilty of theft shall not be retained therein. C. M. O. 66, 1894, 2.
2. **Same**—A seaman, United States Navy, was tried by general court-martial by order of the commander in chief of the United States Atlantic Fleet, and found guilty of the charge of "Theft," the three specifications thereunder being "proved by plea." He was sentenced to confinement at hard labor for a period of one year with corresponding forfeiture of pay, and to dishonorable discharge.

   The convening authority in approving the sentence mitigated the confinement to detention, thus providing a means whereby a self-confessed thief might effect his restoration to duty in an honorable status in the naval service.

   The Manual for Government of Naval Prisons, Prison Ships, and Disciplinary Barracks, page 1 of the Addenda, etc., limits the mitigation of sentences of confinement to detention to cases of men convicted of "purely military offenses." The mitigation of sentences involving confinement to detention in cases of men convicted of "Theft" is in direct conflict with the department's policy and precedents which exclude all persons convicted of "Theft" from being placed in detention among boys under 21 years of age who have been placed in detention for "purely military offenses."

   In accordance with the recommendation of the Bureau of Navigation and in order that the interests of justice and discipline, and particularly the standard maintained among detentioners may not suffer by this action, the department remitted the confinement, etc., and directed the discharge of the accused in accordance with the remaining terms of the sentence. File 26262-2440, Sec. Navy, Dec. 20, 1915; C. M. O. 49, 1915, 21-22.
3. **Tagged "thief"**—No former jeopardy. *See* JEOPARDY, FORMER, 43.

THREATENING AND ATTEMPTING TO ASSAULT HIS SUPERIOR OFFICER WHILE IN THE EXECUTION OF THE DUTIES OF HIS OFFICE.

1. **Enlisted man**—Charged with. C. M. O. 23, 1910, 5.

THREATENING AND PROFANE LANGUAGE.

1. **Massachusetts statutes.** File 26251-2993:12.

THREATENING LETTERS. *See* OFFICERS, 118; PRIVILEGE, 3.

Digitized by Google

THREATENING TO COMMIT SUICIDE WHILE DRUNK.
1. **Boatswain**—Charged with. C. M. O. 60, 1888, 2.

THROUGH INATTENTION AND NEGLIGENCE SUFFERING A VESSEL OF THE NAVY TO BE HAZARDED.
1. **Officer**—Charged with. C. M. O. 19, 1910.

THROUGH INATTENTION AND NEGLIGENCE SUFFERING A VESSEL OF THE NAVY TO BE RUN UPON A SHOAL.
1. **Officer**—Charged with. C. M. O. 31, 1907; 32, 1913, 1.

THROUGH INATTENTION AND NEGLIGENCE SUFFERING A VESSEL OF THE NAVY TO BE RUN UPON A SHOAL AND SERIOUSLY INJURED.
1. **Officers**—Charged with. C. M. O. 17, 1913; 2, 1914; 29, 1916.

THROUGH INATTENTION AND NEGLIGENCE SUFFERING A VESSEL OF THE NAVY TO BE SERIOUSLY INJURED.
1. **Officer**—Charged with. C. M. O. 31, 1916.

THROUGH NEGLIGENCE SUFFERING A VESSEL OF THE NAVY TO BE HAZARDED.
1. **Officers**—Charged with. C. M. O. 82, 1906; 26, 1908.
2. **Warrant officer**—Charged with. C. M. O. 15, 1912, 6.

THROUGH NEGLIGENCE SUFFERING A VESSEL OF THE NAVY TO BE RUN UPON A REEF.
1. **Officer**—Charged with. C. M. O. 9, 1911.

THROUGH NEGLIGENCE SUFFERING A VESSEL OF THE NAVY TO BE RUN UPON A REEF AND STRANDED.
1. **Officers**—Charged with. C. M. O. 32, 1894 29, 1903; 25, 1909; 26, 1909; G. C. M. Rec. 11192.

THROUGH NEGLIGENCE SUFFERING A VESSEL OF THE NAVY TO BE RUN UPON A ROCK AND GROUNDED.
1. **Officer**—Charged with. C. M. O. 15, 1905.

THROUGH NEGLIGENCE SUFFERING A VESSEL OF THE NAVY TO BE RUN UPON A ROCK AND HAZARDED.
1. **Officer**—Charged with. C. M. O. 7, 1893.

THROUGH NEGLIGENCE SUFFERING A VESSEL OF THE NAVY TO BE RUN UPON A SHOAL.
1. **Officer**—Charged with. C. M. O. 43, 1906; 53, 1906; 3, 1907; 36, 1908; 1, 1909; 29, 1909; 30, 1909; 17, 1913; G. C. M. Rec. 12965; C. M. O. 19, 1917.

THROUGH NEGLIGENCE SUFFERING A VESSEL OF THE NAVY TO BE STRANDED.
1. **Officers**—Charged with. C. M. O. 60, 1889; 29, 1891; 111, 1894; 50, 1903; 2, 1915; 23, 1916; 26, 1916.

THROUGH NEGLIGENCE SUFFERING PROPERTY OF THE UNITED STATES TO BE HAZARDED.
1. **Officer**—Charged with. C. M. O. 26, 1908.

TIME.
1. **Absence, unauthorized**—Allegation of period of absence in specification. *See* ABSENCE, 10, 11; ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 29; CHARGES AND SPECIFICATIONS, 92.
2. **Burglary.** *See* BURGLARY, 7.
3. **Commission of offenses**—Time of, should be alleged. *See* CHARGES AND SPECIFICATIONS, 92; FINDINGS, 27, 32, 33, 35.
4. **Specification**—When time is material. *See* ABSENCE, 10, 11; ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 29; CHARGES AND SPECIFICATIONS, 92; FINDINGS, 27, 32, 33, 35.
5. **Statute of limitations**—Time alleged so that offense will come within. *See* FINDINGS, 35.

Digitized by Google

TITLES.

1. **"Admiral"**—Under the Navy usage the temporary title of rear admiral follows the temporary rank and pay in the case of a line officer, because, unlike the staff officer, he is at all times in the military and command branch of the service, to which alone the *ancient title of admiral appertains.* (23 Op. Atty. Gen. 297, Dec. 20, 1904; 13 J. A. G., 394, Dec. 28, 1904.)
2. **Army rule**—Respecting titles. File 13–4, J. A. G., May 22, 1907.
3. **Chiefs of bureaus.** *See* BUREAU CHIEFS, 19.
4. **Controversy**—Brief history of controversy regarding titles. *See* BUREAU CHIEFS, 19.
5. **Correspondence.** *See* DESIGNATIONS.
6. **Court-martial orders.** *See* COURT-MARTIAL ORDERS, 38.
7. **Deck court officers.** *See* TITLES, 13.
8. **Line officers**—Only line officers have title as well as rank, etc. *See* RANK, 17.
9. **Line and staff**—Title and rank as between line and staff. *See* File 22724–16:1, J. A. G., Apr. 24, 1911, p. 4.
10. **Members of courts-martial**—Error in title in precept. *See* CHALLENGES, 15.
11. **Officers**—Should be addressed by titles. 13 J. A. G., 254. *See also* DESIGNATIONS.
12. **Statutes.** *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 121.
13. **Summary court-martial and deck courts**—Titles to be used by certain commanding officers in convening summary courts-martial and deck courts. File 26287–1182, J. A. G., May 4, 1912.
14. **Theft**—Allegations of title of stolen property in specifications. *See* THEFT, 22.

TORPEDO BOATS.

1. **Commanders**—"Nerve" is a prime requisite, etc. *See* COLLISION, 6.
2. **Confinement**—In fire room of a torpedo boat. *See* CONFINEMENT, 44.

TRANSFERS.

1. **Coast Guard**—Transfer of vessel. *See* COAST GUARD, 3.
2. **Fleet Naval Reserve**—Transfer of enlisted men to Fleet Naval Reserve. C. M. O. 40, 1916, 4.
3. **Marine Corps to Hospital Corps.** File 3976–02; 9033–02; 5315–04, Sec. Navy, July 5, 1904.

TRANSFER CLOTHING ACCOUNTS.

1. **Evidence, as.** C. M. O. 15, 1910, 8–9.

TRANSPORTS.

1. **Army**—Army courts and courts-martial have no jurisdiction over Marines on Army transports. *See* ARMY, 7.

TRANSPORTATION.

1. **Applicants for enlistment.** *See* NAVAL RESERVE, 6.
2. **Minor may waive**—A minor enlisting with the consent of his guardian has the same right as other enlisted men of the Navy to enter into agreement to waive transportation and to reenlist. File 4682–04, J. A. G., May 31, 1904.
3. **Naval Reserves.** *See* NAVAL RESERVE, 6.
4. **Retired enlisted men.** *See* RETIRED ENLISTED MEN, 13, 14.
5. **Witnesses, Marine.** *See* WITNESSES, 108.

TREATIES.

1. **Amity and commerce.** *See* TREATIES, 3.
2. **Date**—"As respects property rights and the performance of undertakings between individuals, the courts have held that 'the date of a treaty is the date of its final ratification.' (Wheaton's International Law, vol. 2, sec. 132.)
   "According to the same authority, it is, however, a principle of international law that 'so far as concerns the relations of the sovereigns concerned, it operates, when ratified, from the date of its signature.'" File 26516–47, J. A. G., May 18, 1911, p. 3.
3. **Desertion**—Desertion, *per se*, and unassociated with felony, is not included in the category of *crimes* commonly enumerated in treaties or conventions of extradition. In the past it has been considered in numerous treaties and conventions with foreign countries, but invariably in connection with the rights and privileges of consular officers as provided in treaties of Amity and Commerce. Extradition treaties concern *crimes* only. File 27403–132:1, J. A. G., Jan. 6, 1916.
4. **Same**—Japan. File 27403–132:1, J. A. G., Nov. 6, 1916, and Jan. 6, 1916.
5. **Same**—Greece. File 27403–132:1, J. A. G., Nov. 6, 1916, and Jan. 6, 1916.

Digitized by Google

6. **Same**—If any person belonging to the Navy or Marine Corps charged with *crime* deserts in the waters of any foreign state between which and the United States a treaty of extradition for the apprehension and delivery of persons charged with *crime* exists, the senior officer present shall take measures for his recovery in accordance with the provisions of such treaty.
   In no case shall force be used to recover deserters within foreign territorial limits or on board foreign ships. (R-3642.) *See* File 27403-132:1, J. A. G., Nov. 6, 1910, p. 5.
7. **Greece**—Extradition of deserters. File 27403-132:1, J. A. G., Nov. 6, 1916.
8. **Japan.** *See* File 27403-132:1, J. A. G., Nov. 6, 1916.
9. **Larceny**—Larceny is an extraditable *crime* within the purview of existing treaties and for which extradition may be requested with competent right and propriety. File 27403-132:1, J. A. G., Nov. 6, 1916, p. 5.
10. **Merchant vessels of the United States**—So far as lies within their power, commanders in chief, division commanders, and commanding officers of ships shall protect all merchant vessels of the United States in lawful occupations, and advance the commercial interests of this country, always acting in accordance with international law and treaty obligations. (R-1650.)
11. **Neutrals in time of war.** *See* TREATIES, 13.
12. **Seaman's Act of March 4, 1915 (38 Stat. 1164)**—Abrogating effect of the Seaman's Act upon treaties. File 27403-132:1, Sec. Navy, Jan. 6, 1916.
13. **War**—When the United States is at war, the commander in chief shall require all under his command to observe the rules of humane warfare and the principles of international law. When dealing with neutrals he shall cause all under his command to observe the rules of international law and the stipulation of treaties, and expect and exact a like observance from others (R-1634).

TREATING HIS COMMANDING OFFICER WITH DISRESPECT.
1. **Officer**—Charged with. G. C. M. Rec. 6809.

TREATING HIS SUPERIOR OFFICER WITH CONTEMPT WHILE IN THE EXECUTION OF HIS OFFICE.
1. **Gunner**—Charged with. C. M. O. 1, 1893.
2. **Officer**—Charged with. C. M. O. 33, 1896.

TREATING WITH CONTEMPT HIS SUPERIOR OFFICER.
1. **Officer**—Charged with. C. M. O. 51, 1882.

TREATING WITH CONTEMPT HIS SUPERIOR OFFICER AND BEING DISRESPECTFUL TO HIM IN LANGUAGE AND DEPORTMENT WHILE IN THE EXECUTION OF HIS OFFICE.
1. **Master**—Charged with. C. M. O. 21, 1882.
2. **Officers**—Charged with. C. M. O. 15, 1914; G. C. M. Rec. 6404; 6486.

TREATING WITH CONTEMPT HIS SUPERIOR OFFICER AND BEING DISRESPECTFUL TO HIM IN LANGUAGE AND DEPORTMENT WHILE IN THE EXECUTION OF HIS OFFICE, IN VIOLATION OF ARTICLE 8, ARTICLES FOR THE GOVERNMENT OF THE NAVY.
1. **Officer**—Charged with. C. M. O. 28, 1908.

TREATY OF PEACE WITH SPAIN. *See also* WAR WITH SPAIN, 4.
1. **Ratified**—On April 11, 1899. File 26516-47, J. A. G., May 18, 1911; C. M. O. 49, 1915, 24. *See also* FILIPINOS, 3.
2. **Signed**—On December 10, 1898. File 26516-47, J. A. G., May 18, 1911. *See also* DESERTION, 133.

TRESPASSING. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 104, 105.

TRIALS. *See also* SPEEDY TRIALS.
1. **Accused**—Responsible to notify interested parties. *See* ACCUSED, 61; CHARGES AND SPECIFICATIONS, 18.
2. **Army.** *See* ARMY, 29; COURT, 171.
3. **Careless.** C. M. O. 74, 1899.
4. **Civil authorities**—Date fixed for trial of enlisted men desired by civil authorities should be shown in requisition. *See* CIVIL AUTHORITIES, 46.
5. **Congress**—Recommended the trial by general court-martial of a naval officer. *See* CONGRESS, 11.

Digitized by Google

6. **Courts of inquiry**—Not trials. *See* COURTS OF INQUIRY, 51.
7. **Delay in commencing**—Delay that may be allowed accused to arrange for counsel and prepare defense is matter within the discretion of the court, to be determined after hearing the reason for the delay requested. File 26504-111:3. *See also* ARMY, 13; CONSTITUTIONAL RIGHTS OF ACCUSED, 17; CONTINUANCES, 1; COUNSEL, 20; COURT, 134; POSTPONEMENT.
8. **Delay over 10 days**—Reports of cases. *See* JUDGE ADVOCATE, 112; SPEEDY TRIALS, 2.
9. **Expedition**—The department is anxious to reduce by every practicable means the time between the arrest of a prisoner and the final promulgation of the sentence. File 26504-111:329, Sec. Navy, May 4, 1915. *See also* SPEEDY TRIALS, 2.
10. **"Fair trial"**—In reviewing a court-martial it is, as a rule, easy to determine whether or not there has been a fair trial. Every word spoken and every act done in connection with the proceedings of the court is duly recorded. 13 J. A. G., 325, June 11, 1904. *See also* EVIDENCE, 13.
11. **Full power trial of a naval vessel**—Boilers exploded. C. M. O. 36, 1915; 37, 1915; 38, 1915.
12. **Insane accused.** *See* INSANITY, 19, 32, 41.
13. **Joinder**—Trials in joinder. *See* JOINDER, TRIAL IN.
14. **Jurisdiction of naval courts-martial**—Over the personnel of the naval service after expiration of enlistment. *See* BREAKING ARREST, 3; ENLISTMENTS, 8-11; JURISDICTION, 52, 97.
15. **Jury**—Trials by jury are not required in the naval service. *See* JURY, 6.
16. **Members of courts-martial may demand trial**—Where the convening authority of a naval court-martial feels that an individual member of a court-martial is deserving of severe strictures and criticism for his actions while serving as a member he should prefer or cause to be preferred charges against them. In cases where such is not done, but severe criticism is made, if the party reflected upon demands a trial by court-martial for the misconduct imputed, his application can not in general fairly be denied. *See* CRITICISM OF COURTS-MARTIAL, 35, 36.
17. **Midshipmen**—Subject to trial. *See* MIDSHIPMEN, 22, 27, 32, 35, 67, 88.
18. **Multiplicity of trials.** *See* SUMMARY COURTS-MARTIAL, 49; TRIALS, 26.
19. **Public trial.** *See* COURT, 126-128; JUDGE ADVOCATE, 105.
20. **Record of proceedings**—The fact that the trial is finished should invariably be noted in the record of a general court-martial. C. M. O. 14, 1910, 9.
21. **Second trial**—Where the court on motion by counsel for the accused strikes out a charge and specification because it "alleged seven distinct and separate offenses," the accused "may still be tried for the offenses stated therein" inasmuch as the charge and specification in question were stricken out as invalid. C. M. O. 16, 1911, 4. *See also* JEOPARDY, FORMER, 36, 38.
22. **Same**—In criticizing several deck court cases the department stated in part: "It is manifest that failure to set forth in each specification the name and rate of the accused, the offense and the date of the commission thereof, and all other material facts connected with the offense not only militates against the accused, but makes possible a second trial for the same offense." C. M. O. 42, 1909, 16.
23. **Secrecy.** *See* COURT, 126-128, 171.
24. **Set aside.** *See* SETTING ASIDE, 16.
25. **Speedy trials.** *See* SPEEDY TRIALS.
26. **Summary courts-martial**—Multiplicity of trials. *See* SUMMARY COURTS-MARTIAL, 49.
27. **"Undue haste."** *See* COURT, 171; CRITICISM OF COURTS-MARTIAL, 66.

TRIAL COURSES.

1. **Rockland and Provincetown**—In the matter of buying land and placing permanent beacons to mark the trial courses at Rockland and Provincetown. File 186-92 and 1906-8 and 9, J. A. G., Jan. 17, 1907.

"TRICING UP."

1. **Illegal punishment**—An acting master was dismissed for inflicting illegal punishment, by "tricing up," it appearing that he was aware at the time of inflicting such punishment that it was unauthorized by law. G. O. No. 2, Jan. 12, 1863.

TRUE. *See* WAR, 3-5.

"TRUE COPIES." *See* CERTIFIED COPIES, 1, 2; EVIDENCE, DOCUMENTARY, 10, 58.

Digitized by Google

TRUMPETER, U. S. MARINE CORPS.

1. **General court-martial**—Tried by and acquitted of "Manslaughter." C. M. O. 49, 1915, 12.

TRYING CASE OUT OF COURT.

1. **Judge advocate, by.** C. M. O. 61, 1894; 55, 1897; 28, 1909, 3; 37, 1909, 8; 42, 1909, 15; 30, 1910, 5; 1, 1911, 4; 30, 1912, 6; 10, 1912, 7; 16, 1913, 4; 34, 1913, 8; 1, 1914, 6; 29, 1914, 6; 42, 1915, 8. *See also* JUDGE ADVOCATE, 123, 124.
2. **Recorder, by.** *See* SUMMARY COURTS-MARTIAL, 101.

TYPEWRITING.

1. **Findings**—Should not be in. C. M. O. 17, 1915, 3. *See also* FINDINGS, 88.
2. **Sentence**—Should not be in. C. M. O. 37, 1909, 4. *See also* SENTENCES, 110.

TYPHOID FEVER.

1. **Fraudulent enlistment.** *See* FRAUDULENT ENLISTMENT, 27.
2. **Nature of.** *See* TYPHOID PROPHYLACTIC, 1.

TYPHOID PROPHYLACTIC.

1. **Naval Instructions, 1913, I-3212, prescribing that typhoid prophylactic shall be administered to all persons of the Navy and Marine Corps who are under 45 years of age, or who have not had a well-defined case of typhoid fever, is mandatory and does not admit of exceptions**—The department has received several requests from officers to be excused from receiving typhoid prophylatic on account of various assigned reasons. In a recent request of this kind an adherence to a certain religious belief was stated as the basis of the request.

   The department has been obliged to deny this request as well as others of a similar nature for the reason that Naval Instructions, 1913, I-3212, prescribing that typhoid prophylactic shall be administered to all persons of the Navy and Marine Corps who are under 45 years of age, or who have not had a well-defined case of typhoid fever, is both explicit in phraseology and mandatory in character and admits neither of doubt as to its intention nor of exception.

   In commenting upon this request the Bureau of Medicine and Surgery made the following remarks:

   "Typhoid fever is a communicable disease and its prevention by prophylactic measures is a well-known procedure, employed in foreign armies and navies as well as in our own. Its value to the service can only be evident if universally employed * * *. This bureau has never regarded this measure as one for the benefit of the individual solely, but as a measure of prophylaxis for the benefit of the whole service, and for the suppression of a communicable and at the same time a preventable disease. With this end in view the bureau believes it has a right to expect the loyal support of all officers, their religious beliefs notwithstanding, as the end sought is military efficiency, and on broad principles is not incompatible with the primary precepts of humanitarianism." (*See* File 26181–36. For cases in which enlisted men have refused to take this treatment *see* G. C. M. Rec. Nos. 24756, 24881, 21477, and 31931.) C. M. O. 16, 1916, 9–10. *See also* File 26251–6149.
2. **Order**—The Navy Department general order requiring the administration of typhoid prophylactic treatment is a legal order. An enlisted man sentenced to confinement for refusal to receive the above-mentioned treatment may, if he again refuses, be tried by court-martial for such latter refusal, which would constitute a second offense. An enlisted man under sentence of court-martial may be discharged as undesirable. *See* File 26262–1419:1.
3. **Refusing to submit**—An enlisted man was tried by general court-martial for refusing to submit to an "antityphoid vaccination," on the charge of "Refusal to obey the lawful order of his superior officer." G. C. M. Rec. 24893.

TYPHOON SIGNALS. C. M. O. 7, 1915.

UNDESIRABLE DISCHARGE.

1. **Commanding officer**—May not adjudge an undesirable discharge but the department may. C. M. O. 146, 1900, 2.
2. **Convict and fugitive from justice**—Given undesirable discharge and turned over to civil authorities. *See* CIVIL AUTHORITIES, 12.
3. **"Parole violator"**—Given undesirable discharge and turned over to civil authorities. *See* CIVIL AUTHORITIES, 8.
4. **Threat of**—By convening authority. *See* CONVENING AUTHORITY, 65.
5. **Under sentence of court-martial.** *See* TYPHOID PROPHYLACTIC, 2.

Digitized by Google

UNDISPUTED FACTS. *See* CRITICISM OF COURTS-MARTIAL.

UNIFORM.

1. **Civilians**—Purchasing from deserters. File 26516-49, J. A. G., June 13, 1911, p. 9. *See also* DESERTION, 12.
2. **Commanding officer**—Uniform disarranged and drunk on shore in a foreign port. Tried by general court-martial. *See* COMMANDING OFFICERS, 44.
3. **Definition**—Of uniform. *See* File 26516-49, J. A. G., June 13, 1911, p. 2.
4. **Desertion**—Discarding uniform as an inference of specific intent to desert. *See* DESERTION, 102, 111, 131.
5. **Detentioners.** *See* DETENTIONER, 2.
6. **Discrimination against the uniform.** *See* DISCRIMINATION AGAINST UNIFORM.
7. **Philippine campaign badge**—Is a part of the uniform. File 19245-43, J. A. G., Sept. 8, 1911. *See also* PHILIPPINE CAMPAIGN BADGES, 1.
8. **Regulations.** *See* UNIFORM REGULATIONS.
9. **Retired officers**—A civil engineer, retired with the rank of commander, is entitled to wear the uniform of that grade with distinguishing insignia of his corps. *See* File 795-05; 3819-03.
10. **Sale of.** *See* File 26516-49, J. A. G., June 13, 1911.
11. **Solicitor**—Investigation by solicitor of discrimination against the uniform. *See* OATHS, 41.
12. **Uniform of enlisted men**—Confiscation and forfeiture of. *See* An. Rep. J. A. G., 1908, p. 21.
13. **Unlawful wearing of**—Arrest and proposed prosecution of a civilian for unlawfully wearing the uniform of the United States Navy. File 5012-60, J. A. G., Aug. 17, 1916.
14. **Same**—In violation of section 125, act of June 3, 1916 (39 Stat. 216). File 21355-31, Sec. Navy, July 15, 1916.

UNIFORM REGULATIONS.

1. **Regulations**—Force and effects as. *See* REGULATIONS, NAVY, 14.

UNIFORMITY OF SENTENCES.

1. **General courts-martial.** C. M. O. 6, 1909, 3; 1, 1903, 4; 10, 1913, 5; 16, 1913, 3. *See also* SENTENCES, 111, 112.
2. **Summary courts-martial.** C. M. O. 10, 1911, 8. *See also* SENTENCES, 111.

UNITED STATES MARSHAL.

1. **Rewards**—For delivering deserters. *See* REWARDS, 2.

UNITING WITH A MUTINOUS ASSEMBLY.

1. **Enlisted man**—Charged with. C. M. O. 14, 1879.

UNIVERSAL TRAINING. *See* DISCIPLINE, 2.

"UNJUSTIFIABLE." *See* ASSAULT, 27.

UNLAWFUL AND FELONIOUS ENTRY.

1. **Enlisted man**—Charged with. C. M. O. 42, 1892.

UNLAWFUL ORDERS. *See* ORDERS, 67.

"UNLAWFUL PURPOSE."

1. **Specification**—In a specification under a charge of "Conduct to the prejudice of good order and discipline," it was alleged that intoxicants were by order of the accused brought into the recruiting office for the "*unlawful purpose*" of the accused. *Held*, That the words "unlawful purpose" can be found not proved by the court and the specification will still support the charge, the evidence showing that the intoxicants were taken into the recruiting office in violation of law and regulation. G. C. M. Rec. 30485, p. 807. *See also* CHARGES AND SPECIFICATIONS, 49, 102.

UNLAWFULLY CONVEYING SPIRITS OR ALCOHOLIC LIQUORS ON BOARD A VESSEL OF THE NAVY.

1. **Enlisted man**—Charged with. C. M. O. 14, 1879.

UNLAWFULLY DISPOSING OF PROPERTY OF THE UNITED STATES FURNISHED AND INTENDED FOR THE UNITED STATES NAVAL SERVICE.

1. **Warrant officer commissioned**—Charged with. C. M. O. 20, 1912.

Digitized by Google

UNLAWFULLY DISPOSING OF PROPERTY OF THE UNITED STATES FURNISHED AND INTENDED FOR THE NAVAL SERVICE.
1. **Chief carpenter**—Charged with. C. M. O. 20, 1912.

UNPROFESSIONAL CONDUCT UNBECOMING A MEDICAL OFFICER OF THE NAVY.
1. **Surgeon**—Charged with. C. M. O. 59, 1882.

UNSOUND MIND. *See* INSANITY, 9.

UNTRAINED MIND. *See* INASANITY, 6.

UNTRUTHFUL OFFICER. *See* ADEQUATE SENTENCES, 11; OFFICERS, 121.

USAGES. *See* CUSTOMS OF THE SERVICE, 6; WORDS AND PHRASES.

USELESS PAPERS.
1. **Disposition of**—The act of February 16, 1889 (25 Stat. 672) is applicable to useless papers on file with the board of labor employment, navy yard, Philadelphia. File 4496-77.
2. **Same**—The act of February 16, 1889 (25 Stat., 672) is applicable to useless papers on file at Marine Corps posts. File 14287-5.
3. **Same**—Useless papers in office of Judge Advocate General destroyed. File 14287-20, J. A. G., Nov. 4, 1915.

USING ABUSIVE AND PROFANE LANGUAGE TOWARD HIS SUPERIOR OFFICER WHILE IN THE EXECUTION OF THE DUTIES OF HIS OFFICE.
1. **Officer**—Charged with. C. M. O. 26, 1913, 1.

USING ABUSIVE AND THREATENING LANGUAGE TOWARD ANOTHER PERSON IN THE SERVICE.
1. **Enlisted man**—Charged with. C. M. O. 21, 1910, 10.
2. **Officer**—Charged with. C. M. O. 78, 1896.
3. **Warrant officer**—Charged with. C. M. O. 25, 1908; 10, 1914.

USING ABUSIVE LANGUAGE TOWARD ANOTHER PERSON IN THE SERVICE.
1. **Officer**—Charged with. C. M. O 60, 1904.

USING ABUSIVE, OBSCENE, AND PROFANE LANGUAGE TOWARD HIS SUPERIOR OFFICER.
1. **Enlisted man**—Charged with. C. M. O. 23, 1910, 4.

USING ABUSIVE, OBSCENE, AND THREATENING LANGUAGE TOWARD HIS SUPERIOR OFFICER.
1. **Enlisted man**—Charged with. C. M. O. 23, 1910, 5.

USING DISRESPECTFUL AND ABUSIVE LANGUAGE TO HIS SUPERIOR OFFICER.
1. **Officer**—Charged with. C. M. O. 15, 1882.

USING LANGUAGE DISRESPECTFUL TO THE PRESIDENT OF THE UNITED STATES.
1. **Officer**—Charged with. G. O. 85, Oct. 11, 1867.

USING MENACES TOWARD ANOTHER PERSON IN THE NAVY.
1. **Enlisted man**—Charged with. C. M. O. 3, 1888.

USING MUTINOUS WORDS.
1. **Enlisted man**—Charged with. C. M. O. 22, 1887. *See also* MUTINY.

USING OBSCENE AND ABUSIVE LANGUAGE AGAINST ANOTHER PERSON IN THE NAVY.
1. **Officer**—Charged with. C. M. O. 18, 1910, 1.

USING OBSCENE AND THREATENING LANGUAGE TOWARD ANOTHER PERSON IN THE NAVAL SERVICE.
1. **Warrant officer (commissioned)**—Charged with. C. M. O. 28, 1915.

Digitized by Google

USING OBSCENE LANGUAGE TOWARD HIS SUPERIOR OFFICER.
1. **Enlisted man**—Charged with. C. M. O. 30, 1910, 8.

USING PROFANE, ABUSIVE, AND OBSCENE LANGUAGE TOWARD ANOTHER PERSON IN THE SERVICE.
1. **Gunner**—Charged with. C. M. O. 212, 1901.
2. **Officer**—Charged with. C. M. O. 18, 1910.

USING PROFANE, OBSCENE, ABUSIVE, AND THREATENING LANGUAGE TOWARD ANOTHER PERSON IN THE SERVICE.
1. **Boatswain**—Charged with. C. M. O. 69, 1904.

USING PROFANE AND ABUSIVE LANGUAGE TOWARD ANOTHER PERSON IN THE NAVY.
1. **Officer**—Charged with. C. M. O. 60, 1904; 45, 1909, 1.

USING PROFANE AND ABUSIVE LANGUAGE TOWARD HIS SUPERIOR OFFICER.
1. **Officers**—Charged with. C. M. O. 28, 1908; 26, 1913.

USING PROVOKING AND REPROACHFUL WORDS TOWARD ANOTHER PERSON IN THE NAVY.
1. **Officer**—Charged with. C. M. O. 23, 1886; 19, 1915.

USURPATION.
1. **Court, by**—Of functions of judge advocate. *See* COURT, 99; JUDGE ADVOCATE, 61.
2. **Same**—Of functions and prerogatives of convening, reviewing and revising authority. *See* ADEQUATE SENTENCES, 3–11, 13; CLEMENCY, 13; COURT, 17, 18.
3. **Judge advocate**—Should not usurp functions of court. *See* COURT, 98; JUDGE ADVOCATE, 123–126.
4. **Recorder**—Should not usurp the functions of the court. *See* SUMMARY COURTS-MARTIAL, 101.

UTTERING SEDITIOUS WORDS.
1. **Enlisted man**—Charged with. C. M. O. 14, 1910, 13. *See also* SEDITION.

VACCINATION.
1. **Office of Judge Advocate General**—Employees in. *See* File 4488–112, J. A. G., Mar. 15, 1913.
2. **Typhoid.** *See* TYPHOID PROPHYLACTIC.
3. **Smallpox**—A medical officer was tried by general court-martial under the charge of "Neglect of duty," for neglecting and failing to advise his commanding officer of the necessity and advisability for and for neglecting and failing to effect, the vaccination of such of the officers and crew as were not known by the accused to be protected by vaccination from smallpox, as it was his duty so to do. C. M. O. 35, 1914. *See also* SMALLPOX, 1.

VENEREAL DISEASE.
1. **Hospital Fund**—Persons not earning pay. *See* HOSPITAL FUND, 3, 6.
2. **Promotion of an officer.** *See* PROMOTION, 212.

VENEREAL PROPHYLACTIC.
1. **Court-martial**—For refusing to take. *See* G. C. M. Rec. 21477.
2. **Sale of**—Prohibited in ship's store. File 26181–39, Sec. Navy, Aug. 26, 1916.

VERIFICATION OF EVIDENCE BY WITNESSES. *See* EVIDENCE, 121, 122, 123.

VESSELS.
1. **Boiler tubes**—Purchase abroad of boiler tubes for a torpedo boat. File 4652, Sec. Navy, Dec. 4, 1891.
2. **Same**—Use in a torpedo boat of boiler tubes manufactured within the United States from raw material of foreign production. File 2782–92, Sec. Navy, July 7, 1892.
3. **Classification.** *See* File 611–04, J. A. G.; 2267–04, J. A. G.; act of Mar. 3, 1901 (31 Stat., 1133).
4. **Crank shaft**—Purchase abroad of a crank shaft for a submarine. File 576–244.
5. **Foreign vessels**—Use of foreign vessels for the transportation of coal. File 4390–19, J. A. G., Sept. 23, 1907.
6. **Foreign built vessels.** File 4390–4, Mar. 23, 1907.

Digitized by Google

7. **Gold**—Transportation of gold by vessels of the United States Navy. *See* GOLD.
8. **Merchandise**—Application of R. S. 4347. File 4390–19.
9. **Naval Militia**—Liability for damages done by a vessel turned over to the Naval Militia. *See* COLLISION, 14; NAVAL MILITIA, 3.
10. **Sale of**—Does not include guns. 15 J. A. G., 115, Mar. 23, 1911.
11. **Transfer of**—A vessel of the United States Navy to another department. File 3160–54, J. A. G., May 4, 1907. *See also* REVENUE CUTTER SERVICE, 2.

VIOLATING A LAWFUL ORDER ISSUED BY THE SECRETARY OF THE NAVY.

1. **Officer**—Charged with. C. M. O. 80, 1905.

VIOLATING OR REFUSING OBEDIENCE TO ANY LAWFUL GENERAL ORDER, ETC.

1. **Specific intent**—Not necessary. *See* INTENT, 2.

VIOLATION OF A LAWFUL REGULATION ISSUED BY THE SECRETARY OF THE NAVY.

1. **Enlisted men**—Charged with. C. M. O. 21, 1910, 6; 27, 1913, 5.
2. **Officer**—Charged with. C. M. O. 22, 1890; 28, 1894; 30, 1896; 33, 1896; 52, 1898; 129 1898; 111, 1894; 50, 1903; 76, 1903; 48, 1904; 11, 1908; 38, 1909; 4, 1911, 3; 11, 1912; 7, 1913; 39, 1913, 2; 17, 1914; 35, 1914; 4, 1915; 18, 1915; 27, 1916; 10, 1917; G. C. M. Rec. 16956; 11192; 12142. *See also* C. M. O. 7, 1893; 82, 1892; G. C. M. Rec. 6135.
3. **Paymaster's clerk**—Charged with. C. M. O. 38, 1913; 24, 1915.
4. **Warrant officers**—Charged with. C. M. O. 121, 1907; 7, 1909; 12, 1912; 15, 1912; 11, 1915.

VIOLATION OF ARTICLE 13 OF AN ACT ENTITLED "AN ACT TO ADOPT THE REVISED INTERNATIONAL REGULATIONS TO PREVENT COLLISIONS AT SEA." APPROVED MARCH 3, 1885.

1. **Officer**—Charged with. C. M. O. 111, 1894.

VIOLATIONS OF ORDERS.

1. **Line of duty.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 107–112.

VIOLATIONS OF VARIOUS ARTICLES OF THE ARTICLES FOR THE GOVERNMENT OF THE NAVY. (Phraseology not to be followed.)

1. **Master**—Charged with. C. M. O. 16, 1882; G. C. M. Rec. 8380.
2. **Midshipman**—Charged with. C. M. O. 128, 1905.
3. **Officers**—Charged with. C. M. O. 76, 1903; 51, 1893; 41, 1892; 82, 1892; 35, 1892; 29, 1890. G. C. M. Rec. 6054, 7247, 7296.
4. **Paymaster's clerk**—Charged with. C. M. O. 4, 1907; G. C. M. Rec. 6058.
5. **Warrant officers**—Charged with. C. M. O. 26, 1906.

VIOLATION OF SECTION 549, REVISED STATUTES, TO THE PREJUDICE, ETC.

1. **Officer**—Charged with. G. C. M. Rec. 6359.

VIOLATION OF SO MUCH OF ARTICLE 8, PAGE 9, OF THE LAWS RELATING TO THE NAVY (MARCH 3, 1883) AS REFERS TO SCANDALOUS CONDUCT TENDING TO THE DESTRUCTION OF GOOD MORALS.

1. **Enlisted man**—Charged with. C. M. O. 32, 1893, and many others.

VIOLENTLY ASSAULTING THE CORPORAL OF THE GUARD.

1. **Enlisted man**—Charged with. C. M. O. 23, 1887.

VOIR DIRE. *See* C. M. O. 128, 1905, 2; G. C. M. Rec. 10196, p. 5; 27960, 45; CHALLENGES, 13; EVIDENCE, 124; MEMBERS OF COURTS-MARTIAL, 39; WORDS AND PHRASES.

VOLUNTARY DRUNKENNESS. *See* DRUNKENNESS.

VOLUNTARY RETIREMENT. *See* RETIREMENT OF OFFICERS.

VOMIT. *See* C. M. O. 23, 1908; 24, 1908.

VOTING.

1. **Confidential**—The vote of the members of a general court-martial in determining the guilt or innocence of the accused is a confidential matter. C. M. O. 125, 1900, 2. *See also* COURT, 191; CRITICISM OF COURTS-MARTIAL, 22, 36; OATHS, 47.
2. **Congress**—Vote of thanks by Congress. *See* CONGRESS, 8–10.
3. **Dishonorable discharge**—Effect on. *See* DISHONORABLE DISCHARGE, 5.

Digitized by Google

4. **General courts-martial.** *See* COURT, 191; CRITICISM OF COURTS-MARTIAL, 22; OATHS, 47.
5. **Jurisdiction**—Of the department to decide whether an officer or enlisted man has the right to vote. *See* VOTING, 7–11.
6. **Midshipman**—Question whether a dismissed midshipman is eligible to vote in a certain jurisdiction depends upon the laws of the State in which he claims the right, and is not one under the jurisdiction of the Navy Department. File 5252–79, June 19, 1916.
7. **Officers and enlisted men**—The department has no jurisdiction to decide whether certain enlisted men and officers of the naval service have a right to vote in a certain city. The only point involved is whether the persons possess the necessary qualifications prescribed by the laws of the State, and the local officers are not only presumably qualified to determine this question, but they are charged with the responsibility of so doing and may be required to defend their action in the civil courts, if they deny the right of voting to one who asserts his eligibility. Thus the question is a judicial one, and the Attorney General of the United States has repeatedly held that executive officers of the Federal Government are not authorized to render decisions upon judicial questions, not only because this would be an unwarranted excess of their legal powers, but because their decision might bring the Executive into conflict with the civil courts. It was therefore held that the department could not, either legally or with propriety, decide the question presented. File 9212–67, J. A. G., Nov. 1, 1915; C. M. O. 42, 1915, 13. *See also* File 9212–73, J. A. G., May 2, 1916; 9212–83, J. A. G., Oct. 14, 1916; 9212–84, Sec. Navy, Oct. 4, 1916.
8. **Same**—The right of a soldier, sailor, or marine, home on furlough, to vote, depends upon the Constitution and laws of the State where the man resides, and therefore is a question within the jurisdiction of the local State authorities and not of the Navy Department. File 9212–54, Nov. 30, 1914. *See also* File 3027, J. A. G., Oct. 14, 1905.
9. **Same**—The department is aware of no Federal law which would permit an enlisted man on duty on board a battleship to register, without actually returning, in a city of Georgia and become a citizen of a certain county therein and be eligible to vote. Attention invited to the Constitution of the State of Georgia, 1877, Art. II, Sec. I, Par. II, and Sec. II, Par. I. File 9212–84, Sec. Navy, Oct. 4, 1916.
10. **Same**—Right to vote in the various States. File 9212–83, J. A. G., Oct. 4, 1916 (Illinois); 9212–84, Sec. Navy, Oct. 4, 1916 (Georgia); 28550–14, J. A. G., Mar. 16, 1916 (Missouri); 9212–71, Sec. Navy, Mar. 27, 1916; 9212–67, J. A. G., Nov. 1, 1915; 9212–73, J. A. G., May 2, 1916; 5252–79, June 19, 1916; 9212–56 (New York).
11. **Pensacola, Fla.**—Right of inhabitants of Warrington and Woolsey to vote. *See* File 7090–04.
12. **Residence of retired officers**—Concerning the residence of a retired naval officer and his right to vote in the State of New York, his residence having been changed to Washington, D. C., in the Bureau of Navigation, Navy Department; and certain New York laws and decisions on the subject. *See* File 9212–56.
13. **Retired officer.** *See* VOTING, 12.
14. **Revealing**—Vote on finding or sentence of general and summary courts-martial. *See* COURT, 189–191; CRITICISM OF COURTS-MARTIAL, 22; OATHS, 47.
15. **Right of officers and enlisted men to vote.** *See* DISHONORABLE DISCHARGE, 5; VOTING, 6, 7–12, 16.
16. **Summary courts-martial**—Department has no jurisdiction to decide and can not with propriety express any opinion upon the subject as to the effect of discharge by summary court-martial upon a man's right to vote in a certain State. File 9212–81, J. A. G., Aug. 2, 1916.
17. **Same**—Member disclosing vote on finding or sentence. C. M. O. 125, 1900, 2; 42, 1915, 8–9; 49, 1915, 21. *See also* COURT, 189; CRITICISM OF COURTS-MARTIAL, 22, 36; OATHS, 47.
18. **Same**—Member called upon by a "court of justice" to reveal vote. *See* COURT, 189.
19. **Thanks of Congress.** *See* CONGRESS, 8–10.

VULGAR AND INDECENT ACTS. *See* MEDICAL OFFICERS OF THE NAVY, 11.

WAITING ORDERS PAY. C. M. O. 27, 1915, 8. *See also* PAY, 61.

WAIVING.

1. **Absence of accused**—Can not be construed as a waiver. (Weirman *v.* U. S., 36 Ct. Cls. 236.)
2. **Age limit.** *See* MIDSHIPMEN, 3–6, 63.
3. **Allowances.** *See* ALLOWANCES, 14.

Digitized by Google

4. **Circulars of the department**—By the Secretary of the Navy. *See* ACTING ASSISTANT SURGEONS, 2; MARINE CORPS, 66.
5. **Counsel**—Accused may waive counsel at any time during the trial. C. M. O. 42, 1909, 6. *See also* COUNSEL, 2.
6. **Criminality**—Waiving of rights as to self-incrimination. *See* SELF-INCRIMINATION, 18.
7. **Departments circulars.** *See* ACTING ASSISTANT SURGEONS, 2.
8. **Errors in charges and specifications**—Waived by plea of "guilty." *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 29.
9. **Evidence, documentary.** *See* EVIDENCE, DOCUMENTARY, 60.
10. **Fraudulent enlistment**—Waived by department. *See* FRAUDULENT ENLISTMENT, 75, 76, 94, 95.
11. **"Guilty," plea of**—Waiving of unsubstantial defects in charges and specifications. *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 29.
12. **Navy Regulations.** *See* DESERTERS, 11; REGULATIONS, NAVY, 90, 95.
13. **Original documentary evidence.** *See* EVIDENCE, DOCUMENTARY, 61.
14. **Plea of "Guilty"**—Waiving unsubstantial defects in charges and specifications. *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE, 29.
15. **Pay.** *See* LEAVE OF ABSENCE, 6, 12, 13.
16. **Physical qualifications.** *See* ACTING ASSISTANT DENTAL SURGEONS.
17. **Proceedings, irregular**—If the accused neglects to insist on his rights at the proper time he waives them. *See* ESTOPPEL, 6.
18. **Record of proceedings**—Accused waived right to copy. *See* RECORD OF PROCEEDINGS, 32, 33.
19. **Regulations.** *See* DESERTERS, 11; REGULATIONS, NAVY, 90-95.
20. **Self-incrimination.** *See* SELF-INCRIMINATION, 18.
21. **Statute**—The provisions of a statute may not be waived by the department. *See* MARINE CORPS, 66.
22. **Statute of limitations.** *See* STATUTE OF LIMITATIONS, 24.
23. **Testimony**—Witness can not waive reading. *See* JUDGE ADVOCATE, 134.
24. **Transportation.** *See* APPRENTICES, 2.

WAR.

1. **Armistices**—Doubtless the most important international agreement ever entered into by the Executive of the United States without the advice and consent of the Senate was the *armistice, or peace protocol*, with Spain, concluded at Washington, August 12, 1898. (5 Moore's Digest of International Law, 213.) File 26516-47, J. A. G., May 18, 1911, p. 8.
2. **Same**—If the suspension of hostilities is for a more considerable length of time or for a more general purpose, it is called a *truce or armistice*. Such suspension is either general or partial. * * * But a general truce or armistice applies to the general operations of war, and whether it be for a longer or shorter time extends to all the forces of the belligerent States and restrains the *state of war* from producing its proper effects, leaving the contending questions between them *in the same situation in which it found them*. Such a truce has sometimes been called a temporary peace, though in such cases the word peace is used only *in opposition to acts of war* and *not in opposition to a state of war*. (7 Moore's Digest of International Law, 327.) File 26516-47, J. A. G., May 18, 1911, p. 9.
3. **Same**—"It is also stated by Hall in his International Law (sec. 192) that the terms * * * 'armistice,' 'truce,' and 'suspension of arms' are applied to agreements for a *cessation of hostilities* for a limited duration or extent." File 26516-47, J. A. G., May 18, 1911, p. 9.
4. **Same**—"It is stated also that 'at the expiration of the truce hostilities may recommence without any fresh declaration of war.' (1 Kent, 161.)" File 26516, J. A. G., May 18, 1911, p. 9.
5. **Same**—"A truce or suspension of arms does not terminate the war, but it is one of the *commercia belli* which suspends its operations. (1 Kent's Comm., 160.)" File 26516-47, J. A. G., May 18, 1911, p. 6.
6. **Asleep on post**—Enlisted man tried by general court-martial for sleeping on post during war. C. M. O. 91, 1898; 95, 1898, 2.
7. **China campaign**—"A case which does not appear to have gone to the courts, but where an executive branch of the Government held the word ["war"] to have the more liberal meaning, is that of the officers and enlisted men of the Army who served in China beginning with May 26, 1900. They were held to be entitled to the increased allowance of pay for service in time of war. (Digest of Opinions of the Judge Advocate General of the Army, 1912, p. 1055IB4.)" File 28653-1, Sec. Navy, July 24, 1916, p. 2.

Digitized by Google

8. **Civil War.** *See* CIVIL WAR; CIVIL WAR SERVICE; NAME, CHANGE OF, 16.
9. **Clemency**—Granted because of excellent war record of accused. *See* CLEMENCY, 67.
10. **Corean forts**—Capture of the Corean forts, June 9, 10, 1871. *Held*, That the "expedition which resulted in the capture of the Corean forts, June 9 and 10, 1871, comes within the meaning of the words 'in any war' as used in the act of April 27, 1916" (39 Stat. 53). File 28653-1, Sec. Navy, July 24, 1916, p. 2. *See also* MEDALS OF HONOR, 4.
11. **Definition**—War is that state in which a nation prosecutes its rights by force. (Alaire *v.* U. S., 1 Ct. Cls., 238.) File 28653-1, Sec. Navy, July 24, 1916, p. 1.
"Public war is a state of armed hostilities between sovereign nations or Governments." (Stockton, p. 293.)
12. **Desertion in time of war.** *See* DESERTION, 28, 29, 132-137.
13. **Europe**—Neutrality of naval officers with reference to war in Europe. *See* NEUTRAL, 4.
14. **Formal declaration**—It has been held that no formal declaration of war by Congress or proclamation by the President was necessary to define and characterize an Indian War. (Alaire *v.* U. S., 1 Ct. Cls., 238; Marks *v.* U. S., 28 Ct. Cls., 147.) File 28653-1, Sec. Navy, July 24, 1916, p. 1.
15. **General courts-martial**—Convening of, in time of war. *See* CONVENING AUTHORITY, 27.
16. **Indian Wars.** *See* WAR, 14.
17. **Maritime war**—The special objects of maritime war, which are, *inter alia*, to capture or destroy the military forces of the enemy, his maritime commerce, and to prevent his procuring war material from neutral sources, and to protect and to defend its own national territory, property, and sea-borne commerce, within the area of maritime warfare, which comprises the high seas or other waters that are under no jurisdiction, necessarily gives to a belligerent the right to adopt *all unprohibited* methods to successfully attaining its ends. File 10451-02, J. A. G., Dec. 9, 1902; 22 J. A. G. 2-3.
18. **Medals of honor**—"To hold that the word 'war,' as used in the act under consideration (Apr. 27, 1916, 39 Stat., 53), means only a perfect war, or one where Congress, by special enactment, has declared that a war exists, would be a highly technical and narrow construction, and it is not believed that it would at all accord with the liberal purpose of Congress in providing for the special reward for those distinguished men who would otherwise receive the benefits of the act. File 28653-1, Sec. Navy, July 24, 1916.
19. **Merchant crews**—Status in time of war. *See* MERCHANT VESSELS, 2.
20. **Munitions of war.** *See* WAR MUNITIONS.
21. **Neutrality.** *See* NEUTRAL; TREATIES, 13.
22. **Object of greater penalty for desertion in time of war**—"A consideration of the object of the greater possible penalty for desertion in time of war leads to the conclusion that its object was to hold persons in the service when the country's need for them was most pressing—to repel invasion, to defend the country, or to suppress internal war. In time of peace no such penalty is necessary; it is commensurate with the necessity." File 26516-47, J. A. G., May 18, 1911, p. 9. *See also* DESERTION, 137.
23. **Offenses in time of war.** C. M. O. 67, 1898; 33, 1899. *See also* DESERTION, 28, 29, 132-137; OFFENSES, 11; WAR, 22.
24. **Peace**—Desertion committed after signing of treaty of peace. *See* DESERTION, 134.
In a foreign war, a treaty of peace would be the evidence of the time when it closed. (U. S. *v.* Anderson, 19 Wall., 70.) File 26516-47, J. A. G., May 18, 1911, p. 9.
25. **Rights of a belligerent war vessel**—The right of a belligerent war vessel to screen its lights and omit fog signals in order to shield its presence from an enemy, particularly when employed on scout duty, would seem to be axiomatic. File 10451-02, J. A. G., Dec. 9, 1902, p. 2; 22 J. A. G. 3.
26. **Service.** *See* CIVIL WAR SERVICE; WAR SERVICE.
27. **Spain.** *See* WAR WITH SPAIN.
28. **"State of war" distinguished from an "act of war"**—Although *acts* of war may terminate for a time, or permanently, a state of war does not close until the ratification of a treaty of peace. A state of war may exist when no hostile acts take place. File 26516-47, J. A. G., May 18, 1911.
29. **State of**—Although *acts* of war may terminate for a time or permanently, a *state* of war does not close until the ratification of a treaty of peace, and until the belligerents are thus *morally* bound to cease acts of war a state of war still exists, and the need for men does not end. While acts of war are necessarily done *in time of war* (or closely preceding or following it), nevertheless a *state of war* may exist when no hostile acts take place. It seems to be evident that a *time of war* is practically synonymous with a *state of war*, both logically and upon authority. File 26516-47, J. A. G., May 18, 1911, quoted in File 26282-68, J. A. G., Oct. 6, 1911, p. 2.

Digitized by Google

WAR IN EUROPE.
1. **Neutrality—Officers.** *See* NEUTRAL, 4.

WAR MUNITIONS.
1. **Employment of officer**—By a foreign corporation manufacturing. C. M. O. 29, 1915, 10-11. *See also* RETIRED OFFICERS, 28, 31.

WAR OF THE REBELLION. *See* NAME, CHANGE OF, 16.

WAR PRISONERS. *See* PRISONERS OF WAR.

WAR SERVICE.
1. **Retirement of enlisted men**—Credit for double time. *See* RETIREMENT OF ENLISTED MEN, 2.
2. **Service on a practice ship**—While at the Naval Academy during the Civil War. File 1494-04. *See also* File 1494-04, Mar. 7, 1904.

WAR WITH SPAIN.
1. **Date when ended**—The date of the signing of the treaty (Dec. 10, 1898) is the earliest on which war with Spain can be considered to have terminated *for any purpose.* File 24368-11, J. A. G., Mar. 14, 1914. *See also* Eliot A. De Pass et al. *v.* U. S., decided by Ct. Cls. Mar. 16, 1914, No. 21402.
2. **Enlistment during**—The date of the signing of the protocol, August 12, 1898, did not end the war, as hostilities might have thereafter recommenced; and accordingly the enlistment of a man on August 16, 1898, was an enlistment "during * * * the War with Spain" within the meaning of the act, June 25, 1910. File 24368-11, J. A. G., Mar. 14, 1914.
3. **Protocol.** *See* WAR WITH SPAIN, 2, 4.
4. **Treaty of peace**—"On December 10, 1898, the treaty of peace was signed, and on April 11, 1899, the ratifications thereof were exchanged and the treaty proclaimed." (File 26516-47, p. 2.) [*See also* JURISDICTION, 108.]
   "Notwithstanding the signing of the protocol and the suspension of hostilities, a state of war between this country and Spain still exists. Peace has not been declared and can not be declared except in pursuance of the negotiations between the peace commissioners authorized by the protocol." (22 Op. Atty. Gen., 190.) File 26516-47, J. A. G., May 18, 1911, p. 8. A state of war did not in law cease until the ratification in April, 1899, of the treaty of peace. (Hijo *v.* U. S., 194 U. S., 315, 323.) File 26516-47 p. 9. *See also* TREATY OF PEACE WITH SPAIN.
5. **Service of men**—Under assumed names. *See* NAME, CHANGE OF, 16.

WARNING.
1. **Accused**—Not necessary that accused be warned that any statement he makes might be used against him. *See* CONFESSIONS, 26, 27.
2. **Same**—Should the accused plead either "Guilty" or "Guilty in a less degree than charged," the court shall warn him that he thereby precludes himself from the benefits of a regular defense by the former plea, and as to the acts confessed by the latter (R-778 (1).) *See* ACCUSED, 64; ARRAIGNMENT, 33; GUILTY IN A LESS DEGREE THAN CHARGED, 10.
3. **Accused as witness**—Not to be warned when he resumes status. C. M. O. 47, 1910, 8; 15, 1910, 5; 31, 1910, 13. *See also* WITNESSES, 10.
4. **Confession**—Not necessary that accused should be warned. *See* CONFESSION, 26, 27.
5. **Counsel as witness**—Not to be warned or shown as withdrawing when he leaves witness stand. *See* COUNSEL, 54.
6. **Crimination**—Court may caution ignorant witnesses of their privilege as to crimination. C. M. O. 49, 1910, 9; 14, 1910, 11-12; 29, 1914, 13. *See also* SELF-INCRIMINATION, 8.
7. **Judge advocate as witness**—Not to be warned when he resumes status. C. M. O. 37, 1909, 9; 15, 1910, 5; 26, 1910, 8; 31, 1910, 3. *See also* JUDGE ADVOCATE, 133.
8. **Member as witness**—Not to be warned when he resumes status. C. M. O. 15, 1910, 5; 26, 1910, 8. *See also* JUDGE ADVOCATE, 133; MEMBERS OF COURTS-MARTIAL, 53.
9. **Oath**—Witness should be cautioned that his oath is still binding if he continues his testimony after a recess, or is recalled. *See* RECESS, 3.
10. **Officer of the Deck**—To commanding officer. *See* OFFICER-OF-THE-DECK.
11. **Witnesses.** *See* JUDGE ADVOCATE, 133.

WARRANTS FOR PARDONS. *See* PARDONS, 55.

Digitized by Google

WARRANT OFFICERS.

1. **Acting warrant officers.** *See* ACTING BOATSWAINS; ACTING GUNNER; ACTING MACHINISTS; ACTING PAY CLERKS; ACTING WARRANT OFFICERS.
2. **Appointment**—Discharge of a man from his enlistment by rating him as a mate or appointing him as a warrant officer. (*See* R. S., 1409.) Also when commissioned as warrant officers. *See* File 8627-03.
3. **Boatswains and chief boatswains**—Are classed as line officers. *See* COMMAND, 21.
4. **Borrowing money**—From enlisted men. *See* BORROWING MONEY, 3.
5. **Carpenters and chief carpenters**—Are classed as staff officers. *See* COMMAND, 21.
6. **Command**—Who should take command. File 17789-15; 26806-54; 5210-2, J. A. G., Dec. 16, 1907.
7. **Same**—Classification with reference to line and staff. *See* COMMAND, 11, 21.
8. **Courts-martial**—Warrant officers (not commissioned) may not sit as members. C. M. O. 7, 1914, 11; 6, 1915, 5.

   Commissioned warrant officers are entitled to sit as members of general court-martial. *See* CHIEF BOATSWAINS, 2.

   Warrant officers, if actually commanding a naval vessel may convene summary courts-martial. *See* BOATSWAINS, 10; COURT, 196; SUMMARY COURTS-MARTIAL 7, 21, 105.
9. **Deck court**—Warrant officers (not commissioned) may not act as deck court officer. *See* COURT, 192; DECK COURTS, 62.
10. **Same**—Warrant officer actually commanding a naval vessel may convene. *See* DECK COURTS, 4.
11. **Deposits.** *See* DEPOSITS, 4.
12. **Desertion**—*See* CIVIL AUTHORITIES, 49; DESERTION, 138.
13. **Gunners and chief gunners**—Are classed as line officers. *See* COMMAND, 21.
14. **Leave of absence**—The act of August 29, 1916 (39 Stat., 578), provides: "Warrant officers shall be allowed such leave of absence, with full pay, as is now or may hereafter be allowed other officers of the United States Navy." *Held*, That as there is no express or implied language used in this case which would give the above provision retroactive operation, *advised* that same takes effect from August 29, 1916. File 17789-25, Sec. Navy, Sept. 29, 1916.
15. **Machinists**—By act of March 3, 1899 (30 Stat., 1007), the grade of warrant machinist was established, to which grade appointments were to be made after examination open to (1) machinists serving in the Navy as petty officers and (2) machinists in civil life not over 30 years of age. File 17789-15, J. A. G., Dec. 13, 1909.
16. **Same**—Under act of May 4, 1898 (30 Stat., 1007), the appointment of certain officers, including warrant machinists, from civil life was authorized. *Held*, That this was not intended to limit, but to enlarge power of appointment, and persons in naval service may be appointed. File 3259-98.
17. **Machinists and chief machinists**—Exercise of command by. *See* COMMAND, 9-11, 21.
18. **Same**—Are classed as line officers. *See* COMMAND, 21.
19. **Naval militia**—Physical examinations. *See* NAVAL MILITIA, 29.
20. **Numbers, loss of.** *See* NUMBERS, LOSS OF, 15; WARRANT OFFICERS, 29, 30.
21. **Pay clerks and chief pay clerks**—Are classed as staff officers. *See* COMMAND, 21.
22. **Pharmacists and chief pharmacists**—Are classed as staff officers. *See* COMMAND, 21.
23. **Precedence of commissioned warrant officers**—Line officers shall take rank in each grade according to the dates of their commissions. (R. S. 1467.) A Chief Boatswain is classed as a line officer. (*See* COMMAND, 21.) File 11130-36, J. A. G., Dec. 28, 1916.
24. **Probation**—Chief boatswain placed on probation. Case approved by the President. G. C. M. Rec., No. 24405.
25. **Retired boatswain**—Tried by general court-martial. G. C. M. Rec., 32614.
26. **Retired chief boatswain**—Tried by general court-martial. C. M. O. 15, 1915.
27. **Retirement.** *See* RETIREMENT OF OFFICERS, 53.
28. **Sailmakers and chief sailmakers**—Are classed as staff officers. *See* COMMAND, 21.
29. **Sentence**—The department favors loss of pay rather than loss of members for commissioned warrant officers. C. M. O. 48, 1915, 5. *See also* PAY, 100.

Digitized by Google

30. **Same**—The law governing the promotion of a commissioned warrant officer does not give him the right of promotion by reason of seniority, and the department has on numerous occasions expressed its disapproval of a form of sentence which involves loss of numbers in the case of a commissioned warrant officer as practically it is without any effect. In order that there may be uniformity in the sentences adjudged, it is desirable that courts-martial use the following form and make it a basis for adjudging sentences in the cases of commissioned warrant officers.:

"The court, therefore, sentences him ——, ——, to be restricted to his ship or station for a period of —— (——) months, and to lose —— dollars ($——) per month of his pay for a period of —— (——) months." C. M. O. 37, 1914; 52, 1914.

31. **Staff officers**—Carpenters and chief carpenters, sailmakers and chief sailmakers, pharmacists and chief pharmacists, pay clerks and chief pay clerks, are classed as staff officers. *See* COMMAND, 21.

32. **Summary courts-martial**—A warrant officer when actually commanding a naval vessel may convene summary courts-martial. *See* COURT, 196; SUMMARY COURTS-MARTIAL, 7, 21, 105.

33. **Same**—A warrant officer (other than commissioned warrant officers) may not sit as a member of a naval court-martial. *See* COURT, 192, 194; WARRANT OFFICERS, 8.

34. **Same**—Commissioned warrant officers may sit as members of summary courts-martial. *See* CHIEF BOATSWAINS, 2.

WARRANT OFFICER'S STEWARD.

1. **General court-martial**—Tried by. C. M. O. 90, 1890; 98, 1894.

WATCH OFFICERS. *See also* OFFICER-OF-THE-DECK.

1. **Drunkenness of.** *See* DRUNKENNESS, 99.
2. **Leaving station before being regularly relieved**—"It must, indeed, be obvious to the most ordinary intelligence that if an officer can not be trusted in his watch, he has yet to learn the simplest practical duties of his profession, and is unfitted for a station where the lives of others, as well as the honor of his country, may depend on his vigilance and fidelity." G. O. 31, Mar. 22, 1864.
3. **Loyalty and zeal**—A board of investigation in making its report stated that the watch officers of the ship "seem to lack familiarity, if not with the regulations, at least with the customs and traditions of the Navy defining the loyalty and zeal which should characterize their attitude toward their commanding officer and their ship." File 3558-04, J. A. G., Apr. 21, 1904. *See also* C. M. O. 86, 1898.

WEAK-MINDED. *See* INSANITY, 6.

WEAPONS.

1. **Carrying concealed deadly weapons.** *See* CARRYING CONCEALED WEAPONS, 1.

WEATHER.

1. **Extension of time for building a naval vessel**—Severe winter weather is not regarded as a sufficient ground for claiming an extension of time for building a naval vessel. The contractors are presumed to have assumed the risk of delay on such account. File 3788-04, May 31, 1904.

WEDDINGS.

1. **Common law marriage.** *See* DEATH GRATUITY, 12; WIFE, 3, 5.
2. **Prisoner**—Married while in a naval prison. *See* MARRIAGE, 2.

WHEN ON SHORE ABUSING AND MALTREATING AN INHABITANT.

1. **Enlisted man**—Charged with. C. M. O. 49, 1915, 10.

WHEN ON SHORE PLUNDERING AN INHABITANT.

1. **Enlisted man**—Charged with. C. M. O. 17, 1910, 11; 21, 1910, 15.

WHOLLY RETIRED.

1. **Definition**—"Wholly retired" is a phrase coined for the purpose of conveying, with reference to officers, the same idea as attaches to the word "discharged" when applied to enlisted men. File 26260-1392 and 697, J. A. G., June 29, 1911, p. 25½.

WIDOW.

1. **Death gratuity**—Payment to. *See* DEATH GRATUITY, 30.
2. **Naturalization of.** *See* CITIZENSHIP, 39.

Digitized by Google

WIFE.

1. **Allotments**—Chief carpenter confined in Government Hospital for the Insane. *See* ALLOTMENTS, 3.
2. **Citizenship of.** *See* CITIZENSHIP, 40.
3. **Common law wife**—Defined and discussed. File 26254–1936, J. A. G., Jan. 29, 1916. *See also* DEATH GRATUITY, 12; WIFE, 5.
4. **Same**—Death gratuity. *See* DEATH GRATUITY, 12.
5. **Common law wife as a witness**—In the case of a coal passer, United States Navy, tried by general court-martial, there was called by the prosecution a witness whose competency the defense challenged on the ground that she was the common law wife of the accused. The defense introduced testimony to show the relation existing between the accused and the witness, and that such relation created a common law marriage relation between them. Counsel for the defense also presented a brief to the court, setting forth the laws of Pennsylvania governing such status, which laws supported counsel's contention. The court properly sustained the objection of the defense and declared the witness incompetent on the ground that she was the common law wife of the accused. G. C. M. Rec. No. 32186; C. M. O. 22, 1916, 8.
6. **Divorce.** *See* CIVIL COURTS, 7.
7. **Nonsupport of wife**—By husband (officer). *See* CIVIL COURTS, 7.
   By husband (enlisted man). File 7657–408, Sec. Navy, Oct. 28, 1916.
8. **Privilege**—Judge Advocate objected to testimony of accused on ground that his statements were confidential between husband and wife. G. C. M. Rec. 31509, p. 51.
9. **Quarrel, assault, and strike**—A warrant officer (gunner) was tried by general court-martial, in that he did "quarrel with, assault, and strike his wife." C. M. O. 5, 1913.
10. **Willfully and maliciously and without justifiable cause, "assault, strike, and choke" his wife**—By officer who was tried by general court-martial for the offense, under the charge of "Conduct unbecoming an officer and a gentleman." G. C. M. Rec. No. 31509.
11. **Witness against her husband**—The accused attempted to introduce his wife as a witness in his behalf. Objection thereto was made by the judge advocate and properly sustained by the court. The judge advocate cited in support of his objection C. M. O. 21, 1910, p. 13 *et seq.*; also Secretary of the Navy's letter of March 9, 1912, File 26251–5820, which latter reference cites further C. M. O. 17, 1910, p. 7; Winth., p. 507; and Forms of Procedure, 1910, p. 136. (To the same effect, *see* File 5859–41, J. A. G., May 16, 1907.) Counsel for the accused cited in support of the competency of a wife to testify in behalf of her husband, Jones on Evidence. A reference to this work on evidence (sec. 753) shows that contrary to the contention of counsel for the accused, the rule is stated therein as follows:
   "In any criminal prosecution, neither spouse is a competent witness for or against the other. A well-recognized exception to this rule, arising from necessity, exists in prosecutions for personal injury committed by one spouse upon the other." C. M. O. 31, 1914, 2.
   This class covers all communications of a confidential nature made during the continuance of marriage. In personal assaults, however, of the one against the other, the testimony of either as against the defendant is admissible. (Forms of Procedure, 1910, p. 143.) *See also* G. C. M. Rec. 22029; 24813; File 5859–41, J. A. G., May 16, 1907. 26251–5820; 36 J. A. G., 369; WITNESSES, 52 (p. 651).
12. **Same**—In a summary court-martial case where the court permitted the wife of the accused to testify the department disapproved the finding and acquittal, stating in part: "In view of the above, and also the fact that had the testimony of the wife of the accused been excluded the court would probably have arrived at a different finding, the finding and acquittal on the first specification are disapproved." File 26287–3064, Sec. Navy, July 27, 1915.
13. **Same**—Whereas it might appear that no good ground exists to exclude the testimony of either the husband or wife for the other, public policy has caused the rule to be laid in common law that either is incompetent to testify either for or against the other.
   One of the principles upon which this rule is founded is that, though called in behalf of the other, yet no witness is privileged to impart only what favorable point may be within his or her knowledge, but must submit to cross-examination, and under such procedure might be called upon to disclose facts of a very damaging nature, which might be so serious as to materially injure the other's cause, even to the extent of a conviction, and by so doing the domestic relations would be seriously affected and probably family peace destroyed.

Digitized by Google

Hence the rule, though departed from in some States, is fixed in so far as United States courts are concerned, and naval courts-martial in their proceedings should be governed by the rules of evidence as laid down in such courts.

The following excerpts bearing on this changing of the rule in some of the States, are taken from Federal Reporter (vol. 32, p. 571):

Neither the removal of the disability of interest, nor allowing the defendant in a criminal action to testify in his own behalf, renders the wife of such defendant a competent witness. The rule excluding her testimony where her husband is a party rests solely upon public policy. (U. S. *v.* Crow Dog (Dak.), 14 N. W. Rep., 437.) The common-law rule disabling the husband and wife from being witnesses for or against each other has been changed in Iowa so far as to permit them to testify for each other in a civil proceeding by one against the other. (Parcell *v.* McReynolds, 33 N. W. Rep., 139.) In Pennsylvania, the statute only disables the husband and wife from giving evidence against each other. (Pleasanton *v.* Nutt, 8 Atl. Rep., 63.) In Michigan, the husband can not give testimony for or against the wife without her consent, except when the title to the separate property of either is in litigation between them, when the statute permits either to testify to facts which lie at the foundation of the ownership of the property. (Hunt *v.* Eaton, 21 N. W. Rep., 429.) In Minnesota, neither husband nor wife can give testimony for or against the other without the other's consent, except in the case of a civil action maintained by one against the other. (Huot *v.* Wise, 6 N. W. Rep., 425.) The same statute has been enacted in Utah. (U. S. *v.* Bassett, 13 Pac. Rep., 237.) In Florida, the common-law rule has been modified to the extent of permitting the wife to testify where her husband is a party; but the same right is not accorded to the husband where the wife is a party. (Schnabel *v.* Betts, 1 South. Rep., 692.) In Vermont, the wife has been rendered a competent witness in a number of cases, but the disqualification of the husband exists as at common law, except in divorce cases. (Witters *v.* Sowles, 28 Fed., 121.)

The States of Illinois and Wisconsin have also made special rules regarding the competency of the husband and the wife as witnesses for or against the other.

In the case of the United States *v.* Jones (District Court, D. South Carolina, October, 1887) (32 Fed., 569), the court said:

"There can be no doubt that at common law a wife is not a competent witness for or against her husband. And this is so, not on account of interest, but on the ground of public policy. (1 Greenl. Ev., par. 334; Stein *v.* Bowman, 13 Pet., 221; Lucas *v.* Brooks, 18 Wall., 452.)

"There exists no statute of the United States removing this disability. No act of the State of South Carolina has changed the common law on this subject. (State *v* Workman, 15 S. C., 545.) And, although the rule has been put upon the ground that confidential communications between husband and wife should not be disclosed, it has been applied to a case in which it was sought to prove an alibi by the wife. (State *v.* Dodson, 16 S. C., 453.) In actions for divorce, and for violence to her person, the wife has been permitted to testify. (U. S. *v.* Smallwood, 5 Cranch, C. C., 35.) These are exceptions. It was error, therefore, to permit her to be called to testify."

In the case of Stein *v.* Bowman (38 U. S. Rept., 222) on appeal to the Supreme Court of the United States, one of the points of contention related to the fact that the wife of one of the parties to the cause had been placed upon the stand as a witness.

The court in this case recited as follows:

"It is, however, admitted, in all the cases, that the wife is not competent, except in cases of violence upon her person, directly to criminate her husband; or to disclose that which she has learned from him in their confidential intercourse. Some color is found in some of the elementary works for the suggestion, that this rule, being founded on the confidential relations of the parties will protect either from the necessity of a disclosure; but will not prohibit either from voluntarily making any disclosure of matters received in confidence; and the wife and the husband have been viewed, in this respect, as having a right to protection from a disclosure, on the same principle as an attorney is protected from a disclosure of the facts communicated to him by his client.

"The rule which protects an attorney in such a case is founded on public policy, and may be essential in the administration of justice; but this privilege is the rule which protects the domestic relations from exposure, rests upon considerations connected with the peace of families. And it is conceived that this principle does not merely afford protection to the husband and wife, which they are at liberty to invoke or not, at their discretion, when the question is propounded; *but it renders them incompetent to disclose facts in evidence in violation of the rule.*"

Digitized by Google

Winthrop on page 507 states that though the general rule of the law of evidence founded on public policy, that neither the husband nor wife is competent as a witness either for or against the other, though departed from in some of the States, *is strictly held in the criminal courts of the United States and in courts-martial*, and that it extends to all cases. C. M. O. 21, 1910, 13–15. *See also* EVIDENCE, 82 (p. 223).

WILKES EXPEDITION. *See* File 9386–1418, J. A. G., Jan. 20, 1916.

WILLS.

1. **Ambiguous description of beneficiaries**—"Greenleaf also says in his work on evidence (vol. 1, s. 291, p. 411, 10th ed.), in considering the cases of ambiguous description of beneficiaries under wills: * * * 'The general principle in all these cases is this, that if there be a *mistake in the name* of the devisee, *but a right description* of him, the court may act upon such right description.' * * *

"It may be admitted, that, in all cases in which a difficulty arises in applying the words of a will * * * to the person of the devisee, the difficulty or ambiguity, * * * may be rebutted and removed by the production of further evidence upon the same subject calculated to explain * * * who was the person really intended to take under the will. * * * But the cases to which this construction applies will be found to range themselves into two separate classes, * * *. The other class of cases is that, in which the description contained in the will * * * of the person who is intended to take, is true in part, but not true in every particular. As, * * * where an estate is devised to a person whose surname or Christian name is mistaken; or whose description is imperfect or inaccurate; in which latter class of cases parol evidence is admissible to show * * * who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence." (Miller *v.* Travers, 8 Bing. 244, cited in Greenleaf, sec. 301, p. 431, 10th ed.) File 26543–48 and 48:1, J. A. G., Oct. 10, 1910, p. 4.
2. **Mariner at sea**—Under the laws of New York unwritten wills of personal property are allowed when made "by a mariner while at sea." It is understood that similar statutory provisions exist in other jurisdictions, but are not general. File 7657–231, J. A. G., May 1, 1914; 26250–477:6½, J. A. G., Oct. 6, 1914.
3. **Unwritten wills.** *See* WILLS, 2.

"WILLFUL AND MALICIOUS." C. M. O. 146, 1901, 4.

"WILLFUL DESTRUCTION." *See* GUILTY IN A LESS DEGREE THAN CHARGED, 50.

WILLFUL DESTRUCTION OF GOVERNMENT PROPERTY.

1. **Paymaster's clerk**—Charged with. C. M. O. 37, 1912.

"WILLFUL INJURY." *See* GUILTY IN A LESS DEGREE THAN CHARGED, 50.

WILLFUL NEGLECT OF DUTY.

1. **Officers**—Charged with. C. M. O. 1, 1882; 6, 1883.

WILLFULLY. *See also* KNOWINGLY; MANSLAUGHTER, 13 (p. 353).

1. **Definition**—The word "willful" or "willfully," is a term used in averring or describing an act, particularly one charged as a crime, to show that it was done in the free activity of the perpetrator's will. C. M. O. 14, 1910, 11. *See* also C. M. O. 47, 1910, 8; 30, 1910, 9; 23, 1911, 5; 10, 1912, 6–7.
2. **Fraudulent enlistment.** *See* C. M. O. 12, 1911, 5.
3. **Maliciously**—"Willfully" distinguished from "maliciously." *See* MALICIOUSLY, 1.

WILLFULLY AND DELIBERATELY. *See* "DELIBERATELY AND WILLFULLY."

WILLFULLY AND KNOWINGLY.

1. **Definition.** *See* G. C. M. Rec. 24983.

WILLFULLY AND MALICIOUSLY.

1. **Assault.** *See* ASSAULT, 28.
2. **Definition**—Concerning the part of the finding that the words "willfully and maliciously" were not proved, these words have formed part of specifications of offenses of assault and battery of various kinds in the Navy for many years. The word "willfully" has in law a number of meanings, depending upon the necessity for its use. Thus, it signifies intentionally as distinguished from accidentally; or consciously.

Digitized by Google

or designedly; or regardless of whether an act is done rightfully or wrongfully; or with evil intent; or governed by the will, without yielding to reason; or knowingly; or a willingness to commit an act. (Words and Phrases, etc., v. 8, p. 7468, *et seq.*) And as also said in the same work, citing cases (p. 7479):

"'Willful' is a word of familiar use in every branch of the law, and it amounts to nothing more than this: That the person knows what he is doing, and is a free agent." C. M. O. 10, 1912, 6.

WIRELESS TELEGRAPHY.

1. **Interference with**—By private parties. File 7239–4, June, 1907.

WITHDRAWAL.

1. **Charges and specifications.** *See* NOLLE PROSEQUI.
2. **Resignations, of**—After a resignation has been accepted it may not be withdrawn. *See* RESIGNATIONS, 27, 28.

"WITHOUT JUSTIFIABLE CAUSE." *See* File 26251–12159, Sec. Navy, Dec. 9, 1916, p. 15; FINDINGS, 62; C. M. O. 5, 1917.

WITNESSES.

1. **Accused**—Shall enjoy the right to have compulsory process for obtaining witnesses in his favor, etc. *See* CONSTITUTIONAL RIGHTS OF ACCUSED, 17.
2. **Same**—Right to be confronted by witnesses and afforded an opportunity to cross-examine them. *See* CONSTITUTIONAL RIGHTS OF ACCUSED, 16.
3. **Accused as witness in his own behalf**—Formerly, in criminal prosecutions, the accused could not testify, but by the act approved March 16, 1878 (20 Stat., 30), it was provided that the "accused shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create a presumption against him." Care must be taken by the court that the accused is not placed on the stand unless he, himself, requests to be permitted to testify, otherwise a fatal error is committed. The record must affirmatively show that the statutory request was, in fact, made. (Forms of Procedure, 1910, p. 141.) *See in this connection* C. M. O. 65, 1907.

   With reference to the fact that no presumption lies against the accused on account of his failure to testify, the Supreme Court held that it was not allowable to make "comment, especially hostile comment, upon such failure." "The minds of the jurors," it was further held, "can only remain unaffected from this circumstance by excluding all reference to it." (Wilson *v.* U. S., 149 U. S., 60.) It is accordingly highly improper for the judge advocate, in summing up the case for the prosecution, to comment on the failure of the accused to take the stand in his own behalf. (Forms of Procedure, p. 141.)
4. **Same**—In weighing the evidence of the accused the Supreme Court has held that "the testimony of the defendent in a criminal case is to be considered and weighed by the jury, taking all the evidence into consideration, and giving such weight to the testimony as in their judgment it ought to have." (Forms of Procedure, 1910, p. 140.)

   The testimony of an accused should not be accorded entire credit unless corroborated. He is necessarily an interested party and very probably would color his testimony in order to make his acts appear in as favorable light as possible. (C. M. O. 42, 1909, 4–5; 28, 1910, 6; 14, 1913, 4; 20, 1913, 5; 22, 1913, 5.) *See also* WITNESSES, 7.
5. **Same**—"The law provides that the accused shall *at his own request but not otherwise*, be a competent witness and shall be allowed to testify in his own behalf." (Forms of Procedure, 1910, p. 33; C. M. O. 17, 1902, 9.)

   "Parties to the cause testifying *on their own offer* are considered as thereby waiving their privilege as to the subject matter of their testimony in chief and must submit to a full cross-examination thereon, notwithstanding the answers tend to criminate or disgrace them." (Reynolds' Stephen on Evidence, p. 172, art. 120. *See also* Foster *v.* Pierce, 11 Cush., 437, 59 Amer. Dec. 152; Fitzpatrick *v.* U. S., 178 U. S. 304; C. M. O. 55, Mar. 1, 1910, p. 10; 14, 1910, p. 12; 17, 1910, pp. 12–16; 26, 1910, p. 4; 28, 1910, p. 4; 6, 1913, p. 4; 8, 1913, p. 5.) "Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf, and makes his own statements, it is clear that the prosecution has a right to cross-examine him upon such statement with the *same latitude* as would be exercised in the case of an *ordinary witness, as to the circumstances connecting him with the alleged crime.* While no inference of guilt can be drawn from his refusal to avail himself of the privilege

Digitized by Google

of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to cross-examination upon those facts. * * * Indeed, we know of no reason why an accused person who takes the stand as a witness should not be subject to cross-examination as other witnesses are." (Fitzpatrick *v.* U. S., 178 U. S. 304; C. M. O. 17, 1910, pp. 13–14.)

"It is not allowable to make comment, especially hostile comment," of the failure of the accused to take the stand in his own behalf (Forms of Procedure, 1910, p. 34; C. M. O. 31, 1910, p. 3), "and his failure to make such request shall not create any presumption against him" (Forms of Procedure, 1910, p. 33). C. M. O. 29, 1914, 14–15. *See also* C. M. O. 54, 1902; 40, 1909, 2; 49, 1910, 9; 17, 1910, 12–16; G. C. M. Rec., 21318, 21662, 22065, 22502.

3. **Same**—Should not be placed on stand without his consent to identify a document—The submitting of documents to the accused for identification practically amounts to placing him upon the stand as a witness to identify papers used against him by the prosecution, which is contrary to the provisions of the act of March 16, 1878 (20 Stat., 30).
7. **Same**—The testimony of the accused unsupported by corroborative evidence should not be accorded entire credit. C. M. O. 42, 1909, 4, 5; 28, 1910, 6; 14, 1913, 4; 20, 1913, 5; 22, 1913, 5. *See also* WITNESSES, 4.
8. **Same**—Should not be shown as withdrawing after testifying. C. M. O. 47, 1910, 8; 23, 1910, 5. *See also* ACCUSED, 5.
9. **Same**—Testimony of accused should be carefully scrutinized and weighed. C. M. O. 14, 1913, 4; 20, 1913, 5; 22, 1913, 5. *See also* C. M. O. 63, 1899, 1–2; WITNESSES, 4.
10. **Same**—Should not be warned—It is improper and contrary to the Navy Regulations and Forms of Procedure, 1910, page 26, to warn or caution the accused to not converse upon matters pertaining to the trial during its continuance. C. M. O. 47, 1910, 8; 15, 1910, 5; 23, 1910, 5; 31, 1910, 3. *See also* G. C. M. Rec. 21217; 21279; 21401; 21422; JUDGE ADVOCATE, 133; WARNING, 3.
11. **Same**—It is improper for the judge advocate to comment upon the fact that the accused does not take the stand and testify in explanation of certain matters developed by the testimony. Such comment is improper, it being the right of the accused to determine for himself the question whether he should or should not take the stand in his own behalf. The act approved March 16, 1878 (20 Stat. 30), contains the following provision: "That in * * * proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in * * * courts-martial and courts of inquiry * * * the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." C. M. O. 117, 1902, 8–9.
12. **Acquittal**—Casts no reflection upon any witness, etc. *See* ACQUITTAL, 31.
13. **Affirmation.** *See* OATHS.
14. **Affray**—Witness of. *See* AFFRAY.
15. **Appearance and manner**—Of witnesses while testifying. *See* COURT, 198; EVIDENCE, 129; WITNESSES, 52.
16. **Arresting accused**—Testimony of person arresting accused should be corroborated if practicable. *See* ARREST, 17; EVIDENCE, 33, 34.
17. **Assistance**—While on the witness stand is irregular. *See* COUNSEL, 56; JUDGE ADVOCATE, 129.
18. **Cautioning**—Ignorant witnesses. C. M. O. 14, 1910, 12. *See also* SELF-INCRIMINATION, 8. A witness on stand at beginning of recess should be cautioned that oath is still binding at end of recess. (*See* RECESS, 3.) When a witness is recalled he should be warned that the oath previously taken is still binding. C. M. O. 47, 1910, 5.
19. **Character witnesses.** *See* EVIDENCE, 12–22.
20. **Charges and specifications**—Reading to witnesses. *See* CHARGES AND SPECIFICATIONS, 105.
21. **Children.** *See* WITNESSES, 52.
22. **Civil authorities**—Persons in naval service desired by civil authorities as witnesses. *See* CIVIL AUTHORITIES, 50–52; GENERAL ORDER NO. 121, Sept. 17, 1914.
23. **Civil courts**—Naval constructor appearing as a witness in a case where the United States was the complainant. Right to accept "ordinary mileage and attendance fees." File 4565–4, Oct. 23, 1906.

Right of an employee of the department who attends court as a witness otherwise than as a witness for the Government, to draw salary during the period of absence. File 6036–2, Apr. 5, 1907.
24. **Same**—Judge of a civil court as a witness. *See* DECK COURTS, 58.

Digitized by Google

25. **Civilian witnesses**—Fees for, before a court of inquiry. *See* EXPERT WITNESSES, 3, 4.
26. **Same**—Compulsory attendance of civilian witnesses before naval courts-martial. C. M. O. 88, 1895, 15. *See also* CONSTITUTIONAL RIGHTS OF ACCUSED, 17.
27. **Same**—Safe-keeping of certain civilian witnesses for the Department of Justice. File 7018-487, J. A. G., Oct. 7, 1915, quoting File 26276-60; 2824-295. *See also* File 1778, May 25, 1905; COAST GUARD, 1.
28. **Common law wife**—As a witness for or against her husband. *See* WIFE, 5.
29. **Competency of**—Objection must be made before witness leaves stand. *See* EVIDENCE, 79-84; WITNESSES, 52.
30. **Complaining prosecuting witness.** G. C. M. Rec. 30562, p. 36.
31. **Complaining witness.** C. M. O. 53, 1910, 2; 54, 1910, 2.
32. **Compulsory process**—For obtaining witnesses for the accused. *See* CONSTITUTIONAL RIGHTS OF ACCUSED, 17.
33. **Congress**—Member of the House of Representatives as a witness before a naval court of inquiry. *See* CONGRESS, 12.
34. **Contempt of court.** *See* CONTEMPT OF COURT.
35. **Coroner**—As witness. C. M. O. 5, 1913, 11. *See also* CONFESSIONS, 10.
36. **Counsel for accused**—Not to be warned or shown as withdrawing. *See* COUNSEL, 54; WARNING, 5.
37. **Same**—Not permitted to object to a witness answering a question which might criminate the witness. *See* SELF INCRIMINATION, 16.
38. **Same**—Should not improperly assist witness on stand. C. M. O. 49, 1915, 10, 11. *See also* COUNSEL, 56.
39. **Court**—The record of proceedings should show that the court had been afforded an opportunity to question witnesses. C. M. O. 36, 1914, 6.
40. **Court, examined by**—Scope of examination—Questions asked by members of the court are subject to objection either by the judge advocate or counsel for the accused, and if the objection is sustained, the question is recorded as having been asked "by a member." (C. M. O. 88, 1895, p. 13; 17, 1910, p. 7.) If, however, the objection is overruled, it is recorded as a question by the court and must be answered. (Forms of Procedure, 1910, p. 26.)

In questioning witnesses the court occupies an impartial position, seeking only to obtain additional light on the question at issue, hence the rule that objection may be made by either party who may be adversely affected by the asking of improper questions.

A member may put such questions as he desires; though, since members must be impartial and without prejudice, questions by them should, in general, be for the purpose of making clear the meaning of testimony already given.

With reference to this subject, it is said by Winthrop in his work on Military Law and Precedents (vol. 1, pp. 429-430):

"While it is no part of the province of the court to conduct either the prosecution or the defense, it is open to any member to put questions to the witnesses for either side. But this, though it may be done at any stage of a protracted examination where some matter, which may be forgotten if not noticed at the moment, has not been made quite clear by the witness, is in general postponed until both the parties have concluded their examinations, and is then resorted to for the purpose only or mainly of the elucidation of some part of the testimony which has been left obscure. A member may also suggest a question to be put by the judge advocate or accused where he has omitted to elicit some material particular. Further, while the court can not legally 'originate' evidence, i. e., take the initiative in providing any part of the proofs, yet where, with a view to a more thorough investigation of the case, it desires to hear certain evidence not introduced by either party, it may properly call upon the judge advocate to procure the same if practicable, adjourning for a reasonable period to allow time for the purpose. New testimony thus elicited must of course be received subject to cross-examination and rebuttal by the party to whom it is adverse."

The rules applied in the civil courts with reference to the examination of witnesses by the court, are stated as follows in Cyclopedia of Law and Procedure (vol. 40, pp. 2439-2442):

"It is proper for a trial judge to ask a witness questions for the purpose of informing himself or the jury as to any matters material to the issues, whether the case be a civil or a criminal one, provided the questions are not such as to injure or prejudice the rights of either party. * * *

Digitized by Google

"Ordinarily a very few questions by the court will suffice to clear up a doubtful matter. * * * But it has been held that where in a criminal case the examination of defendant by counsel left the evidence indefinite and conflicting as to some points, the action of the court in subjecting him to a lengthy examination as to such points, but without opening up any new subject or putting questions in a prejudicial form, did not call for a new trial, although it was not to be commended.

"Where the court undertakes to interrogate a witness the same rules as to the form of questions as apply to an examination by counsel should be applied, although the court may, in its discretion, put leading questions to the witness when necessary to elicit the facts, repeat questions previously asked, or call for a repetition of previous statements. * * *

"The trial judge may *ex mero motu* [of his own mere motion] call to the stand witnesses who have not been called by either party, or when necessary to arrive at the true facts, recall a witness who has already testified in order to question him further."

Generally speaking it may be said that members of courts-martial may impartially examine witnesses for the prosecution or defense, with a view to arriving at the truth and are allowed greater latitude in this respect than the parties; but this power can not be so exercised as to admit evidence which is clearly improper. (G. C. M. Rec., 29422.) This point was presented in the present case during the examination of a witness called by the court, said witness being the officer who had previously conducted an official investigation of the accusations against the accused before the department ordered his trial by court-martial. This witness had no personal knowledge concerning any of the facts at issue, but was asked by a member to repeat unsworn statements made to him during his investigation by one of the witnesses who had been before the court and testified for the prosecution. This question clearly called for hearsay testimony concerning the facts of the case, and the objection thereto made by counsel for the accused, was properly sustained. The only possible ground on which such testimony could have been admissible would have been for the purpose of impeaching the witness for the prosecution. However, no foundation had previously been laid, as is required, by asking the witness, when on the stand, whether witness had not, at a specified time and place, made a certain statement contradictory of the testimony given before the court. This foundation, as stated, had not been laid, and the prosecution and defense had both rested when the investigating officer was called as a witness by the court, and was asked by a member the question above mentioned for the purpose of impeaching the prosecution's witness. Under the circumstances, this question was open to objection either by the judge advocate or counsel for the accused. C. M. O. 19, 1915, 3–5. *See also* C. M. O. 72, 1895, 2; 88 1895, 13; 80, 1898.

41. **Same—Leading questions—The court, during the examination, acting as judges, may propound leading questions. One of the natural parts of the judicial function, in its orthodox and sound recognition, is the judge's power and duty to put to the witness such additional questions as seem to him desirable to elicit the truth more fully. This just exercise of his functions was never doubted at common law; the judge could even call a new witness of his own motion, and could seek evidence to inform himself judicially; much more could he ask additional questions of a witness already called but imperfectly examined.**

It follows that a judge's question may be *leading in form*, simply because the reason for the prohibition of leading questions has no application to the relation between judge and witness.

The confusion of a witness would be a further valid reason why leading questions might, in the discretion of the court, be asked. (*See* Wigmore, Sec. 784.) File 26262–1194, J. A. G., June 16, 1911, pp. 7–8.

The court may, in its discretion, put leading questions to the witness when necessary to elicit facts. *See* WITNESSES, 40.

42. **Same—The court is privileged to call witnesses or recall those who have previously testified to clear up any doubtful points in the case, but when such action is taken the witness should not be referred to as one called in rebuttal; neither should such be classed as a witness for the prosecution or the defense, but simply as one called by the court. C. M. O. 21, 1910, 12.**
43. **Court should assist—Where accused desires certain witnesses. C. M. O. 17, 1910, 8–10.**
44. **Court of inquiry—Civilian witnesses. *See* EXPERT WITNESSES, 3.**
45. **Same—Has power to issue like processes to compel witnesses to appear and testify as United States courts of criminal jurisdiction. *See* COURTS OF INQUIRY, 52.**

Digitized by Google

46. **Same**—Witnesses before courts of inquiry testify under oath. *See* COURTS OF INQUIRY, 53.
47. **Same**—Witness fees. *See* COURTS OF INQUIRY, 3, 4.
48. **Same**—Member of Congress as witness. *See* CONGRESS, 12.
49. **Same**—Examination of witnesses by court. *See* COURTS OF INQUIRY, 55.
Evidence before a court of inquiry is under oath. *See* COURTS OF INQUIRY, 53.
50. **Credibility**—Degrading questions may not be asked if they are only asked to impair the credibility of the witness. *See* SELF-INCRIMINATION, 11.
51. **Same**—It is irregular to introduce the service record of a witness, after he has left the stand, for the purpose of attacking his credibility, reading from said record extracts which in no way affect his credibility or general character. C. M. O. 47, 1910, 4–5. *See also* SERVICE RECORDS, 25.
52. **Same**—May be affected by admission upon cross-examination of a conviction of an offense involving moral turpitude—During the trial a witness for the prosecution was questioned in cross-examination by counsel for the accused as follows:

"28. Q. Do you remember ever having been punished for having another man's clothing in your possession?"

This question was objected to by the judge advocate on the ground that it was irrelevant and covered ground that had nothing to do with this case.

COUNSEL. "I have the right to test his credibility."

JUDGE ADVOCATE. "The witness should be instructed that the question he has been asked involves a matter of criminality." [*See* SELF-INCRIMINATION, 11.]

The court then asked the counsel if he wished to attack the credibility of the witness.

COUNSEL. "Yes, sir. Not as to his reputation but as to his credibility as a witness in this case. I want to prove by his own mouth what he has been punished for. I have a right to do that. That rule holds good in a court of law when a witness gets on the stand. 'Did you not serve three months for larceny or housebreaking' is a perfectly competent question in a court of law."

The judge advocate did not reply. The court instructed the witness that he did not have to answer questions that would tend to incriminate or degrade him. [*See* SELF-INCRIMINATION, 11, 12, 17.]

WITNESS. "Yes, sir. I don't remember having another man's clothes. I remember having one man's jumper in my possession and was found guilty by the court; but after the court my division officer made it his business to look it up and I was found not guilty. I did five days bread and water, which was a very serious offense in the Navy, and I would have gotten more, if I was really guilty, by a summary court-martial." (Rec., pp. 29, 30.)

In regard to the above the judge advocate, on the one hand, contended, "I do not believe the offense of 'having clothing of another in his possession' is such an offense as to affect his credibility as a witness. It is not an infamous crime, not a capital crime." Furthermore he made the point, "It is a rule of common law that the records of a former trial are the proper evidence of the trial or conviction."

Counsel for the accused, on the other hand, although he did not move to strike out the testimony of this witness, in his oral argument stated, "Now we come to ———, the man convicted for having another man's clothes in his possession. In a civil court his testimony would not be admitted," and, in effect, questioned the competency of this witness.

The foregoing brings into issue the following: (1) The nature of an offense, the conviction of which may serve as a basis for an attempt to impeach a witness; (2) the manner in which such a conviction may be introduced in evidence; and (3) the weight to be given testimony of this character; that is, does evidence, if properly introduced, of a conviction of an offense of such a nature as to be admissible for the purpose of impeaching a witness attack the competency or merely the credibility of such witness.

As to (1) it may be stated as the weight of modern authority that, "the fact that a witness has been convicted of crime may be brought out as bearing on his credibility, where the crime amounts to a felony, or is infamous in its nature, and involves moral turpitude. But it is usually held that a witness is not to be discredited by showing his conviction of a mere misdemeanor, or minor offense not involving moral turpitude, or infamous in its nature." (40 Cyc. 2607.) In the application of this principle the department has no hesitancy in stating that it does not consider that a conviction of a strictly military offense, such as "having clothing in lucky bag," could be introduced in evidence for the purpose of discrediting a witness; but it can not accept the contention of the judge advocate in this case that the offense of "having unlawful possession of the clothing of another" is a strictly military offense in the same category

Digitized by Google

as the example given above, but, on the contrary, considers that this latter offense is not essentially military in its character, and that it does involve a certain degree of moral turpitude.

As to (2), the manner in which evidence of the conviction was introduced, "a conviction of crime is properly proved by the record or a properly authenticated copy thereof, and in the absence of any controlling statute on the subject, the record is the only competent evidence of the conviction, and parol evidence is not competent for that purpose if objected to. But modern statutes very generally allow the witness to be cross-examined as to conviction of crime; and, if he admits his conviction, this is sufficient and the production of the record is not necessary." (40 Cyc.,2640.) The admission of this witness, therefore, could properly be accepted by the courts as evidence of his conviction of the offense in question.

In regard to (3), the question as to whether conviction of an infamous crime affects the competency or credibility of a witness, the distinction between competency and credibility is clearly laid down in Forms of Procedure, 1910, pages 135, 136, where it is stated that "at present there are few persons except idiots, the insane, intoxicated persons, very young children, and the wives of accused persons that by law are not competent to testify * * * it may be stated as a general rule that all witnesses capable of so doing are entitled to testify, and that it rests with the court in its capacity as a jury to decide how much weight is to be given their testimony."

It may be seen, therefore, from a consideration of the foregoing that such credence as the court may have given to the admissions of this witness regarding his conviction of the offense in question, might operate to affect his credibility, but not his competency as a witness. G. C. M. Rec. No. 31998; C. M. O. 16, 1916, 7-9. *See in this connection* SELF-INCRIMINATION, 11.

The question of the credibility of the testimony given by a witness is a most important one, for upon it rests the decision of the court as to the proof of the various allegations. When the character for veracity of a witness has been shown to be bad—and whether this has been done or not is a matter within the sound judgment and discretion of the court—his testimony is not necessarily to be wholly disregarded, but is to be considered in connection with the rest of the testimony and such credit given to it as it appears to be entitled to receive. Also when a witness has been shown to have testified falsely to a certain particular, the maxim *falsus in uno, falsus in omnibus*, need not always be applied, nor all his testimony disregarded, but it should be weighed in connection with the other testimony, especially when corroborated. The general manner and bearing of a witness is an important consideration in weighing his testimony. (Forms of Procedure, 1910, p. 140.) *See also* EVIDENCE, 129.

53. **Criticised by court**—The accused was on the stand as a witness in his own behalf and during cross-examination became distatorial and also critical of the manner in which the questions were being asked him. The court "cautioned the witness that he is to address any remarks he may have to make to the court and not to the counsel for the judge advocate, and not to try to dictate in which way he shall ask the questions, but to answer the questions as directly as possible, and any objection to be made will be made to the court." G. C. M. Rec., 30485, pp. 494, 496.
54. **Cross-examination**—Witnesses should be cross-examined only on matter brought out in the examination in chief. G. C. M. Rec., 30485, p. 36. *See also* C. M. O. 26, 1910, 4; 8, 1913, 5.
55. **Deck court officer**—Not a competent witness. *See* DECK COURTS, 58.
56. **Degrading questions.** *See* SELF-INCRIMINATION, 11, 12.
57. **Disgraceful questions.** *See* SELF-INCRIMINATION, 11, 12.
58. **Employee of Navy Department**—Who attends court as a witness otherwise than as a witness for the Government is not entitled to draw salary during the period absent from work, unless such absence is charged to his annual leave. File 6036-2, Apr. 5, 1907.
59. **Enlisted men**—"Such document [summons] may properly be addressed directly to the man and transmitted through his commanding officer." File 26504-52, Sec. Navy, July 21, 1909.
60. **Examining board**—Testimony before. *See* NAVAL EXAMINING BOARDS, 25, 26.
61. **Excited**—Weight of evidence. *See* AFFRAY, 1; EVIDENCE, 128.
62. **Exclusion from court of all persons who might be witnesses.** *See* COURT, 126-128; RECORD OF PROCEEDINGS, 105.
63. **Extenuation**—Where the accused goes on the stand at his own request as a witness in extenuation of his acts, the record should contain the proper notation that he was a witness in extenuation. C. M. O. 8, 1911, 4-6; 17, 1915, 2.

Digitized by Google

64. **Eyewitnesses.** *See* WORDS AND PHRASES.
65. **Facts**—Witnesses should testify as to facts. C. M. O. 17, 1916, 9. *See also* COURT, 199; OPINION, 15–17.
66. **Fees.** *See* ADDRESS, 3; EXPERT WITNESSES, 3, 4.
67. **Husband and wife.** *See* WIFE.
68. **Identification**—Preliminary questions. *See* LEADING QUESTIONS, 5.
69. **Illegally sworn.** *See* case of Commodore Barron, in which case witnesses were sworn by the judge advocate instead of by the president of the court. *See* ESTOPPEL, 9.
70. **Introductory questions.** *See* LEADING QUESTIONS, 5.
71. **Impeachment.** *See* IMPEACHMENT.
72. **Incompetent.** *See* EVIDENCE, 65.
73. **Intimidating witnesses**—Offense charged under "Scandalous conduct tending to the destruction of good morals." G. C. M. Rec. 32161. *See also* G. C. M. Rec. 18904, p. 3 of charges and specifications.
74. **Judge advocate**—As a witness. *See* JUDGE ADVOCATE, 130–136.
75. **Judge of a civil court**—As a witness. *See* DECK COURTS, 58.
76. **Manner, bearing and appearance**—Of witnesses while testifying. *See* COURT, 198; EVIDENCE, 129; WITNESSES, 52.
77. **Members of courts-martial**—As witnesses. *See* MEMBERS OF COURTS-MARTIAL, 52–56.
78. **Memory**—Refreshing. *See* WITNESSES, 95–99.
79. **Naval examining board**—Unrecorded presence of witnesses. *See* NAVAL EXAMINING BOARDS, 25.
80. **Same**—Candidate as a witness. *See* NAVAL EXAMINING BOARDS, 26.
81. **Naval Militia**—Officer of Naval Militia called as a witness before a court-martial of the Regular Navy. *See* NAVAL MILITIA, 45, 46.
82. **Numbering of questions.** *See* RECORD OF PROCEEDINGS, 105.
83. **Oaths.** *See* OATHS.
84. **Opinions**—By witnesses. *See* COURT, 199; OPINION, 15–17; WITNESSES, 65.
85. **Ordinary witnesses**—Should not be examined as an expert. *See* EXPERT WITNESSES, 9.
86. **Prisoners**—General court-martial prisoners as witnesses before civil courts, grand juries, etc. *See* File 26276–17; 26276–33; 26276–36; 26276–93. *See also* GENERAL ORDER No. 121, Sept. 17, 1914, 15; PRISONERS, 38, 39.
87. **Private litigation**—An officer ordered to perform travel in order that he might be present to testify if needed in a suit to which the Government is not a party, but its interest in the result of the litigation is sufficiently great in the opinion of the Secretary of the Navy to cause the officer to be present, is entitled to mileage for the travel performed. (Compt. Dec., July 28, 1915; 173 S. & A. Memo. 3729.) File 26254–1855; C. M. O. 35, 1915, 10.
88. **Same**—Prisoners. *See* GENERAL ORDER No. 121, Sept. 17, 1914, 15; WITNESSES 86.
89. **Same**—Department will not compel an officer to furnish any testimony whatever for use in private litigation, the matter not being one under its official cognisance. File 26276–136, Sec. Navy, Apr. 17, 1916.
90. **Prosecuting witness**—An accused appealed from the sentence of a deck court, one of the three grounds assigned for appealing being the fact that the deck-court officer turned *prosecuting witness* himself. C. M. O. 14, 1911, 4. *See also* DECK COURTS, 58.
91. **Questions**—Should be numbered properly. *See* RECORD OF PROCEEDINGS, 104, 105.
92. **Recognizance.** *See* INTENT, 2; WORDS AND PHRASES.
93. **Record of proceedings.** *See* RECORD OF PROCEEDINGS.
94. **Reflection.** *See* ACQUITTAL, 31.
95. **Refreshing memory**—A witness may be allowed to refresh his memory by reference to a memorandum, provided it was made by him at the time the fact or transaction to which it refers occurred, or as soon thereafter as to afford the presumption that the memory of the witness was fresh at the time of making it. If the paper is not one made by the witness, it must appear that after inspecting it, he can speak from his own recollection; otherwise he can not use it. The privilege of using a memorandum does not authorize the witness to read his evidence from notes previously made. (Forms of Procedure, 1910, p. 141.) *See* WITNESSES, 97.
96. **Same**—A general court-martial ruled that the proceedings of a court of inquiry can not be introduced for the sole purpose of refreshing the memory of the judge advocate (who officiated as such before the court of inquiry), he offering to testify as a witness. The department in acting upon the case stated in part:

Digitized by Google

"It is the official duty of the judge advocate of a court of inquiry faithfully to record the proceedings and the testimony taken before such court, and he must attach his signature thereto. I am of opinion that such a record is therefore admissible, as would be any memorandum made by the witness at the time, for the purpose of refreshing his memory, whether or not he has an independent recollection in the matter. This, of course, is a different thing from introducing the record in evidence." C. M. O. 12, 1904, 3, 4. *See also* COURTS OF INQUIRY, 20.

97. **Same**—While a witness may refresh his memory from memoranda written by himself, under certain conditions (Forms of Procedure, 1910, pp. 34–35, 139), this privilege of using a memorandum does not authorize the witness to *read* his evidence from notes previously made (Forms of Procedure, 1910, p. 139). C. M. O. 41, 1914, 5.
98. **Same**—The court improperly allowed a witness to refresh his memory by holding a telephone conversation and obtaining testimony from another person, which conversation the witness was then allowed to repeat in order to verify a name previously given as that of a person by whom some jewelry had been pawned. (*See* Index-Digest, 1914, p. 43.) C. M. O. 9, 1916, 8.
99. **Same**—A mess attendant, called as a witness, was asked who the officer of the deck was at a certain time, and upon his answering that he did not remember, the record stated that "a recess of five minutes was here taken to give the witness an opportunity to refresh his memory." After reconvening the question was answered by the witness. Such a course of procedure was improper. A midshipman had just previously testified that he was officer of the deck, and other witnesses were available, if it had at all been necessary to substantiate this midshipman's testimony, or the ship's log could have been introduced to prove the fact, without the court taking a recess in order to permit a mess attendant to look up the official records of the ship. C. M. O. 15, 1910, 5.
100. **Refusing to answer a question**—If the accused goes on the stand voluntarily in his own behalf and refuses to answer a question, the reason for his refusing should appear on the record and not be made to appear solely by inference. C. M. O. 17, 1910, 12, 13.
101. **Representative.** *See* CONGRESS, 12.
102. **Retiring board**—Candidate as a witness. *See* NAVAL EXAMINING BOARDS, 26.
103. **Self-incrimination.** *See* SELF-INCRIMINATION.
104. **Single witness.** *See* EVIDENCE, 114.
105. **Specifications**—Read to witness by judge advocate. *See* CHARGES AND SPECIFICATIONS, 105.
106. **Spouse.** *See* WIFE.
107. **Summoning of witnesses.** *See* WITNESSES, 59.
Summons to persons, to appear as witnesses before summary courts-martial, under the command of the convening authority shall be transmitted through the executive officer or officer of the day; to other naval persons through the usual official channels; and to civilians, in the mode best calculated to reach them. (R–606(3).)
108. **Transportation of**—Transportation of enlisted men of the Marine Corps as witnesses before courts-martial. File 26276–8b, Sec. Navy, June 11, 1909.
109. **Usurpation**—When a witness while testifying states his opinion as to guilt or innocence of accused he usurps the prerogatives of the court. *See* COURT, 199; OPINION, 15–17; WITNESSES, 65.
110. **Verification of testimony.** *See* ACCUSED, 4; EVIDENCE, 121–123.
111. **Warning.** *See* WARNING, 3, 5, 6, 7, 8, 9.
112. **Weight**—"Where two witnesses testify with regard to the same matter and one of them remembers and the other merely does not remember the circumstances of the matter * * * the evidence of him who remembers must be accepted." Ct. Inq. Rec. 4952, p. 1801.
113. **Weight of evidence as affected by number of witnesses**—The relative number of witnesses for the prosecution and defense is by no means decisive in general, as the relative weight of the evidence depends much less upon the number of the witnesses than upon their character, their relation to the case, and the circumstances under which their testimony is given. (Forms of Procedure, 1910, p. 140.)
114. **Same**—In general. *See* COURT, 198; DRUNKENNESS, 100; EVIDENCE, 126, 128, 129; REASONABLE DOUBT; WITNESSES, 4, 52, 112, 113.
115. **Wife of accused.** *See* WIFE; WITNESSES, 52.
116. **Youthful witnesses.** *See* WITNESSES, 52.

Digitized by Google

WORDS AND PHRASES.

A fortiori—"For stronger reasons." (C. M. O. 6, 1915, 15.) "With stronger reason; much more." (1 Bouv., 1.) C. M. O. 31, 1911, 5; 4, 1913, 56; 27, 1913, 14; 7, 1914, 10; 6, 1915, 15; 13 J. A. G., 483; 16 J. A. G., 81; File 5252-36, J. A. G., May 5, 1910, p. 7; 26251-1963:1, J. A. G., Aug. 17, 1910, p. 13; 5362-35, p. 9; 13 J. A. G., 483.

Ab initio—"From the beginning." (C. M. O. 12, 1915, 5.) "From the beginning; entirely; as to all the acts done; in the inception." (1 Bouv., 2.) C. M. O. 21, 1898; 12, 1915, 5, COURT, 192.

"Abandon ship." C. M. O. 22, 1883.

Abscond. *See* THEFT, 19.

Abet—"To encourage or set another on to commit a crime. This word is always applied to aiding the commission of a crime. To abet another to commit a murder, is to command, procure, or counsel him to commit it." (1 Bouv., 51.) *See* AIDING AND ABETTING.

Absente reo—"In the absence of the defendant." (C. M. O. 49, 1915, 12.)

"Abstract or theoretical questions." C. M. O. 5, 1913, 8.

"Academic questions." File 6427-63, p. 7.

Accessory—"He who is not the chief actor in the perpetration of the offense, nor present at its performance, but is in some way concerned therein, either before or after the fact committed." (1 Bouv., 58.)

Accessories—In a general court-martial sentence. *See* ACCESSORIES; SENTENCES, 3.

Accomplice—"One who is concerned in the commission of a crime." (1 Bouv., 62.) *See* ACCOMPLICE; C. M. O. 8, 1913, 3-4.

Accused—"One who is charged with a crime or a misdemeanor." (1 Bouv., 66.) *See* ACCUSED.

"Acquiescence implies consent, and consent cures error." C. M. O. 14, 1911, 5, 8; 13, 1916; 6: ESTOPPEL, 9.

Act of God—Under the term "Act of God" are comprehended all misfortunes and accidents arising from inevitable necessity, which human prudence could not foresee or prevent.

Act of war. *See* WAR, 28, 29.

"Acts of a treasonable or riotous nature." C. M. O. 14, 1910, 14.

Ad interim—"In the meantime." (1 Bouv., 90.) File 26253-114; 22724-18, p. 5; COMMISSIONS, 1, 23, 29.

Ad litem—"For the suit." (1 Bouv., 90.) *See* GUARDIAN, 1.

Ad testificandum. *See* GENERAL ORDER No. 121, Sept. 17, 1914, 23; WORDS and PHRASES (Subpœna *ad testificandum*).

Ad valorem—"According to the valuation." (1 Bouv., 91.)

"Additional ingredient." C. M. O. 23, 1910, 11; FRAUDULENT ENLISTMENT, 50.

Administration—Of government—"The management of the executive department of the Government. Those charged with the management of the executive department of the Government." (1. Bouv., 96.)

Admissions—"Confessions or voluntary acknowledgments made by a party of the existence or truth of certain facts." (1 Bouv., 102.). *See* ADMISSIONS.

Admissions against interest. *See* ADMISSIONS AGAINST INTEREST.

Admonition—"A reprimand from a judge to a person accused, on being discharged, warning him of the consequences of his conduct, and intimating to him that should he be guilty of the same fault for which he has been admonished, he will be punished with greater severity." (1 Bouv., 104.) *See* JUDGE ADVOCATE, 6; MARINE EXAMINING BOARDS, 2; PROMOTION, 8.

Affiant—One who makes an affidavit. C. M. O. 48, 1915, 1; AFFIDAVITS.

Affidavit. *See* AFFIDAVITS, 4.

Affinity—"Relationship by marriage between the husband and the blood relations of the wife, and between the wife and the blood relations of the husband." *See* DEATH GRATUITY, 26.

Affirm—"To make a solemn religious asseveration in the nature of an oath." (1 Bouv., 112.)

Affirmation. *See* OATHS, 20.

Affray—"The fighting of two or more persons in some public place to the terror of the people." Differs from a riot in not being premeditated. Fighting in a private place is only an assault. (1 Bouv., 113.) C. M. O. 23, 1911, 8, 11; 26, 1914; EVIDENCE, 128.

Aggravation—"That which increases the enormity of a crime or the injury of a wrong." (1 Bouv., 121.)

Agreement between officers—As to quarters. File 26254-2052, July, 1916.

Digitized by Google

Aiding and abetting. *See* AIDING AND ABETTING.
Alcohol. C. M. O. 42, 1909, 12, 13, 14; 24, 1914.
Ale. C. M. O. 7, 1911, 10.
Alias—"Before; at another time; otherwise. The term is sometimes used to indicate an assumed name." (1 Bouv., 129.) C. M. O. 49, 1910, 11; 55, 1910, 6; 28, 1910, 18; 25, 1914, 6; 29, 1914, 4, 7; 9, 1916, 5.
Alibi—"Presence in another place than that described." (1 Bouv., 128.) C. M. O. 21, 1910, 15; 6, 1915, 7; WIFE, 13 (p. 644).
Alimony. G. C. M. Rec., 31509, p. 4. of changes and specifications; DEBTS, 1.
Alimony pendente lite—"*Alimony pendente lite* is that ordered during the pendency of the suit." (1 Bouv., 130.) File 28478-40, J. A. G., Oct. 24, 1916.
"All fours"—"A metaphorical expression signifying that a case agrees in all its circumstances with another." (1 Bouv., 133.) C. M. O. 34, 1913, 8; File 26260-1392, p. 2.
Allegation—"The assertion, declaration, or statement of a party of what he can prove." (1 Bouv., 133.)
"All hands abandon ship." C. M. O. 22, 1883, 4.
"All-hands evolution of coaling." C. M. O. 15, 1909.
"American bluejacket." C. M. O. 14, 1910, 13; 7, 1911, 6, 9.
Amicus curiæ—"A friend of the court." (Index, 1915, 4.) "One who, for the assistance of the court, gives information of some matter of law in regard to which the court is doubtful or mistaken; such as a case not reported," etc. (1 Bouv., 138.) *See* FILIPINOS, 3.
"Ancient title of admiral." 13 J. A. G., 394; TITLES, 1.
"And for other purposes of naval administration." *See* OATHS, 16, 30, 38, 39, 48.
Anesthetic. C. M. O. 10, 1915, 8.
Animadversion—"The utterance of criticism or censure; a censorious comment or reflection." (Stan. Dict.) CRITICISM OF COURTS-MARTIAL, 19, 20, 35.
Animadverts—"To pass criticism or censure; make censorious remarks." (Stan. Dict.) File 3558-04, 1.
Animus—"The intention with which an act is done." (1 Bouv., 142.)
Animus furandi—"The intention to steal." (1 Bouv., 143.)
Animus non revertendi—"The intention of not returning." (C. M. O. 31, 1915, 15. *See* DESERTION, 24, 39; SERVICE RECORDS, 16; C. M. O. 49, 1910, 8, 15; 21, 1910, 5; 31, 1915, 15.
"*Animus* peculiar to desertion." C. M. O. 65, 1895, 2; 66, 1895, 2; 12, 1896, 2.
Animus revertendi—"The intention of returning." (1 Bouv., 143.)
"Annoyance and chagrin." C. M. O. 4, 1911, 2.
Ante—"Before, in time, order or position." (Stan. Dict.) C. M. O. 26, 1911, 5, 6; File 6769-21, p. 26; 14818-4, J. A. G., Aug. 16, 1909, p. 14; 13 J. A. G., 136; DYING DECLARATIONS, 1.
Anti-enlistment societies. File 15183-65, Sec. Navy, Apr. 10, 1916.
"Any other officer in either department"—As used in R. S., 179. *See* JUDGE ADVOCATE GENERAL, 4.
Appelate jurisdiction—"The jurisdiction which a superior court has to rehear causes which have been tried in inferior courts." (1 Bouv., 151.)
Armistice. *See* WAR, 1-5.
Arrest. *See* ARREST.
Ash-pan doors. C. M. O. 37, 1915, 4.
Asportation—"A carrying away; felonious removal of goods." *See* THEFT, 17.
Assault—An apparent unlawful offer to do violence to another within reach of the means employed. *See* ASSAULT, 7-9.
"Assembly of a judicial character." *See* JURISDICTION, 53.
"Attaching no criminality." C. M. O. 10, 1911, 5.
"Atone for his misconduct." C. M. O. 25, 1910, 2.
"Atone for the disgrace." C. M. O. 56, 1910.
Attorney. C. M. O. 21, 1910, 13; 51, 1914, 8.
Attorney-at-law—"An officer in a court of justice who is employed by a party in a cause to manage the same for him." (1 Bouv., 192.)
Attorney in fact—"A person to whom the authority of another, who is called the constituent, is by him lawfully delegated." (1 Bouv., 192.) "In ordinary terminology is synonymous with agent." (File 26251-12159, Sec. Navy, Oct. 7, 1916, p. 2.)
Autrefoits acquit—A former acquittal. (File 26504-285, J. A. G., July 15, 1916.)
Autrefoits convict—A former conviction. (File 26504-285, J. A. G., July 15, 1916.)
Axiom—A self-evident or necessary truth.
"Axiomatic." *See* DRUNKENNESS, 84.

Digitized by Google

"Bald conclusion of law." C. M. O. 4, 1914, 7.
"Banter or joke." C. M. O. 5, 1912, 12.
Bar—"Man at bar." C. M. O. 28, 1910, 8.
"Barbecue." C. M. O. 16, 1911, 2.
Bawdyhouse—"A house of ill-fame, kept for the resort and unlawful commerce of lewd people of both sexes." (1 Bouv., 225.)
"Beach comber"—"An idle or vicious vagrant about wharves and beaches at seaports." (Stan. Dict.) *See* G. O. 152, Mar. 29, 1870.
"Beachmaster." C. M. O. 10, 1908, 2.
"Beat it." C. M. O. 28, 1908, 2.
"Beat with his fist." C. M. O. 53, 1910, 1.
Bench warrant—"An order issued by or from a bench, for the attachment or arrest of a person. It may issue either in case of a contempt, or where an indictment has been found." (1 Bouv., 228.) C. M. O. 35, 1915, 8; File 26524-206, Sec. Navy, Nov. 19, 1915; Sec. Navy 26524-74:2, Sec. Navy, July 27, 1915.
"Best evidence"—"Best evidence" means the best evidence of which the nature of the case admits. (1 Bouv., 230.)
By the best evidence is meant not necessarily the greatest quantity of evidence, but the most authoritative and legally satisfactory evidence of which the case is capable. Whenever it appears that there is a higher and better grade of evidence than that which is introduced, the latter is not admissib. (FORMS OF PROCEDURE, 1910, p. 138.)
Bill of exceptions—"A written statement of objections to the decision of a court upon a point of law, made by a party to the cause, and properly certified by the judge or court who made the decision." (1 Bouv., 236.) *See* BILLS OF EXCEPTIONS.
Binnacle list. G. O. 140, Sept. 17, 1869.
Blackmail. File 26251-12159; BLACKMAIL.
"Bluffed." C. M. O. 8, 1911, 6.
"Blunted conscience." C. M. O. 51, 1914, 4.
Bona fides—"Good faith, honesty, as distinguished from *mala fides* (bad faith). (1 Bouv., 251.)
Bona fide—"In good faith." (1 Bouv., 251.) C. M. O. 29, 1914, 9; 27, 1915, 8; File 26542-66, p. 4; 8554-04, p. 4.
"Bondsmen." C. M. O. 11, 1908, 4.
Bounty—"An additional benefit conferred upon or a compensation paid to a class of persons." (1 Bouv., 260.) C. M. O. 6, 1915, 8.
"Boxing matches." C. M. O. 23, 1911, 6. *See also* LINE OF DUTY AND MISCONDUCT CONSTRUED, 7-9; MANSLAUGHTER, 13.
Brawl. C. M. O. 23, 1882.
Breach of trust. *See* BREACH OF TRUST.
Bread—"To deprive old officers of bread." (Brown v. U. S., 18 Ct. Cls., 542.) File 26253-114, J. A. G., Aug. 19, 1910, p. 16.
"Brother officers." C. M. O. 39, 1912; 35, 1914, 4; ADEQUATE SENTENCES, 11.
"Brutal or cruel" hazing. *See* HAZING; C. M. O. 12, 1913, 1.
Buggery. *See* SODOMY.
"Bugle calls." C. M. O. 4, 1911.
Bully. *See* BULLY; C. M. O. 12, 1913, 2.
"Bunk." C. M. O. 15, 1909; 16, 1910.
Burden of proof—Shifting. C. M. O. 42, 1909, 4; 49, 1910, 6; 30, 1910, 10; BURDEN OF PROOF, 8.
Bystander. *See* C. M. O. 23, 1911, 7; 49, 1915, 12; BYSTANDER, 1.
"Calisthenic exercises." C. M. O. 12, 1913, 1.
Cape Cruz—Casilda Surveying Expedition. C. M. O. 13, 1911.
"Capital operation"—"One involving some danger to life." File 26253-98, J. A. G., May 17, 1910, p. 12.
"Captious doubt." *See* REASONABLE DOUBT.
"Carrying concealed weapons." C. M. O. 2, 1912, 9; 7, 1912; CARRYING CONCEALED WEAPONS.
Cashier. *See* CASHIERED.
"Catch-all"—Clause of the Navy Regulations. *See* "CATCH-ALL" CLAUSE.
Caterer of the junior officer's wine mess. C. M. O. 6, 1912.
Caveat emptor—"Let a purchaser beware." (6 Cyc., 706.) G. C. M. Rec., 30485, p. 818.
Causa—"A cause, occasion, or reason." (6 Cyc., 703.)
Causa causans—"The immediate cause." (6 Cyc., 703.) *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 89.
Causa mortis—In contemplation of approaching death.

Digitized by Google

Cavil—"A captious or hypercritical objection; a frivolous, carping argument; also the raising of such objections; caviling." (Stan. Dict.) C. M. O. 29, 1914, 9.
Cebu, P. I.—Naval reservation. File 1357, J. A. G., Apr. 22, 1905; 13 J. A. G., 437.
Censorship. File 27403-130:5.
"Censurably negligent." C. M. O. 9, 1911, 1.
Certified checks—"A check which has been recognized by the proper officer as a valid appropriation of the amount of money therein specified to the person therein named, and which bears upon itself the evidence of such recognition." (1 Bouv., 301.)
Certiorari—"A common-law writ issued from a superior court directed to one of inferior jurisdiction commanding the latter to certify and return to the former the record in the particular case." (6 Cyc., 737.) C. M. O. 2, 1912, 8; File 26287-1020, p. 6; 13 J. A. G., 124.
Cestui que trust—The beneficiary of a trust. C. M. O. 39, 1913, 8.
"Challenge to fight a duel." C. M. O. 5, 1912, 12.
"Chance"—Orders to "take a chance." C. M. O. 37, 1915; ORDERS, 8.
Civil employee—Investigated by a board of investigation. File 26283-968, Sec. Navy, Dec. 16, 1915.
Cochero. C. M. O. 36, 1912, 2.
"Code of ethics." C. M. O. 12, 1911, 6, 7; CODE OF ETHICS.
Coersion—"Constraint; compulsion; force." (1 Bouv., 345.)
Collusion—"An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law." In divorce collusion is "an agreement between a husband and wife that one of them will commit or appear to commit a breach of matrimonial duties in order that the other may obtain a remedy at law as for a real injury." (1 Bouv., 352.)
"Color of his office." C. M. O. 27, 1911, 1; 4, 1913, 42.
"Color of right." 13 J. A. G., 467.
"Colors on the flagstaff." C. M. O. 4, 1911, 5.
"Combination of action." C. M. O. 10, 1911, 4.
Comity—"Courtesy; a disposition to accommodate." (1 Bouv., 354.)
Commercia belli—"War contracts; contracts entered into by belligerent nations to secure a temporary and limited peace; contracts between nations at war or their subjects." (7 Cyc., 493.) File 26516-47, J. A. G., May 18, 1911, p. 6; *see also* WAR, 5.
Committee—"A guardian appointed to take charge of the person or estate of one who has been found to be *non compos mentis*." (File 8528-406, J. A. G., May 6, 1914.) *See* GOVERNMENT HOSPITAL FOR THE INSANE, 2; INSANITY, 9.
Commitment papers. File 26251-11491:3, J. A. G., June 10, 1916.
Common carrier. C. M. O. 9, 1916, 9.
Common law—"English common law—The term 'common law' has been used in different senses. In one sense it signifies that particular portion of the municipal law of England which was formerly administered exclusively by the common-law tribunals and is now administered by them concurrently with, and as modified by, equitable doctrines; and in this sense the English common law includes the *lex scripta* or statute law as well as the unwritten law or *lex non scripta*. Generally, however, when we speak of the English common law we mean the *lex non scripta* or unwritten law as defined by Blackstone—that portion of the law of England which is based not upon legislative enactment but upon immemorial usage and the general consent of the people." (8 Cyc., 367.)
"American common law—The common law in the United States consists of the common or unwritten law of England as it existed in 1607, when the colonists from England settled in America, or in some States at a later date, in so far as that law is applicable to the new surroundings and conditions and has not been abrogated by statute; also in most States of such English statutes enacted before their immigration or afterwards and before the Revolution as were applicable and were adopted; and of some local usages originating in and coming down from colonial times." (8 Cyc., 369.) *See* C. M. O. 94, 1905; 30, 1910, 7; 10, 1911, 6; 23, 1911, 7; 2, 1912, 8; 5, 1912, 7, 7, 1914, 5; 16, 1916, 7; WITNESSES, 52. *See also* COMMON LAW.
Common-law crime. C. M. O. 23, 1911, 5.
Common-law indictment. C. M. O. 23, 1911, 5; 8, 1913, 6.
Common sense—"Sound, practical judgment: that degree of intelligence and reason, as exercised upon the relations of persons and things and the ordinary affairs of life, which is possessed by the generality of mankind, and which would suffice to direct the conduct and actions of the individual in a manner to agree with the behavior of

Digitized by Google

ordinary persons. 'Common sense is an important element in the administration of justice and perhaps an indispensable element in its successful administration.' (Wright *v.* State, 69 Ind., 163, 165; 35 Am. Rep., 212.)" (8 Cyc., 393.)

Company fund. C. M. O. 49, 1915, 4.

Complaining witness. C. M. O. 53, 1910, 2; 54, 1910, 2.

Complements of ships. File 13352-407, J. A. G., Mar. 16, 1912.

Complicity. C. M. O. 47, 1910, 5.

Compounding a felony—"The *gravamen* of this offense consists in the stifling of a public prosecution or in some way perverting public justice; hence the bare retaking of one's own goods which have been stolen would not constitute the offense unless some favor be shown the offender, or the retaking be done with an intent to in some way aid him." (8 Cyc., 493.)

"Compounding of an engine." C. M. O. 27, 1910, 2.

Compulsion—"Constraint; objective necessary; forcible inducement to the commission of an act." (8 Cyc., 542.)

"Compulsion or inevitable necessity." C. M. O. 5, 1912, 11.

Compulsory process. *See* CONSTITUTIONAL RIGHTS OF ACCUSED, 17.

Conclusions of law. *See* CONCLUSIONS OF LAW.

Concert—"Committed by the accused in concert." C. M. O. 10, 1911, 4.

Concurrent jurisdiction—"Concurrent jurisdiction is that which is possessed over the same parties or subject matter at the same time by two or more separate tribunals." (2 Bouv., 57.) *See* JURISDICTION, 21.

"Concurrent responsibility." C. M. O. 24, 1916, 4.

"Condign punishment." C. M. O. 26, 1913.

Conditions, impossible—"Are those which can not be performed in the course of nature." (1 Bouv., 383.)

Conditions precedent—"Precedent conditions are those which are to be performed before * * * the obligation commences. * * * They are distinguished from conditions subsequent." (1 Bouv., 383.) "A condition which calls for the performance of some act or the happening of some event after the terms of the contract have been agreed, before the contract shall take effect." (8 Cyc., 558.) C. M. O. 27, 1898, 1; File 26509-158:2, J. A. G., June 27, 1916.

Conditions subsequent—"Subsequent conditions are those whose effect is not produced until after * * * commencement of the obligation." (1 Bouv., 383.) "A condition which follows the performance of the contract, and operates to defeat and annul it upon the subsequent failure of either party to comply with the conditions." (8 Cyc., 558.) File 26509-158:2, J. A. G., June 27, 1916.

"Conditional sale." C. M. O. 6, 1915, 9; DESERTERS, 11.

Condonation—"A pardon or forgiveness of a past wrong, fault, or deficiency which has occasioned a breach of some duty or obligation." (8 Cyc., 559.) C. M. O. 29, 1909; CONDONE.

"Conning." C. M. O. 19, 1910; 33, 1913, 2.

Connivance—"An agreement or consent, indirectly given that something unlawful shall be done by another." (1 Bouv., 398.) *See* File 26251-12159, p. 4.

Consanguinity—"The relation subsisting among all the different persons descending from the same stock or common ancestor." (1 Bouv., 399.) *See* DEATH GRATUITY, 26.

Conscience—With reference to oaths of naval courts-martial members. C. M. O. 25, 1916, 4.

Conspiracy. C. M. O. 10, 1911, 5; JOINDER, TRIAL IN, 19.

Construction of statutes—"A distinction has been drawn between the words 'interpretation' and 'construction,' the former being held to mean the reading of a statute according to its letter, while the latter is defined to be the reading of a statute according to its spirit and intent, it being said that 'the very essence of construction is the extension of the meaning of a statute beyond its letter.' In practice, however, this distinction is not always observed, the terms frequently being used interchangeably."

Consuls—Descriptive lists, signed by the commanding officer and stating the amount of the reward offered for a deserter shall in foreign ports be sent to the consul of the United States. (R-3636(2).) File 27403-132:1, J. A. G., Nov. 6, 1916, p. 3.

Continuance—"The postponement of the trial of a cause." (1 Bouv., 422.) *See* CONTINUANCES.

Contravene—"To come into conflict with; prevent or obstruct the operation of; violation; transgression." (Stan. Dict.) C. M. O. 31, 1911, 7.

Contra—"Over; against; opposite." (1 Bouv., 423.) C. M. O. 29, 1915, 5.

Digitized by Google

Contributory negligence. C. M. O. 33, 1914, 10.
Constitution of the United States—"Nineteen violations of the Constitution do not justify a twentieth." File 28687-4:1.
Contumacy—"The refusal or neglect of a party accused to appear or answer to a charge preferred against him in a court of justice." (1 Bouv., 431.)
"*Actual contumacy* is the refusal of a party actually before the court to obey some order of the court." (1 Bouv., 431.)
Convert. C. M. O. 39, 1908; 19, 1909; 42, 1904, 4; 27, 1911; 39, 1913, 8, 12; 9, 1914, 3.
"Conviction as a matter of policy." File 26251-12159, p. 22.
"Convivial occasions." C. M. O. 7, 1908, 2; 9, 1908, 4.
"Convulsion." C. M. O. 42, 1909, 13.
Copy—"A true transcript of an original writing." (1 Bouv., 436.) *See* CERTIFIED COPIES, 1, 2.
"Copyist"—Clerk of general court-martial acting as. C. M. O. 135, 1897, 2.
Corporal—"Bodily; relating to the body; as, corporal punishment." (1 Bouv., 443.)
"Corporal injury." C. M. O. 10, 1912, 6.
Corpus delicti—"The body of the offense; the essence of the crime." (1 Bouv., 445.) C. M. O. 26, 1910, 10; CORPUS DELICTI.
Corruption and venality. G. O. 156, May 24, 1870. *See also* CONGRESS, 11.
Court of Admiralty—A court having jurisdiction of causes arising under the rules of admiralty law.
Cowardice—"Pusillanimity; fear; misbehavior through fear in relation to some duty to be performed before an enemy." (1 Bouv., 474.)
"Cowardice to fly from an enemy." C. M. O. 23, 1911, 11.
"Cramps." C. M. O. 12, 1908, 2.
"Creditable records"—With reference to the pay, etc., of warrant and commissioned warrant officers under act of August 29, 1916. File 17789-27, J. A. G., September 21, 1916; C. M. O. 33, 1916, 6.
"Creditable records"—With reference to retirement under act of March 3, 1899, section 11. 14 J. A. G., 16, May 26, 1908.
"Crew's head." C. M. O. 9, 1908, 1.
Criminal *animus*. C. M. O. 6, 1908, 5.
Criminal code. (35 Stat., 1088.) C. M. O. 4, 1913, 40.
Culpable. *See* CULPABLE.
"Customs and traditions of the Navy." *See* WATCH OFFICERS, 3.
Cyanosis—"A diseased condition of the circulation causing a livid, bluish color in the skin; blue jaundice." (Stan. Dict.) G. C. M. Rec., 30485, p. 117.
"Damned Navy." C. M. O. 28, 1908, 3.
"Dampers." C. M. O. 37, 1915, 4.
"Day in court." *See* DAY IN COURT.
"Day laborers"—Officers are not. C. M. O. 28, 1914, 4.
Dead reckoning. C. M. O. 24, 1911, 1; DEAD RECKONING; NAVIGATION.
Debauch—"To corrupt one's manners, to make lewd, to mar or spoil; to seduce and vitiate a woman; * * * enticing and corrupting." (1 Bouv. 511.) *See* DRUNKENNESS, 16, 76.
Declarant—"One who makes a declaration." (1 Bouv., 517.) C. M. O. 26, 1911, 4; DYING DECLARATIONS, 1.
De facto—"Actually; in fact; in deed. A term used to denote a thing actually done.
"An officer *de facto* is one who performs the duties of an office with apparent right, and under claim and color of an appointment, but without being actually qualified in law so to act." (1 Bouv., 500.) *See* C. M. O. 217, 1902, 4; 14, 1910, 17; File 5839-04; 26509-½-64:1, J. A. G., Apr. 25, 1910, p. 4; FRAUDULENT ENLISTMENT, 22; HONORABLE DISCHARGE, 3.
Degeneracy. C. M. O. 24, 1914, 18.
De jure—"Rightfully; of right; lawfully; by legal title. Contrasted with *de facto* (*which see*)." (1 Bouv., 501.) C. M. O. 217, 1902, 4; File 26509-½-64:1, J. A. G., Apr. 25, 1910, p. 4; File 26260-1244, J. A. G., Apr. 14, 1911, p. 2; 26254-1936.
"Delirious." C. M. O. 7, 1911, 15.
Demurrer—"In pleading, a declaration that the party demurring will go no further, because the other has not shown sufficient matter against him." (13 Cyc., 784.)
De novo—"Anew; afresh." (1 Bouv., 502.) C. M. O. 215, 1902, 2; 217, 1902, 4; 16, 1911, 3. File 26260-1392, J. A. G., June 29, 1911; 3468-04, p. 10; 13 J. A. G., 324, June 11, 1904.
"Defensive sea areas." File 24514-39:10.
"Dependent relative." *See* DEATH GRATUITY, 14, 26.

Digitized by Google

Deponent—"One who gives information, on oath or affirmation, respecting some facts known to him * * *; he who makes a deposition." (1 Bouv., 546.)
Deposition. *See* DEPOSITIONS.
"Depravity of heart." C. M. O. 51, 1914, 4.
Depredation—"A plundering; a laying waste." (Stan. Dict.) C. M. O. 52, 1910, 1.
Descriptive book. C. M. O. 141, 1897.
"Desertion in the execution of a conspiracy." C. M. O. 10, 1911, 5.
Dictum—"An opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication." (1 Bouv., 567.)
"Dilatoriness." C. M. O. 3, 1912, 3.
Dipsomania—"A mental disease characterized by an uncontrollable desire for intoxicating drinks. An irristible impulse to indulge in intoxication, either by alcohol or other drugs." (1 Bouv., 572.) C. M. O. 24, 1914, 18.
Discipline—"Such persistent action on the part of a court is an extremely bad precedent and would tend to undermine the discipline on the ship." C. M. O. 5, 1912, 5. *See also* DISCIPLINE.
Discontinuance. C. M. O. 42, 1914, 60. *See also* NOLLE PROSEQUI.
"Discouraging and disheartening." C. M. O. 4, 1911, 3.
"Discredit upon the naval service." C. M. O. 26, 1914.
"Disgrace and humiliation" upon the naval service. C. M. O. 20, 1910.
"Dissipation." *See* DRUNKENNESS, 46, 76, 77.
"Ditty-box." C. M. O. 12, 1911, 6.
"Dockery Act"—(July 31, 1894, 28 Stat., 205). *See* RETIRED OFFICERS, 38.
"Dope"—And narcotic drugs. File 13673-3882, Sec. Navy, Sept. 26, 1916. *See also* GOUGING.
"Double amenability." 13 J. A. G., 125.
"Drags the good name of the naval service in the dust in the newspapers." C. M. O. 5, 1913, 4.
"Drug." C. M. O. 42, 1909, 13.
"Drunken frenzy." C. M. O. 37, 1912, 2.
"Dry Tortugas." 13 J. A. G., 371.
Dubitancy—"Uncertainty; hesitancy; doubt." (Stan. Dict.)
Duces tecum—"You bring with you." (14 Cyc., 1107.)
Due process of law—"'Due process of law' in each particular case means such an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." (8 Cyc. 1080–1081.) "Law in its regular course of administration through courts of justice." (8 Cyc. 1080.) *See* DEBTS, 18; DUE PROCESS OF LAW; NAVAL EXAMINING BOARDS, 10.
Dueling—"The fighting of two persons, one against the other, at an appointed time and place, upon a precedent quarrel. It differs from an affray in this, that the latter occurs on a sudden quarrel, while the former is always the result of design." (1 Bouv., 624.)
"Dueling is the act of fighting with deadly weapons between two persons in pursuance of a previous agreement." (14 Cyc. 1112.) *See* DUELS.
"Dummy" or "Figurehead." C. M. O. 23, 1913, 13.
Duress—"Personal restraint, or fear of personal injury or imprisonment." (1 Bouv., 626.)
"Dysentery." C. M. O. 24, 1914, 21.
Ejusdem generis. *See* EJUSDEM GENERIS.
"Elementary." C. M. O. 9, 1911, 2.
Embezzlement—Embezzlement of private money by an enlisted man. G. C. M. Rec. 32006.
"Emolument." C. M. O. 27, 1913, 8.
"Empty honor." File 26280-63, p. 5.
"Emulation of his juniors and praise from his seniors." C. M. O. 28, 1914, 5.
"Enervated by stimulants." C. M. O. 30, 1912, 3.
Epsom salts. C. M. O. 6, 1915, 12.
"Equipage." File 24482-34, J. A. G., May 1, 1911, p. 13.
"Equipment"—Defined. File 24482-34, J. A. G., May 1, 1911, p. 10.
"Error of judgment." G. O. 58, June 20, 1865; C. M. O. 23, 1916, 1; 13 J. A. G., 100, Sept. 22, 1903.
Estop. 15 J. A. G., 100. *See also* ESTOPPEL.
"Estopped." *See* ESTOPPEL.
Estoppel—Silence—"Estoppel by silence." File 13673-1442, J. A. G., Nov. 22, 1911, p. 10.

Digitized by Google

Same—"In the broad sense of the term 'estoppel' is a bar which precludes a person from denying the truth of a fact which has in contemplation of law become settled by the acts and proceedings of judicial or legislative officers, or by the act of the party himself, either by conventional writing or by representations, express or implied, *in pais*." (16 Cyc., 679.)

Et al.—"And another" or "and others." (16 Cyc., 815.) File 3031-57, J. A. G., June 25, 1908, p. 2.

Et cetera—"And others; and other things." (1 Bouv., 696.) C. M. O. 55, 1897. 2, DESERTION, 24.

Et seq.—"An abbrevation for *Et sequentia, q. v.* (16 Cyc., 817.) 13 J. A. G., 324; WIFE, 11; WILLFULLY AND MALICIOUSLY, 2.

Et sequentia—"And the following." (16 Cyc., 817.)

"Evade the course of justice." C. M. O. 7, 1911, 12.

"Every Saturaday after 12 o'clock noon." 13 J. A. G., 206.

"Evasive, intentionally misleading and deceptive replies." C. M. O. 9, 1909.

"Evil intent or moral terpitude." C. M. O. 4, 1913, 57.

"Evil mind." C. M. O. 23, 1911, 5.

Ex contractu—"From contract." (Bouv., 708.)

Ex delicto—Actions which arise in consequence of a crime, misdemeanor or tort. (1 Bouv., 709.)

Ex gr. File 26543-66, p. 5.

Ex gratia—"Of favor; of grace." (1 Bouv., 709.)

Ex mero motu—"Of his own mere motion." (C. M. O. 19, 1915, 4.) "Of mere motion. * * * To prevent injustice, the courts will, *ex mero motu*, make rules and orders which the parties would not strictly be entitled to ask for." (1 Bouv., 709.) A naval court-martial under certain conditions may, *ex mero motu*, exclude certain evidence. C. M. O. 31, 1911, 6; EVIDENCE, 82.

Ex necessitate rei—"From the necessity of the case." (Stand. Dict.) File 26254-1936, J. A. G., Jan. 29, 1915, p. 7.

Ex parte—"Of the one part. * * * *'Ex parte'* in the heading of a reported case signifies that the name following is that of the party upon whose application the case is heard. The term *'ex parte'* implies an examination in the presence of one of the parties and the absence of the other." (1 Bouv., 709.) C. M. O. 47, 1910, 9; 49, 1910, 10; 21, 1910, 13; 2, 1912, 7; 10, 1913, 6; 4, 1914, 5; 51, 1914, 2; 48, 1915, 2; File 1009-94.

Ex post facto law—"An *ex post facto* law is one which imposes a punishment for an act which was not punishable when it was committed, imposes additional punishment, or changes the rules of evidence, by which less or different testimouy is sufficient to convict." (8 Cyc., 1027.)

Ex proprio vigore—"By its own force." (1 Bouv., 711.) File 27231-77, Sec. Navy, Sept. 19, 1916; 27231-77:1, J. A. G., Oct. 18, 1916.

Ex rel. and *ex relatione*—"At the information of; by the relation." *Ex rel.* is an abbreviation. (1 Bouv., 711.)

Ex vi termini—"From, or by the force of the term." (19 Cyc., 105.) File 6769-21, p. 38.

"Exchange for cash." C. M. O. 11, 1908, 2.

Exclusive jurisdiction—"Is that which gives to one tribunal sole power to try the cause." (2 Bouv., 57.)

Expatriation—"The voluntary act of abandoning one's country and becoming the citizen or subject of another." (1 Bouv., 736.)

Expressio unius est exclusio alterius—"The expression of one thing is the exclusion of another." (2 Bouv., 353.) C. M. O. 14, 1911, 6; File 3980-375:17, p. 11; 27213, J. A. G., Apr. 24, 1909, p. 4; 15 J. A. G., 457, Oct. 26, 1910. *See also* STATUTORY CONSTRUCTION AND INTERPRETATION, 37.

Extenuation—"That which renders a crime or tort less heinous than it would be without it. It is opposed to aggravation. In general, extenuating circumstances go in mitigation of punishment in criminal cases." (1 Bouv., 742.)

Exterritoriality—"This term (*exterritorialité*) is used by French jurists to signify the immunity of certain persons, who, although in the state are not amenable to its laws; foreign sovereigns, ambassadors, ministers plenipotentiary, and ministers from a foreign power, are of this class." (1 Bouv., 743.)

"Exterritoriality, in this as in every other case, is a fiction only, for diplomatic envoys are in reality not without, but within, the territories of the receiving States." It is nevertheless a valuable term, "because it demonstrates clearly the fact that envoys must in most points be treated as though they were not within the territory of the receiving States." (1 Oppenheim, pp. 460-461.)

Digitized by Google

"The position of men-of-war in foreign waters is characterized by the fact that they are called 'floating' portions of the flag State. For at the present time a customary rule of International Law is universally recognized that the owner State of the waters into which foreign men-of-war enter must treat them in every point as though they were floating portions of their flag State." (1 Oppenheim, pp. 506–507.)

"The extraterritorial character of a naval vessel of one nation in the ports or waters of another is universally recognized and acknowledged, and, therefore, a *crime* committed on board of such vessel falls under the jurisdiction of the vessel's country." File 27403–132:1, J. A. G., Nov. 6, 1916, p. 6. File 3973–136:2, J. A. G., Feb. 26, 1916.

Extradition—"The surrender by one sovereign State to another, on its demand, of persons charged with the commission of crime within its jurisdiction, that they may be dealt with according to its laws." (1 Bouv., 744.)

"Extradition is the delivery of a prosecuted individual to the State on whose territory he has committed a crime by the State on whose territory the criminal is for the time staying." (1 Oppenheim, p. 403, par. 327.)

"By extradition is meant the delivery, to accredited authorities, of criminal fugitives or persons accused of crime committed in one country, upon the request of the government of the country in which the crime was committed, by the government of the country in which they have sought refuge." (Stockton, p. 189.)

Extrajudicial—"That which does not belong to the judge or his jurisdiction, notwithstanding which he takes cognizance of it. Extrajudicial judgments and acts are absolutely void." (1 Bouv., 747.)

Extrajudicial declarations. C. M. O. 26, 1911, 5.

Extrajudicial statements. *See* DYING DECLARATIONS, 1 (p. 202, line 13).

Extremis—"When a person is sick beyond the hope of recovery and near death he is said to be *in extremis*." (1 Bouv., 747.) C. M. O. 26, 1911, 3, 4.

Eyewitness—"One who saw the act or fact to which he testifies. When an eyewitness testifies, and is a man of intelligence and integrity much reliance must be placed on his testimony; for he has the means of making known the truth." (1 Bouv., 747.) C. M. O. 12, 1911, 7; 42, 1915, 8; 48, 1915; 26, 1911, 4; 24, 1914, 20; 42, 1915, 8.

Facsimile. 16 J. A. G., 165.

"Fails"—Defined with reference to refusal to pay debts. File 26262–1626, J. A. G., Dec. 28, 1912.

"Fair trial." *See* EVIDENCE, 13; TRIALS, 10; 13 J. A. G., 323, June 11, 1904.

Falsus in uno, falsus in omnibus—"False in one thing, false in everything." *See* WITNESSES, 52.

"Familiar truths." C. M. O. 1, 1882, 3.

Fauces terræ—"Jaws of the land." "Projecting headlands or promontories, including arms of the sea. Such arms of the sea are said to be inclosed within the *fauces terræ*, in contradistinction to the open sea." (1 Bouv., 763.) 14 J. A. G. 190, Aug. 4, 1909.

Favoritism. *See* CRITICISM OF COURTS-MARTIAL, 35; G. O. 224, March 23, 1877.

"Febiger Board." *See* PRECEDENCE, 12.

"Feigning." C. M. O. 117, 1902, 9.

"Feint." C. M. O. 8, 1911, 6.

Fiduciary—"As a noun, a person holding the character of a trustee. As an adjective, the nature of a trust; having the characteristics of a trust; analogous to a trust; relating to or founded upon a trust; a confidence." (19 Cyc., 526.)

"Fiduciary responsibilities." C. M. O. 48, 1904, 1.

"Field and track meet." C. M. O. 16, 1911.

"Field duties"—The main part of a marine officer's duties are in the field, or "field duties." File 28687–14, Sec. Navy, Jan., 1917.

"Figurehead or dummy." C. M. O. 23, 1913, 13.

Finger prints. C. M. O. 37, 1909, 5; G. C. M. Rec., 28488, pp. 6–16; 29305; FINGER PRINTS.

"Firing-pin lock at 'safe.'" C. M. O. 33, 1914, 11.

"First blush." C. M. O. 37, 1915, 7; ORDERS, 39.

"Flimsy technicalities." C. M. O. 16, 1911, 3.

"Forcibly"—Defined and discussed. G. C. M. Rec. 21315.

"Foretop." C. M. O. 37, 1912.

Found property. C. M. O. 42, 1909, 4.

"Frame up." File 26251–10496.

"Freedom of speech." File 26251–12159, pp. 11, 17; OFFICERS, 89.

"Freeze." C. M. O. 41, 1915, 6.

"Frivolous" objections of judge advocate. C. M. O. 17, 1910, 11.

Digitized by Google

"F—— the United States Navy." *See* SEDITION, 1.
"Fugitive from justice"—"One who, having committed a crime, flees from the jurisdiction within which it was committed, to escape justice." (1 Bouv., 857.)
"Funds." C. M. O. 4, 1913, 39.
Gauge glasses. C. M. O. 37, 1915, 4.
General issue—"A plea which denies or traverses at once the whole indictment or declaration, without offering any special matter to evade it." (1 Bouv., 877.)
General mess. C. M. O. 23, 1913, 3.
Generalia specialibus non derogant—"Things general do not derogate from things special." (2 Bouv., 354.) *See* STATUTORY CONSTRUCTION AND INTERPRETATION, 108.
"Getting underway." C. M. O. 9, 1913.
Gist—"The essential ground or object of the action in point of law, without which there would be no cause of action." (1 Bouv., 884.) C. M. O. 12, 1911, 4.
"Gist of the offense." C. M. O. 14, 1910, 11; 10, 1911, 4; 10, 1912, 4; 17, 1916, 5, 7.
"Good name of naval service." C. M. O. 7, 1912, 3; 5, 1913, 4.
Gouging—"The offense in both instances was substantially what is termed 'gouging.'" 13 J. A. G., 458. *See also* BLOTTER; CHEATING; GOUGING; MIDSHIPMEN, 22; OFFICERS, 13.
Graft. *See* GRAFT.
Grand jury. *See* GRAND JURY.
Gravamen—The grievance complained of; the substantial cause of the action. The part of a charge which weighs most heavily against the accused. (1 Bouv., 902.) C. M. O. 17, 1910, 4; 21, 1910, 8; 23, 1910, 12; 7, 1912, 2; 8, 1912, 3; 20, 1912, 4; 4, 1914, 7; 33, 1914, 10; 17, 1916, 5.
"Gross or culpable negligence." C. M. O. 33, 1914, 10.
Guarantee—"Written guarantee." 16 J. A. G., 19, May 22, 1908.
Guaranty—In writing. C. M. O. 41, 1915, 6.
Guardian *ad litem*—"A guardian appointed to represent the ward in legal proceedings to which he is a party defendant." (1 Bouv., 914.) File 26251-6020, Sec. Navy, July 7, 1913.
"Guilty knowledge." C. M. O. 129, 1898, 6; File 26516-49, p 5.
Habeas corpus—"That you have the body." "A writ directed to the person detaining another and commanding him to produce the body of the prisoner at a certain time and place, with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the court of judge awarding the writ shall consider in that behalf." (1 Bouv., 917.) C. M. O. 23, 1910, 11; 2, 1912, 5, 8; 51, 1914, 2; G. O. 121; File 26504-102, J. A. G., Mar. 1, 1910, p. 1.
"Hammock of an enlisted man." C. M. O. 3, 1909.
"Haphazard method of piloting." C. M. O. 9, 1911, 2.
"Hauling fires." C. M. O. 37, 1915.
Head—"Crew's head." C. M. O. 9, 1908, 1.
"Heat of passion." C. M. O. 12, 1911, 6; 23, 1911, 4.
"Higher evidence." C. M. O. 47, 1910, 7; 49, 1910, 10.
"His Britannic Majesty's Navy." C. M. O. 14, 1910. *See also* SEDITION, 1.
"Hold-on" orders. C. M. O. 37, 1915, 9.
"Honor of his country." *See* WATCH OFFICERS, 2.
"Horse stealing." C. M. O. 2, 1912, 8.
"Horseplay." *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 71.
"Hour of sailing." C. M. O. 51, 1910, 2.
"Housebreaking." *See* WITNESSES, 52.
Humanitarianism. C. M. O. 16, 1916, 10.
"Hunger strike"—By a naval prisoner. File 26251-314:1, Sec. Navy, Oct. 9, 1916.
Hypothecation—The act of pledging personal property as collateral security. A lien given by contract by a debtor to his creditor on movable property as security for a debt, but without passing possession of the property hypothecated. C. M. O. 49, 1910, 6.
Hypothesis. C. M. O. 5, 1913, 2; DRUNKENNESS, 73; REASONABLE DOUBT, 1.
i. e.—An abbreviation of id est, which means "that is." (1 Bouv., 973.)
Ib.—"The same." Abbreviation for *ibidem* or *idem*. (1 Bouv., 28, 973.) C. M. O. 23, 1911, 5, 7, 8, 10; 5, 1912, 11; 10, 1912, 6; File 9736-18, J. A. G., June 25, 1910, p. 6; 16 J. A. G., 88.
Ibid—"The same." C. M. O. 10, 1911, 5; 2, 1912, 7; File 26287-1020, p. 5.
Ibidem—"The same. The same book or place. The same subject." (1 Bouv., 973.)

Digitized by Google

Id.—"The same." Abbreviation for *ibidem* or *idem*. (1 Bouv., 28, 973.) C. M. O. 5, 1912, 13; 34, 1913, 7; File 26253-98, J. A. G., May 17, 1910, p. 12; 26260-1392, p. 32; 16, J. A. G., 112.

Id est—"That is. Commonly abbreviated *i. e.*" (1 Bouv., 973.)

Idem.—"The same." (1 Bouv., 28, 973.) C. M. O. 132, 1901.

Idiosyncracy. C. M. O. 10, 1915, 8.

"Ignorance of law." C. M. O. 10, 1911, 7; Court, 87; DESERTION, 110; FRAUDULENT ENLISTMENT, 23; IGNORANCE OF LAW.

Ignorantia iuris non excusat—"Ignorance of the law is no excuse." (2 Bouv., 355.)

"Imaginary or abstract questions." C. M. O. 5, 1913, 8.

"Impeachment of a mayor." File 20392-612, J. A. G., Aug. 30, 1916.

"Impotent conclusion." C. M. O. 3, 1884. *See also* CRITICISM OF COURTS-MARTIAL, 21.

"Impracticability of reconvening the court." C. M. O. 12, 1911, 8.

"In charge" and "In command." File 5254-03, J. A. G., June 20, 1903.

In extenso—"Fully; at length." File 22724-16:1, J. A. G., Apr. 24, 1911, p. 3.

In extremis—"In extremity; in the last extremity; in the last illness." (22 Cyc., 500.) C. M. O. 26, 1911, 3, 4.

In futuro—"At a future time." (1 Bouv., 1000.)

In pais—"In the country as distinguished from in court; out of court or without judicial process; by deed or not of record." (22 Cyc., 1098.) *See* WORDS AND PHRASES (ESTOPPEL).

In pari delicti—"In equal fault; equal in guilt." (1 Bouv., 1002.) 16 J. A. G., 73; File 26251-5447, J. A. G., Sec. 8, 1911, p. 4.

In pari materia—"Upon the same matter or subject." Statutes *in pari materia* are to be construed together. (1 Bouv., 1003.) Where the subject of a prior act is identical with and not merely similar to the law under consideration, the two acts are said to be *in pari materia* and should be construed together unless the language of the act to be construed is plain and free from all uncertainty. (Barnes *v.* Phila., etc., R. Co., 17 Wall., 302.) File 26251-5447, J. A. G., Dec. 8, 1911, p. 4; 16 J. A. G., 72, 73, 112; File 26254-50, p. 2.

In re—"In the matter; as, *in re* A. B., in the matter of A. B. In the heading of legal reports these words are used more especially to designate proceedings in bankruptcy or insolvency, or the winding up of estates or companies." *See* C. M. O. 2, 1912, 7, 8, 9; 5, 1912, 8; 10, 1912, 9.

In toto—"In the whole; wholly; completely; as, the award is void *in toto*." (1 Bouv., 1004.) C. M. O. 14, 1913, 4; 37, 1915.

"Inclining experiment." C. M. O. 32, 1909.

"Inconceivable stupidity." C. M. O. 10, 1908, 4.

"Indefiniteness and insufficiency" of evidence. C. M. O. 212, 1902, 1; 28, 1904, 3.

Indictment. C. M. O. 10, 1911, 4; 23, 1911, 5; 13, 1916, 5.

Inebriety. C. M. O. 12, 1915, 9.

"Inevitable accident." *See* COLLISION, 12.

"Inevitable necessity." C. M. O. 5, 1912, 11.

"Informal contract." File 26251-12159, Sec. Navy, Oct. 7, 1916, p. 1.

Intra—"Below, under, beneath, underneath." (Index, 1915, 27.) File 3468-04, p.. 2; 24482-34, J. A. G., May 1, 1911, p. 20; File 3468-04, p. 2.

"Ingenious analysis." File 8171-03.

"Ingenius attorneys." C. M. O. 22, 1916, 7.

"Ingredient of the offense." C. M. O. 10, 1911, 5; 19, 1912, 7; 25, 1914, 4.

"Initial point of departure." C. M. O. 29, 1909, 2.

"Insulting language." C. M. O. 7, 1911, 6; 23, 1911, 6.

Inter alia—"Among other things" (C. M. O. 19, 1915, 2). C. M. O. 12, 1897, 2; 86, 1897; 153, 1897, 3; 29, 1902; 49, 1910, 11; 21, 1910, 7; 12, 1911, 3, 4; 16, 1913, 4; 22, 1913, 6; 34, 1913, 8; 4, 1914, 9; 7, 1914, 9; 19, 1915, 2; 31, 1915, 14; 49, 1915, 17; 9, 1916, 5; File 26504-102, J. A. G., Mar. 1, 1910, p. 1; 26260-1392, p. 37.

Intercranial hemorrhage. *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 9.

Interim—"In the meantime; meanwhile." (1 Bouv., 1095.)

Interlocutory—"Something which is done between the commencement and the end of * * * action which decides some point or matter, which, however, is not a final decision of the matter in issue." (1 Bouv., 1096.)

Internment. File 27715-82, J. A. G., Feb. 14, 1916.

Interpretation—"The discovery and representation of the true meaning of any signs used to convey ideas." (1 Bouv., 1105.)

Interpretation of statutes. *See* WORDS AND PHRASES (Construction of statutes).

Digitized by Google

Intra vires—"An act is said to be *intra vires* (within the power) of a person or corporation when it is within the scope of his or its powers or authority. It is the opposite of *ultra vires*." (1 Bouv., 1118.)
"Invited guests." C. M. O. 2, 1911; 6, 1914.
Ipso facto—"By the fact itself; by the very act itself; by the mere fact." (23 Cyc., 353.) C. M. O. 1, 1913, 6; 8, 1913, 4; File 26252-62, p. 3; 3980-629, p. 2.
Ipso jure—"By the operation of law. By mere law." (1 Bouv., 1120.) File 26280-61, p. 5; 26521-148, J. A. G., Aug. 29, 1916, p. 5; C. M. O. 1, 1913, 6.
"Ironclad." G. O. 58, June 20, 1865.
"Irreconcilable chaos." C. M. O. 29, 1915, 8.
Ita lex scripta est—"The law is so written." File 3980-575:17, p. 13.
Jacob's ladders. C. M. O. 29, 1890, 3.
"Judicial approval." C. M. O. 23, 1911, 5.
Judicial confession. File 26251-12159, p. 11.
Judicial notice—"A term used to express the doctrine of the acceptance by a court for the purposes of the case of the truth of certain notorious facts without requiring proof." (2 Bouv., 39.) *See* JUDICIAL NOTICE.
"Judicial oath." C. M. O. 14, 1911, 5.
"Judicial question." C. M. O. 31, 1915, 16; "JUDICIAL QUESTION."
"Junior officers' wine mess." C. M. O. 6, 1912; File 26260-1392, p. 14.
Junks, Chinese. C. M. O. 4, 1914.
"Junk dealers." C. M. O. 34, 1909; 35, 1909.
"Keep-going" orders. C. M. O. 37, 1915, 8.
"Kick." C. M. O. 41, 1915, 9.
"Kicked and abused" a seaman. *See* SCREENING AN OFFENDER.
Kleptomania—Insanity in the form of an irresistible propensity to steal. A form of insanity which is said to manifest itself by a propensity to acts of theft. (2 Bouv., 93.)
Kleptomaniac. File 26251-9280:40, p. 3.
Knowingly. C. M. O. 12, 1911, 5; 17, 1916, 8.
"Landing force." C. M. O. 33, 1908, 1.
"Landing party." C. M. O. 3, 1916, 8.
Larceny—"Larceny is the taking and carrying away of the mere personal goods of another with intent to steal the goods." (25 Cyc., 10.)
"In some jurisdictions offenses usually styled as larcenies are denominated in the statutory definitions as thefts or as stealings." (25 Cyc., 12.) C. M. O. 42, 1909, 10; 8, 1911, 5; THEFT; LARCENY; WITNESSES, 52.
Lasciviousness—Lascivious desires or conduct; lustfulness; wantonness; lewdness. That form of immorality which has reference to sexual impurity. Lasciviousness and lewdness are generally treated as interchangeable if not synonymous terms. (2 Bouv., 137.)
Law—"The law is not a metaphysical or theoretical science." C. M. O. 24, 1914, 11.
"Law forces no one to do vain or useless things." File 13673-1442, J. A. G., Nov. 22, 1911, p. 17.
"Law does nothing and commands nothing in vain." File 13673-1442, J. A. G., Nov. 22, 1911, p. 17.
"Laxness of discipline." C. M. O. 4, 1911, 2, 5.
"Layman." C. M. O. 35, 1914, 5.
"Lead droppings." C. M. O. 41, 1915, 4.
"Legal conclusion." C. M. O. 31, 1915, 8.
"Legal excuse." C. M. O. 5, 1912, 12, 13.
"Legal involvement." C. M. O. 7, 1911, 15.
"Legally accurate." C. M. O. 10, 1911, 5.
"Letters of reproof"—"Forwarded through the usual military channels and placed upon their respective records would not be made public." File 10094-03, J. A. G., Dec. 12, 1903, p. 1.
Lex loci—"The law of the place." (2 Bouv., 199.)
Lex neminem cogit ad vana seu inutilia peragenda—The law forces no one to do vain or useless things. (2 Bouv., 361.) File 13673-1442, J. A. G., Nov. 22, 1911, p. 17.
Lex nil facit frustra, nil jubet frustra—The law does nothing and commands nothing in vain. (2 Bouv., 361.) File 13673-1442, J. A. G., Nov. 22, 1911, p. 17.
Lex non scripta—"The unwritten or common law, which included general and particular customs, and particular local laws." (2 Bouv., 204.) *See* WORDS AND PHRASES (Common Law).
Lex scripta—"Statute law." *See* WORDS AND PHRASES (Common Law).
Ley de fuga—"The law of flight." (Ct. Inq. Rec., 6029.)

Digitized by Google

Limited jurisdiction—"Limited jurisdiction (called, also, *special* and *inferior*) is that which extends only to certain specified causes." (2 Bouv., 57.)
Line of demarcation. 14 J. A. G., 111½.
Locus criminis—"The locality or place of a crime." (2 Bouv., 274.)
Locus penitentiae—"A place of repentance." The opportunity of withdrawing from a projected contract before the parties are finally bound; or of abandoning the intention of committing a crime before it has been completed. (2 Bouv., 274.) File 26251 2833, J. A. G., Mar. 31, 1910, p. 2; COMMISSIONS, 43.
"Lover's Lane"—Naval Academy. File 10316–04, J. A. G., Jan. 12, 1905, p. 1.
"Low-pressure piston." C. M. O. 27, 1910.
"Lucky bag." C. M. O. 16, 1916, 8; WITNESSES, 52.
Luffed. C. M. O. 43, 1883, 3.
"Magnetic." C. M. O. 30, 1909.
"Main feed tank." C. M. O. 34, 1908, 1.
"Major operation"—"An important and serious operation (Gould)." File 26253–98, J. A. G., May 17, 1910, p. 12.
"Make good"—Time lost on account of sickness or disease, etc. File 7657–394:1, Sec. Navy, Sept. 20, 1916.
Mala fides—"Bad faith. It is opposed to *bona fides*, good faith." (1 Bouv., 251; 2 Bouv., 294.)
Mala in se—"Acts morally wrong; offenses against conscience." (2 Bouv., 294.)
Mala prohibita—"Those things which are prohibited by law, and therefore unlawful." (2 Bouv., 294.) C. M. O. 4, 1913, 8, 21, 44; 33, 1914, 9; EMBEZZLEMENT, 15.
"Malevolent and vindictive spirit"—Charges made because of. G. O. 52, Apr. 15, 1865.
"Malice aforethought." C. M. O. 12, 1911, 7; 23, 1911, 5.
"Malignant spirit, a malignant intention to produce a particular evil." C. M. O. 16, 1912, 7.
Malum in se—"Evil in itself. A crime by reason of its inherent nature. * * * An offense *malum in se* is one which is naturally evil, as murder, theft, and the like; offenses at common law are generally *mala in se*. An offense *malum prohibitum*, on the contrary, is not naturally an evil, but becomes so in consequence of its being forbidden, as playing at games which, being innocent before, have become unlawful in consequence of being forbidden." (2 Bouv., 299.) C. M. O. 21, 1910, 9; 23, 1911, 7; 33, 1914, 9; 16 J. A. G., 155.
Malum prohibitum. *See* WORDS AND PHRASES (*Mala prohibita* and *Malum in se*).
C. M. O. 21, 1910, 9; 23, 1911, 7; 33, 1914, 9; 16 J. A. G., 155.
Mandamus—"Mandamus is an action or judicial proceeding of a civil nature, extraordinary in the sense that it can be maintained only when there is no other adequate remedy, prerogative in its character to the extent that the issue of both the alternative and the peremptory or final command is discretionary to enforce only clear legal rights, and to compel courts to take jurisdiction or proceed in the exercise of their jurisdiction, or to compel corporations, public and private, and public boards, commissions, or officers, to exercise their jurisdiction or discretion and to perform ministerial duties, which duties result from an office, trust, or station, and are clearly and peremptorily enjoined by law as absolute and official." (26 Cyc., 139.) 15 J. A. G., 100. *See also* LEGAL LIABILITY, 3.
Marine league—"A measure equal to the twentieth part of a degree of latitude." (2 Bouv., 313.) *See* TARGET PRACTICE, 1.
"Since at the end of the eighteenth century the range of artillery was about three miles, or one marine league, that distance became generally recognized as the breadth of the marine belt." (1 Oppenheim, 250.)
"Marine Officers' School." C. M. O. 22, 1909; 16, 1910.
"Marking time." C. M. O. 42, 1915, 12.
"Mast." C. M. O. 86, 1898, 1; 31, 1911, 6.
Mayhem—"The act of unlawfully and violently depriving another of the use of such of his members as may render him less able in fighting, either to defend himself or annoy his adversary." (2 Bouv., 384.) C. M. O. 22, 1916, 2.
"Mayhem at common law is defined as the violently depriving another of the use of such of his members as may render him less able in fighting to defend himself or to annoy his adversary." (26 Cyc., 1595.)
"Glanville defines mayhem as 'the breaking of any bone or injuring the head by wounding or abrasion.' Foster *v.* People, 50 N. Y., 598, 605, 1 Com. Cr., 508." (26 Cyc. 1595.)
"Maim and mayhem are equivalent terms at common law and mean the same thing. State *v.* Johnson, 58 Ohio St. 417, 51 N. E. 40, 65 Am. St. Rep. 769. *See also* Guest *v.* State, 19 Ark., 405." (26 Cyc., 1595–1596.)

Digitized by Google

Mayor—Impeachment of. File 20392-612, J. A. G., Aug. 30, 1916.
Menaces. C. M. O. 8, 1911, 5; 23, 1911, 7.
"Mental clarity." C. M. O. 5, 1915, 2.
"Mere guesses." C. M. O. 9, 1911, 2.
Mestizo—"Any one of mixed blood; specifically, in Mexico and the western United States, a person of mixed Spanish and Indian blood." (Stan. Dict.) C. M. O. 49, 1915, 23.
"Mexican currency." 13 J. A. G., 480, Aug. 25, 1905.
"Military delinquency." C. M. O. 9, 1916, 6.
"Military offenses." C. M. O. 47, 1910, 5; 10, 1911, 5; 16, 1916, 8.
"Military propriety." C. M. O. 45, 1909.
"Military trust." C. M. O. 7, 1916, 1; 8, 1916, 1.
"Minister of justice." C. M. O. 6, 1909, 3.
Ministerial act—"An act which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act done." (27 Cyc. 793.)
"Minor operation"—"A comparatively trivial one. (Gould.)" File 26253-98, J. A. G., May 17, 1910, p. 12.
"Minute guns." Circular, Sec. Navy, May 12, 1864.
"Miscarriage of justice." C. M. O. 6, 1908, 6; 28, 1910, 9; 5, 1912, 14; 4, 1913, 51; 27, 1913, 13; 12, 1916, 2: COURT, 78; CRITICISM OF COURTS-MARTIAL, 14, 15, 16, 35, 39.
Misdemeanor. C. M. O. 23, 1911, 7.
"Misinterpretation of evidence." C. M. O. 37, 1915, 10.
"Mistake of fact." C. M. O. 10, 1911, 7; 5, 1912, 8.
"Mistake of law." C. M. O. 10, 1911, 7.
"Moral obliquity." C. M. O. 24, 1914, 10, 15; 51, 1914, 4.
"Moral turpitude." C. M. O. 28, 1912, 3: 4, 1913, 5, 34, 40; 16, 1916, 8; WITNESSES, 52.
"Morale of the service." C. M. O. 23, 1910, 11.
"More than 26 years of age"—Means having passed the twenty-sixth birthday. C. M. O. 6, 1915, 15.
Morphine. C. M. O. 42, 1909, 12.
"Mortal blow." C. M. O. 23, 1911, 12.
"Mortification caused this officer." C. M. O. 22, 1911.
"Mulish." File 26251-12159, Sec. Navy, Oct. 7, 1916, p. 1.
"Multiplication of forms of charge for the same offense." C. M. O. 19, 1911, 3. *See also* CHARGES AND SPECIFICATIONS, 61-68.
Narcotic—Question discussed as to whether tobacco and cigarettes are narcotics. G. C. M. Rec., 30485, p. 760.
National honor. *See* C. M. O. 22, 1884, 2. *See also* DRUNKENNESS, 99; WATCH OFFICERS, 2.
National university—Alienation of a site of land at Washington, formerly given for the purpose of a national university. File 8288-03.
Natural and necessary consequences. *See* ACTS, 3.
"Natural and probable consequences." C. M. O. 8, 1911, 5. *See also* ACTS, 3.
"Natural and probable consequences." C. M. O. 8, 1911, 5.
"Navigational lights." C. M. O. 24, 1911, 1.
"Navigational aids." C. M. O. 32, 1913.
"Neglect and omission." C. M. O. 9, 1911, 2.
Negotiable instrument. C. M. O. 27, 1913, 6.
Nephritis. C. M. O. 20, 1915, 7.
"Nerve." C. M. O. 5, 1906, 2.
Neurasthenia. C. M. O. 24, 1914, 6, 18, 19.
Neurologist. C. M. O. 24, 1914, 6.
Neurology—"The science of the nervous system." (Stan. Dict.)
"Neutralizing the error of the court." C. M. O. 127, 1900, 1.
Nol. pros. C. M. O. 42, 1914, 6.
Nolo contendere—"I will not contest it." (29 Cyc., 1053.) *See* NOLO CONTENDERE.
Nolle prosequi. *See* NOLLE PROSEQUI.
Non compos mentis—"Not of sound mind, memory, or understanding." "A generic term including all the species of madness, whether it arise from idiocy, sickness, lunacy, or drunkenness." (2 Bouv., 506.) *See* INSANITY, 9.
Non constat—"It does not appear." (29 Cyc., 1055.) File 24482-34, J. A. G., May 1, 1911, p. 18.
"Nonprosecution."—Promise to enlist. *See* File 7657-395, J. A. G., Sept. 21, 1916.
Non ultra. C. M. O. 23, 1911, 11.

Digitized by Google

North Pole—Discovery of. File 26255-83:4, J. A. G., Aug. 4, 1911, p. 5.
"Norther." *See* OFFICER-OF-THE-DECK, 5.
Noscitur a sociis—The interpretation of a word or phrase by reference to other words with which it is associated. (Va. *v.* Tenn., 148 U. S., 503, 519; U. S. *v.* Rodgers, 150 U. S., 249, 278; Stoutenburgh *v.* Hennick, 129 U. S., 141, 147; Hollender *v.* Magone, 149 U. S., 586; Amer. Fur Co. *v.* U. S., 2 Pet., 358, 367; 21 Op. Atty. Gen., 124.)
Nudum pactum—"A nude pact." "A promise that can not be enforced, either at law or in equity." "A voluntary promise, without any other consideration than mere good will or natural affection." (29 Cyc., 1141.)
Nunc pro tunc—"Now for then." "A phrase used to express that a thing is done at one time which ought to have been performed at another." (2 Bouv., 528.) File 22724-18; 26253-386:1, p. 3: 7657-111, p. 11.
Obesity, general. C. M. O. 12, 1915, 8.
Obiter. File 26280-68, J. A. G., Apr. 12, 1916, p. 2. *See* WORDS AND PHRASES (*Obiter dictum*).
"*Obiter dictum*"—"An opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication." (1 Bouv., 567.) File 5362-35, J. A. G., June 29, 1911, pp. 11, 13: 26260-1294, p. 6; REASONABLE DOUBT, 1.
"Obligations as an officer and a gentleman." C. M. O. 16, 1909.
"Obligations of the service." *See* CLEMENCY, 10.
"Official decorum." C. M. O. 42, 1915, 8.
"Official duty has been regularly performed"—Presumption. C. M. O. 12, 1911, 4.
"Omission." C. M. O. 12, 1911, 5.
On all fours. *See* WORDS AND PHRASES ("All Fours.")
Onus—"A burden or responsibility; duty." (Stan. Dict.)
"Onus for the neglect of." C. M. O. 37, 1915, 9.
Onus probandi—"The burden of proof."
"Opprobrious epithets." C. M. O. 23, 1911, 3: 23, 1911, 6.
"Oral evidence." C. M. O. 52, 1910, 3.
"Original papers" in general courts-martial. C. M. O. 1, 1914, 6; 39, 1915.
"Outrage public opinion." *See* ADEQUATE SENTENCES, 15.
"Overtake and collide." C. M. O. 29, 1910, 2.
"Padding." C. M. O. 23, 1913.
"Parade." C. M. O. 33, 1908, 1.
Pari materia. *See* WORDS AND PHRASES (*In pari materia*).
"Paralleled and shadowed." C. M. O. 29, 1912.
Parole. File 2715-82, J. A. G., Feb. 4, 1916.
"Patrol shack." C. M. O. 16, 1910, 1.
Paroxysm. C. M. O. 42, 1909, 14.
Particeps criminis—A partner in crime.
Pawnbroker. File 26804-8, J. A. G., Aug. 28, 1916; C. M. O. 49, 1910, 6.
"Pawn stolen goods." C. M. O. 13, 1908, 2.
"Pawn tickets." C. M. O. 49, 1910, 6.
"Pawning." C. M. O. 1, 1912, 6.
Pea-coat. *See* OFFICER-OF-THE-DECK, 5.
"Peculation"—"The unlawful appropriation by a depository of public funds, of the property of the Government intrusted to his care, to his own use or that of others." (2 Bouv., 641.) C. M. O. 28, 1914, 4.
Penal Code. (35 Stat., 1088.) C. M. O. 4, 1913, 35.
"Pending question." C. M. O. 6, 1915, 7.
Pendente lite—"Pending the continuance of an action; while litigation continues." (2 Bouv., 645.) G. C. M. Rec., 31509, p. 4 of charges and specifications.
Per curiam—"By the court." (2 Bouv., 649.)
Per se—"Taken alone: in itself; by itself." (2 Bouv., 650.) G. O. 143, Oct. 28, 1869; C. M. O. 19, 1895, 2; 125, 1900; 42, 1909, 10; 47, 1910, 8; 14, 1910, 11; 1, 1912, 5; COURT, 46; DESERTERS, 12; DRUNKENNESS, 22, 49, 52.
"Pernicious." C. M. O. 42, 1915.
"Pie box." C. M. O. 28, 1908, 3; G. C. M. Rec., 18904, p. 14.
Plagiarism—"The act of appropriating the ideas and language of another and passing them for one's own." (2 Bouv., 676.)
Plaintiff. C. M. O. 42, 1914, 6.
Planets—"Table of planets." *See* RETIRED OFFICERS, 59.
"Play upon words." C. M. O. 104, 1896, 5.
Plenary powers. *See* GUAM, 5.

Digitized by Google

"Point of law." C. M. O. 6, 1908, 5.
Poop deck. *See* OFFICER-OF-THE-DECK, 5.
Post—"Above" or "before." (Index, 1915, 39.) C. M. O. 26, 1911, 6; 49, 1915, 11. File 26543-66, p. 5.
Post exchange steward. C. M. O. 5, 1912, 2; 8, 1913, 1.
"Practice march." C. M. O. 22, 1909.
"Practice of the service." C. M. O. 3, 1916, 8.
"Predicate." C. M. O. 88, 1895, 16.
"Predicated." C. M. O. 4, 1913, 5.
"Presidio or penitentiary." File 7142-03, J. A. G., Sept. 21, 1903, p. 2.
Presumption. C. M. O. 12, 1911, 4.
Presumption of law. C. M. O. 12, 1911, 4, 5.
"Pride in his profession"—To an officer without "pride in his profession" "a reprimand would be a waste of words." C. M. O. 27, 1910, 2.
Same—Publication of findings and facts established "should be most humiliating to an officer with any pride in his profession." C. M. O. 29, 1910, 2. *See also* C. M. O. 24, 1912.
"Pride in his reputation." C. M. O. 7, 1914, 16.
Prima facie—"At first view or appearance." C. M. O. 49, 1910, 6; 12, 1911, 4; 5, 1912, 12; 10, 1912, 8; 1, 1913, 6; 6, 1913, 3; 10, 1913, 3; 14, 1913, 4; 34, 1913, 7; 39, 1913, 8; 41, 1914, 3; 9, 1916, 6. File 26260-1294, p. 3; 26260-1392, pp. 31, 37; 16 J. A. G., 88.
"Primary evidence." C. M. O. 49, 1910, 15.
"Prize fighting." C. M. O. 23, 1911, 6; 1, 1913, 6.
Pro forma—"As a matter of form." (2 Bouv., 762.) File 26251-12159, Sec. Navy, Oct. 7, 1916, p. 2.
Pro rata—"According to the rate, proportion, or allowance." (2 Bouv., 763.)
Pro re nata—"For the occasion as it may arise." (2 Bouv., 763). File 5252-36, J. A. G., May 5, 1910, p. 5.
Pro tanto—"For so much." (2 Bouv., 763.) File 10726-03, p. 3; 10726-03, J. A. G., Jan. 12, 1904, p. 3.
Pro tempore—"For the time being; temporarily; provisionally." (32 Cyc., 738.) *See* 25 Op. Atty. Gen., 297.
"Prisoner at large." C. M. O. 10, 1913, 6.
Probative—"Serving for trial as proof." (Index, 1915, 40.) C. M. O. 15, 1910, 4; 31, 1915, 15.
Probative force. C. M. O. 15, 1910, 4; 31, 1915, 15.
"Professional brothers." C. M. O. 24, 1908.
Promissory note. C. M. O. 27, 1913, 6.
Prosecutor. C. M. O. 42, 1914, 6.
"Proximate cause." C. M. O. 35, 1915, 9.
Psychasthenia. C. M. O. 24, 1914, 6.
Public administrator. C. M. O. 6, 1915, 10. *See also* DISPOSITION OF EFFECTS, 2.
"Public barroom." C. M. O. 23, 1882; 14, 1910, 13; SCANDALOUS CONDUCT TENDING TO THE DESTRUCTION OF GOOD MORALS, 11.
Public policy—"That principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good. (4 H. L. Cas., 1; Greenh. Pub. Pol., 2.) It has been designated by Burroughs, J., as 'an unruly horse pursuing us, and when once you get astride of it you never know where it will carry you.' (2 Bingh. 229.)" (2 Bouv., 792-793.) C. M. O. 31, 1911, 7; EVIDENCE, 83.
"Public saloon." C. M. O. 39, 1908, 1.
"Public utility." File 3980-621, p. 7.
"Public works." File 3980-621.
"Pursuance of a common intent." C. M. O. 10, 1911, 4.
Quarantine. C. M. O. 8, 1908, 3; 18, 1908, 1.
Quaere—"Query." A word frequently used to denote that an inquiry ought to be made of a doubtful thing. Commonly used in the syllabi of the reports to mark points of law considered doubtful. (2 Bouv., 799.)
"Quantum of punishment." C. M. O. 24, 1916, 4.
Quash—"To abate or make avoid; to overthrow or annul; to vacate by judicial action." (32 Cyc., 1288.)
Quasi—"As if; almost." A term used to mark a resemblance, and which supposes a difference between two objects. It negatives the idea of identity, but points out that the conceptions are sufficiently similar for one to be classed as the equal of the other. (2 Bouv., 803.) *See* JEOPARDY, FORMER, 3.

Digitized by Google

Quasi judicial. C. M. O. 7, 1914, 8; COMMANDING OFFICERS, 31; JEOPARDY, FORMER, 3.
Quasi penal. File 4924-435, J. A. G., June 20, 1916.
Quid pro quo—"What for what." A term denoting the consideration of a contract. (2 Bouv., 808.)
Quoad hoc—"As to this; with respect to this." A term frequently used to signify, *as to the thing named*, the law is so and so. (2 Bouv., 811.) File 6769-21, J. A. G., July 19, 1911, p. 31.
Range finder. C. M. O. 37, 1912.
Rebuke of judge advocate by court. *See* JUDGE ADVOCATE, 60.
Rebuttal. C. M. O. 75, 1898.
"Recognizance"—"An obligation of record, entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by law which is therein specified." (2 Bouv., 847.) *See* INTENT, 2; C. M. O. 5, 1912, 12.
"Red-light district." G. C. M. Rec., 31509, p. 6 of charges and specifications.
Red tape. An. Rep. J. A. G., 1916, p. 3.
"Redress of wrongs." C. M. O. 38, 1914, 2.
Reductio ad absurdum—"Reduction to an absurdity; proof of a proposition by showing the absurdity of assuming the truth of its contradictory." (Stan. Dict.) C. M. O. 7, 1914, 9.
"Regular devil." C. M. O. 7, 1911, 6.
Relator. C. M. O. 31, 1915, 8.
"Reliefs of the guard." C. M. O. 4, 1911, 5.
"Religious beliefs." C. M. O. 16, 1910, 9-10. *See also* TYPHOID PROPHYLACTIC, 1.
Reproof—"Letters of reproof." *See* WORDS AND PHRASES ("Letters of reproof.")
Res gestae—"Transaction; thing done; the subject matter." *See* DYING DECLARATIONS, 1; RES GESTAE.
Res judicata—"The matter has been decided." *See* RES JUDICATA.
"Residue of the sentence." G. O. 46, Jan. 5, 1865.
Revision—"Additional session." C. M. O. 5, 1912, 15.
"Retreat to the wall." C. M. O. 23, 1911, 11.
Riot. C. M. O. 23, 1911, 7.
"Ruffianly assault." *See* ASSAULT, 21.
"Rules for the road." C. M. O. 38, 1905; 29, 1910, 2.
"Running"—In the sense of "hazing." File 10316-04, J. A. G., Jan. 12, 1905, p. 1.
"Running mates." File 28687-16, J. A. G., Sept. 16, 1916, p. 4; 111 30-37, p. 6.
Safe, "insecurely and incompletely locked." C. M. O. 22, 1910, 2.
"Sail vessel"—Right of way. C. M. O. 4, 1914.
Sangley Point (Punta Sangley or Canacao Peninsula). File 7561-03, J. A. G., Sept. 19, 1903, p. 1.
"Sans peur et sans reproche"—"Without fear and without reproach." (Stan. Dict., p. 2262.) C. M. O. 21, 1894, 3.
Saturday afternoon holidays. 13 J. A. G., 204.
"Savey." C. M. O. 28, 1908.
"Savoring of insubordiantion." C. M. O. 4, 1911, 5.
"Scuffling." *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 71.
Se defendendo—"Defending himself." (2 Bouv., 963.) C. M. O. 23, 1911, 11, 12.
"Sea duties"—The essential duties of an officer of the Navy are "sea duties." File 28687-14, Sec. Navy, Jan., 1916.
"Sea-lawyer" objections. C. M. O. 16, 1911, 3.
"Seaman's Act"—Approved March 4, 1915 (38 Stat., 1164). File 27403-132:2, Let. of Sec. State, Nov. 20, 1916.
"Searchlight." C. M. O. 11, 1911.
"Secondary evidence." C. M. O. 1, 1911, 5.
"Secretaries to commanders in chief." G. O. 153, April 18, 1870.
"Self-defense." C. M. O. 12, 1911, 7; 23, 1911, 6, 8; MANSLAUGHTER, 13; MURDER, 32.
Self-serving statements—Self-regarding or self-serving evidence is "evidence which either serves or disserves the party." (35 Cyc., 1374.) C. M. O. 29, 1914, 8.
Seriatim—"In a series; severally; as, the judges delivered their opinions *seriatim*." (2 Bouv., 982.) File 172-04, p. 2; 7657-167, J. A. G., Jan. 17, 1913; 28687-4:1.
"Set to the eastward." C. M. O. 24, 1911, 2.
"Shakedown" cruise. C. M. O. 53, 1906, 2.
"Shielding the officer accused." *See* CRITICISM OF COURTS-MARTIAL, 21.
"Shipping articles" of the accused. C. M. O. 12, 1911, 3.
"Shipped over." C. M. O. 28, 1910, 8.

Digitized by Google

"Short circuits"—Storage batteries of submarines. C. M. O. 41, 1915.
Sic—"Such." "So; thus; a word inserted in brackets after an erroneous or astonishing statement, to indicate that the quotation is a literal transcript." (Stan. Dict.) C. M. O. 4, 1913, 51; EMBEZZLEMENT, 10.
Sick list. C. M. O. 36, 1909; 42, 1909, 13; DRUNKENNESS, 84; EPILEPSY, 3.
"Sifting of their evidence"—Persons arresting accused. C. M. O. 7, 1911, 10.
"Signal boy." C. M. O. 28, 1908, 2.
Sine die—"Without day." "A final adjournment." (36 Cyc., 459.) *See* G. C. M. Rec. 10196, p. 2.
Sine qua non—"Without which not." "An indispensable requisite or condition." (36 Cyc., 459.)
"Skylarking." C. M. O. 23, 1911, 3; LINE OF DUTY AND MISCONDUCT CONSTRUED, 71.
Smallpox. C. M. O. 35, 1914. *See also* SMALL POX; VACCINATION, 3.
"Smuggling plots"—"Dope" and narcotic drugs. File 13673-3882, Sec. Navy, Sept. 26, 1916.
"Sneak." C. M. O. 128, 1905, 4.
"Solitary drinker." C. M. O. 24, 1914, 15, 17, 19.
"Son of a bitch." C. M. O. 35, 1892, 2.
Speaking English—Accused unable to speak or understand English, his confinement would seem unnecessary and of doubtful benefit to the discipline of the service, etc. C. M. O. 102, 1902, 1.
Special money requisition. C. M. O. 9, 1916, 10.
"Speeding"—Officers speeding in automobiles. *See* AUTOMOBILE, 1, 2.
"Spigs." C. M. O. 7, 1914, 4.
Spite—"In spite or disrespect." C. M. O. 8, 1911, 6.
Spouse. C. M. O. 31, 1914, 2.
"Spree." C. M. O. 24, 1914, 20.
"Squabbling." *See* LINE OF DUTY AND MISCONDUCT CONSTRUED, 71.
Stabbing. C. M. O. 12, 1911, 7; 10, 1912, 5; 19, 1912, 6.
Stare decisis et non quieta movere—"To stand by decided cases." (36 Cyc., 816.) *See* STARE DECISIS.
"Statement of exceptions." Ct. Inq. Rec. 4952, pp. 1831, 1843.
Status quo—"The existing state of things at any given date." (36 Cyc., 927.)
"Sting from the offense." C. M. O. 74, 1899, 2.
"Stores"—Defined. File 24482-34, J. A. G., May 1, 1911, p. 9.
"Strait-jacket." C. M. O. 29, 1908, 7.
Strangulation. C. M. O. 13, 1916, 8.
"Strict accountability." C. M. O. 5, 1913, 4; 23, 1916, 2.
Stricti juris—"Of strict right or law; according to strict law." (370 Cyc., 336.)
Strictissimi juris—"The most strict right or law." (2 Bouv., 1049.)
Strictis simi juris. File 26260-1392, J. A. G., June 29, 1911, pp. 24-24½.
"Stricture." *See* CRITICISM OF COURTS-MARTIAL, 35.
Sua sponte—"Of his or its own will or motion; voluntarily; without prompting or suggestion." (37 Cyc., 339.) C. M. O. 31, 1911, 6; 16 J. A. G., 82; EVIDENCE, 82.
Sub judice—"Under or before a judge or court; under judicial consideration; undetermined." (37 Cyc., 344.) *See* JURY, 5.
Sub voc. C. M. O. 23, 1911, 5.
Sub voce—"Under the word in question; an encyclopedic or dictionary form of reference." (Stan. Dict.)
Suborn—"To procure another to commit perjury."
Subpœna—"The process by which the attendance of a witness is required; a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness." (37 Cyc., 360.)
Subpœna *ad testificandum*—"A process to compel a witness to appear and give testimony, commanding him to appear before a court or magistrate therein named, at a time therein mentioned, to testify for a party named, under a penalty therein mentioned." (37 Cyc., 360.)
Subpœna *duces tecum*—"A process whereby a court, at the instance of a suitor, commands a person who has in his possession or control some document or paper that is pertinent to the issues of the pending controversy to produce it for use at the trial." (37 Cyc., 360.)
Sui juris—"Of his own right; possessing full social and civil rights; not under any legal disability, or the power of another, or guardianship." (37 Cyc., 522.)

Digitized by Google

"Suit money"—"An allowance which is required to be paid by the husband to the wife pending suit for divorce, for the expenses of such suit." (37 Cyc., 526.) G. C. M. Rec. 31509, p. 4 of charges and specifications.
Summons—Enlisted men and others as witnesses. *See* WITNESSES, 59, 107.
"Summons or complaint." G. C. M. Rec., 31509, p. 4 of charges and specifications.
Supra—"Above." (Index, 1915, 50.) C. M. O. 49, 1910, 10; 55, 1910, 8; 10, 1911, 5; 2, 1912, 7; 4, 1913, 43; 5, 1913, 8; 8, 1913, 4; 4, 1914, 7; 24, 1914, 9, 10, 12, 13, 14, 15. File 9736–18, J. A. G., June 25, 1910, p. 16; 2731–34, p. 3; 3093–17, J. A. G., May 22, 1914, p. 1. *Compare* C. M. O. 10, 1911, 5.
Super visum corporis—"Upon a view of the body." (Stan. Dict., p. 2262.) File 6769–21, p. 29.
Surplusage. C. M. O. 8, 1913, 4; 25, 1914, 6; 24, 1916, 4.
Syllabus—"A headnote; a note prefixed to the report of an adjudged case, containing an epitome or brief statement of the rulings of the court upon the point or points decided in the case." (37 Cyc., 660.) File 26287–1020, p. 6.
"Taken by surprise." C. M. O. 5, 1916, 6; DEPOSITIONS, 9; IMPEACHMENT, 5.
"Technical accuracy." C. M. O. 23, 1911, 5; 10, 1912, 10.
"Technical battery." C. M. O. 23, 1911, 6.
"Technical defense." *See* TECHNICAL DEFENSE.
"Technical embezzlement." *See* EMBEZZLEMENT, 14, 30.
"Technical error." C. M. O. 9, 1913, 2; 42, 1914, 3.
"Technically guilty." C. M. O. 12, 1911, 5.
"Technical inaccuracies." C. M. O. 10, 1912, 10.
"Technical inquiries." *See* DEATH GRATUITY, 25.
"Technical objections." C. M. O. 4, 1914, 10.
"Technical pleas." *See* OFFICERS, 88, 116.
"Technicality of law." C. M. O. 5, 1914, 5.
"Terror of the fleet." C. M. O. 7, 1911, 6.
"Testimony and other evidence." C. M. O. 41, 1888, 16.
"Tie a string to his judicial confession." File 26251–12159, p. 11.
"Time of the United States." C. M. O. 42, 1915, 11.
"Torpid moral sense." C. M. O. 51, 1914, 4.
Tort—"A private or civil wrong or injury." (2 Bouv., 1124.)
"Tow of target rafts." C. M. O. 11, 1911, 2.
Trade—Definition. C. M. O. 21, 1910, 6–8.
"Traditions of the service." C. M. O. 59, 1904, 2. *See also* CLEMENCY, 10; WATCH OFFICERS, 3.
"Traversing." Ct. Inq. Rec., 4962, pp. 1831, 1843.
"Travesty of justice." C. M. O. 25, 1915, 1.
"Travesty on the administration of justice." C. M. O. 7, 1914, 12.
Train schedules—With reference to instructions in G. O. 110. C. M. O. 23, 1915, 2.
Trespass. C. M. O. 42, 1909, 10. *See also* LINE OF DUTY AND MISCONDUCT CONSTRUED, 104, 105.
Try cock. C. M. O. 37, 1915, 4.
"Trying case out of court." C. M. O. 28, 1909, 3; 37, 1909, 8; 42, 1909, 15; 30, 1910, 5; 1, 1911, 4; 30, 1912, 6; 10, 1912, 7; 16, 1913, 4; 34, 1913, 8. *See also* JUDGE ADVOCATE, 122–124.
Tuberculosis—Line of duty. File 7657–390:2, Oct. 6, 1916.
"Turned back into the next lower class of midshipmen." C. M. O. 10, 1909, 2.
"Turpitude or moral wrong." C. M. O. 5, 1912, 8.
"Two sides" to the story. File 7657–408, Sec. Navy, Oct. 28, 1916.
Ultimo—"In the month next preceding the present month." (Stan. Dict.) File 27231–77:1, J. A. G., Oct. 18, 1916.
Ultra vires—"Beyond the lawful capacity or powers." (Stan. Dict.) File 24482–34, J. A. G., May 1, 1911.
"Unambiguous phraseology." C. M. O. 13, 1916, 8.
"Unenviable distinction." C. M. O. 16, 1911, 2.
"Unclean habit of thought." C. M. O. 18, 1910, 2.
"Uncontrollable impulse." C. M. O. 24, 1914, 11. *See also* INSANITY, 22.
"Unlawful assembly." C. M. O. 23, 1911, 7.
"Unmilitary and criminal conduct." File 26251–12159, Sec. Navy, Oct. 7, 1916, p. 3.
"Unofficerlike conduct." File 26262–2610, Sec. Navy, July 21, 1916; CRITICISM OF COURTS-MARTIAL, 38; C. M. O. 7, 1914, 16.
"Unofficerlike methods." C. M. O. 16, 1911, 3.

Digitized by Google

"Unsavory matter." File 26251-12159, Sec. Navy, p. 2.
"Untruthful." C. M. O. 24, 1910.
"Unwhipped of justice." *See* REASONABLE DOUBT, 1.
Usages of the service. C. M. O. 18, 1897, 3. *See also* CUSTOMS OF THE SERVICE, 6.
Usury—Usury is *malum prohibitum*, not *malum in se*. (Hamilton *v.* Prouty, 50 Wis., 592. The universally accepted definition of usury by the courts at the present time is that it "is the taking of more interest for the use of money or forbearance of a debt than the law allows." In Newton *v.* Wilson (31 Ark., 484) it was held that "usury is the charging of unlawful interest. Unless there is a law which limits the rate of interest to be charged there can be no usury.' (*See also* Woodruff *v.* Hurson, 32 Barb. [N. Y.], 557.) C. M. O. 21, 1910, 9.
Ut supra—"As above." (Stan. Dict., p. 2263.) File 6769-21, p. 31.
Utile per inutile non vitiatur—"What is useful is not vitiated by the useless." (C. M. O. 4, 1914, 6, 7; 39 Cyc., 1098.)
Utter—"To offer; to put out; to pass off; to sell; to vend; to emit at large or publish." (39 Cyc., 1101.)
"Vacillation of the court and its rulings." *See* REPORTS OF DESERTERS RECEIVED ON BOARD, 3.
"Vague and indefinite." C. M. O. 7, 1911, 13.
"Venality and corruption." G. O. 156, May 24, 1870; CONGRESS, 11.
Verbatim—"In the exact words; word for word." C. M. O. 23, 1911, 4; File 3980-650, p. 1.
Verbiage—"Use of many words without necessity; superabundance of words; wordiness; verbosity." (Stan. Dict.) 14 J. A. G., 60, Nov. 3, 1908.
Vermuth. C. M. O. 56, 1880.
Vide—"See." (Index, 1915, 52.) C. M. O. 56, 1897, 2; 47, 1899; 146, 1901, 4; 216, 1901, 2.
"Vile epithet." C. M. O. 18, 1910. *See also* EPITHETS, 1; OFFICERS, 122.
"Villify the Constitution." C. M. O. 14, 1910, 14.
"*Vindices injuriarum*." C. M. O. 23, 1911, 11.
Viva voce—"With the living voice." "By word of mouth." (40 Cyc., 213.)
Viz.—"Namely" or "to wit." C. M. O. 4, 1916, 3; FILIPINOS, 3.
Void—"In the pure sense of the term, absolutely null; without legal efficacy; ineffectual to bind parties or to convey or support a right; that which is incapable of enforcement, and can not be ratified or confirmed; of no legal force; of no effect whatever; of no legal force or effect whatever; of no legal force or effect whatsoever; null and incapable of confirmation or ratification." (40 Cyc., 214.) *See* FRAUDULENT ENLISTMENT, 30, 31, 32, 50, 92, 93.
Voidable—"Capable of being avoided; capable of being avoided or confirmed." (40 Cyc., 214.)
Voir dire—"A preliminary examination of a witness to ascertain whether he is competent." (2 Bouv., 1200.) "'To speak the truth.' Refers to an oath administered to a proposed witness or juror [or member of a naval court-martial], and also to the examination itself, to ascertain whether he possesses the required qualifications, he being sworn to make true answers to the questions about to be asked him concerning the matter." (40 Cyc., 217.) 13 J. A. G., 324, June 11, 1904. *See also* CHALLENGES, 13; EVIDENCE, 124; MEMBERS OF COURTS-MARTIAL, 39; VOIR DIRE.
"Vomit." C. M. O. 23, 1908.
Waiver—Defined. File 3031-57, J. A. G., July 31, 1908. *See also* WAIVING.
War slate—Retired officers. File 3809-640:2; 28573-64.
"Wardroom." C. M. O. 2, 1911.
"Wardroom country." G. O. 240, Nov. 23, 1878.
"Wardroom messroom." C. M. O. 19, 1914.
"Wardroom mess." C. M. O. 56, 1880.
Wardroom wine mess. File 26260-1392, p. 14.
"Warrant officers' mess." C. M. O. 19, 1909.
"Warrant of commitment." C. M. O. 5, 1912, 12.
"What is useful is not vitiated by the useless." C. M. O. 4, 1914, 6, 7.
"Wherry." C. M. O. 6, 1915, 13; 12, 1915, 9.
"White List"—To prevent discrimination against uniform. File 23243-78:3.
"White-slave traffic act." File 27381-25:1, Sec. Navy, July 14, 1916.
"Wine mess." C. M. O. 6, 1912.
"Wireless telegram." C. M. O. 1, 1908, 1.

Digitized by Google

Withdrawal. C. M. O. 42, 1914, 6. *See also* NOLLE PROSEQUI.
Withdrawing from the combat. C. M. O. 12, 1911, 7; 23, 1911, 8.
"Working back." C. M. O. 24, 1916, 3.
"Year"—In a sentence means 12 calendar months. File 26504, J. A. G., Nov. 3, 1908. *See also* NAVAL ACADEMY, 26; SENTENCES, 118.

WOUND.
1. **Definition**—Within meaning of R. S., 1494. *See* PROMOTION, 163, 164.

WRECKS.
1. **Disposition of**—The department has no authority to make disposition of wrecks or to authorize the raising of them. File 4486-93, Dec. 19, 1907.
2. **Removal**—Removal of wrecks of Spanish ships sunk in the battle of Santiago. File 11142-02, J. A. G., Dec. 26, 1902; 22 J. A. G. 80.
3. **"Submerged and unmarked wreck."** C. M. O. 29, 1916.

WRITTEN INSTRUMENTS.
1. **Charges and specifications.** *See* CHARGES AND SPECIFICATIONS, 106.

WRONGFULLY AND KNOWINGLY SELLING AND DISPOSING OF SUBSISTENCE STORES OF THE UNITED STATES, FURNISHED AND INTENDED FOR THE NAVAL SERVICE THEREOF, IN VIOLATION OF ARTICLE 14 OF THE ARTICLES FOR THE GOVERNMENT OF THE NAVY.
1. **Officer**—Charged with. C. M. O. 23, 1913, 3.

WRONGFULLY AND KNOWINGLY DISPOSING OF PROPERTY OF THE UNITED STATES FURNISHED AND INTENDED FOR THE NAVAL SERVICE THEREOF.
1. **Enlisted man**—Charged with. C. M. O. 1, 1914, 5.

WRONGFULLY AND KNOWINGLY DISPOSING OF PROPERTY OF THE UNITED STATES INTENDED FOR THE NAVAL SERVICE THEREOF, IN VIOLATION OF ARTICLE 14 OF THE ARTICLES FOR THE GOVERNMENT OF THE NAVY.
1. **Paymaster's clerk**—Charged with. G. C. M. Rec., 7354.

"WRONGFULLY" AS EXPRESSING INTENT. *See* CHARGES AND SPECIFICATIONS, 52; JOINDER, TRIAL IN, 19.

WRONGFULLY DISPOSING OF PROPERTY OF THE UNITED STATES INTENDED FOR THE NAVAL SERVICE THEREOF, IN VIOLATION OF ARTICLE FOURTEEN OF THE ARTICLES FOR THE GOVERNMENT OF THE NAVY.
1. **Chief gunner**—Charged with. C. M. O. 38, 1916.

YEAR.
1. **Definition.** *See* NAVAL ACADEMY, 26; SENTENCES, 118.

YELLOW FEVER.
1. **Commanding officer**—Left station and duty without authority when yellow fever was raging—Tried by general court-martial and dismissed. C. M. O. 50, 1882. *See also* C. M. O. 59, 1882; 61½, 1890.

YOSEMITE, U. S. S.
1. **Clemency**—Extended to accused because he had been a member of the crew of. C. M. O. 73, 1905.

YOUTH.
1. **Acquittal**—Because of comparative youth of accused. C. M. O. 24, 1916, 4.
2. **Clemency.** *See* CLEMENCY, 68-72.
3. **Witnesses.** *See* WITNESSES, 52.

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

UVa Law Library
3 50
Digitized by Google

Digitized by Google